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Volume 4

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Since 11 January 2001, official judgment numbers have been given to all judgments delivered in the House of Lords, Privy Council, both divisions of the Court of Appeal and the Administrative Court. All such judgments have fixed paragraph numbering, as do judgments delivered on or after 11 January 2001 in those parts of the High Court which did not then adopt the system of official judgment numbers (see Practice Note (judgments: neutral citation) [2001] 1 All ER 193 for the Court of Appeal and the High Court). On 14 January 2002 the system of judgment numbers was extended to all parts of the High Court (see Practice Direction (High Court judgments: neutral citation) [2002] 1 All ER 351). We have adopted the following practice in respect of judgments with official judgment numbers and official paragraph numbering:

- The official judgment number is inserted immediately beneath the case name;
- Official paragraph numbers are in bold in square brackets;
- Holding references in the headnotes, and any other cross-references, are to an official paragraph number, not to a page of the report;
- When such a judgment is subsequently cited in another report,

  (i) the official judgment number is inserted before the usual report citations in the case lists and on the first occasion when the case is cited in the text. Thereafter, only the report citations are given;

  (ii) All 'at' references are to the official paragraph number rather than to a page of a report, with the paragraph number in square brackets but not in bold;

  (iii) The 'at' reference is only given in conjunction with the first report cited; eg [2001] 4 All ER 159 at [16], [2001] AC 61. If an 'at' reference is included on the first occasion when the case is cited, it also appears alongside the official judgment number.

For the avoidance of doubt, these changes do not apply to reports of judgments delivered before 11 January 2001 or to the citation of such cases in other reports.

CITATION

These reports are cited thus:

[2004] 4 All ER

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These reports contain references to the following major works of legal reference described in the manner indicated below.

Halsbury's Laws of England

The reference 14 *Halsbury's Laws* (4th edn) para 185 refers to paragraph 185 on page 90 of volume 14 of the fourth edition of *Halsbury's Laws of England*.

The reference 15 *Halsbury's Laws* (4th edn reissue) para 355 refers to paragraph 355 on page 283 of reissue volume 15 of the fourth edition of *Halsbury's Laws of England*.

The reference 7(1) *Halsbury's Laws* (4th edn) (2004 reissue) para 9 refers to paragraph 9 on page 11 of the 2004 reissue of volume 7(1) of the fourth edition of *Halsbury's Laws of England*.

Halsbury's Statutes of England and Wales

The reference 14 *Halsbury's Statutes* (4th edn) (2003 reissue) 734 refers to page 734 of volume 14 of the fourth edition of *Halsbury's Statutes of England and Wales*.

The reference 40 *Halsbury's Statutes* (4th edn) (2001 reissue) 269 refers to page 269 of the 2001 reissue of volume 40 of the fourth edition of *Halsbury's Statutes of England and Wales*.

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R (on the application of Uttley) v Secretary of State for the Home Dept **HL** **1**

SOCIAL SECURITY – Funeral payment – Necessary information relating to conditions of entitlement or exceptions to entitlement not known – Whether claim payable

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UNFAIR DISMISSAL – Protected disclosure – Qualifying disclosure – Disclosure made in good faith – Meaning of 'good faith

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VALUE ADDED TAX – Exemptions – Medical care – Medical practitioners personally administering drugs to patients to whom they provided pharmaceutical services – Whether supply of drugs separate from supply of medical care

Dr Beynon and Partners v Customs and Excise Comrs . .. . **HL 1091**

VEXATIOUS PROCEEDINGS – Litigant in person – Persistent unmeritorious litigation – Restriction on oral application to Court of Appeal

Perotti v Collyer-Bristow (a firm) .. .. **CA 53**

VICARIOUS LIABILITY – Master and servant – Employee involved in violent incident with employer's customers during employment and injuring customer – Whether employer vicariously liable

Mattis v Pollock (t/a Flamingos Nightclub) .. .. **CA 85**

House of Lords petitions

This list, which covers the period 11 October 2004 to 24 November 2004, sets out all cases which have formed the subject of a report in the All England Law Reports in which an Appeal Committee of the House of Lords has, subsequent to the publication of that report, refused leave to appeal. Where the result of a petition for leave to appeal was known prior to the publication of the relevant report a note of that result appears at the end of the report.

R v R [2003] 4 All ER 882. Leave to appeal refused 12 October 2004 (Lord Bingham of Cornhill, Lord Rodger of Earlsferry and Lord Carswell).

Pickett v Roberts [2004] 2 All ER 685. Leave to appeal refused 18 October 2004 (Lord Hope of Craighead, Lord Carswell and Lord Brown of Eaton-under-Heywood).

R (on the application of Richardson) v North Yorkshire CC [2004] 2 All ER 31. Leave to appeal refused 28 October 2004 (Lord Steyn, Lord Hoffmann and Lord Walker of Gestingthorpe).

Marlwood Commercial Inc v Kozeny, Omega Group Holdings Ltd v Kozeny [2004] 3 All ER 648. Leave to appeal refused 2 November 2004 (Lord Bingham of Cornhill, Lord Steyn and Lord Hoffmann).

R (on the application of Uttley) v Secretary of State for the Home Department

[2004] UKHL 38

HOUSE OF LORDS

LORD STEYN, LORD PHILLIPS OF WORTH MATRAVERS, LORD RODGER OF EARLSFERRY, BARONESS HALE OF RICHMOND AND LORD CARSWELL

1, 22, 30 JULY 2004

Human rights – Retrospective punishment – Penalty heavier than that 'applicable' at time offence committed – Meaning of 'applicable' – Human Rights Act 1998, Sch 1, Pt I, art 7(1).

Sentence – Custodial sentence – Licence – Claimant committing rapes before 1983 when maximum sentence was life imprisonment – Court sentencing claimant in 1995 to 12 years' imprisonment for those offences – Release regime applicable in 1995 providing for release on licence at two-thirds point of sentence whereas regime applicable in 1983 providing for unconditional release at same point – Whether release on licence infringing claimant's convention right not to be subjected to penalty heavier than that applicable at time offence committed – Criminal Justice Act 1991 – Human Rights Act 1998, Sch 1, Pt I, art 7(1).

Over a period prior to 1983, the claimant committed a number of sexual offences, including three rapes. The maximum sentence for rape in 1983 was life imprisonment. The claimant was not prosecuted for the offences until 1995 when he was sentenced to a total of 12 years' imprisonment. Under the provisions of the Criminal Justice Act 1991, the claimant was released after serving two-thirds of his sentence, but the release was on licence, the terms of which remained in force until he reached the three-quarters point of his sentence. Those terms placed him under supervision and imposed certain restrictions on his freedom. While subject to the conditions of the licence, the claimant was at risk, if he failed to comply with them, of recall to serve the balance of his sentence. If he had been sentenced to 12 years' imprisonment under the release regime applicable in 1983, the claimant would, subject to good behaviour, have been released at the same point of his sentence, but the release would have been unconditional and his sentence would then have expired. Before his release, the claimant brought proceedings for judicial review against the defendant Secretary of State, seeking a declaration that the provisions of the 1991 Act which made his release subject

to licence were incompatible with art 7(1)[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Article 7(1) prohibited the imposition of a heavier penalty than the one that was 'applicable' at the time that the offence was committed. The judge dismissed the proceedings, but his decision was reversed by the Court of Appeal which held that the changes to the release regime effected by the 1991 Act meant that the 12-year sentence imposed on the claimant was a heavier penalty than a 12-year sentence imposed under the regime applicable in 1983. On the Secretary of State's appeal to the House of Lords, their Lordships focused their attention on an issue that had not been central to the argument in the proceedings below, namely the meaning of 'applicable' in art 7(1).

Held – The word 'applicable' in art 7(1) of the convention referred to penalties which the law authorised the court to impose at the time that the offence was committed, and thus art 7(1) would only be infringed if a sentence was imposed on a defendant which constituted a heavier penalty than that which *could* have been imposed on the defendant under the law in force at the time that he committed the offence, ie it would only be infringed if the sentence was heavier than the maximum sentence that could have been imposed at the time that the offence was committed. It followed in the instant case that the 'applicable' penalty for the purposes of art 7(1) was the maximum sentence that could have been imposed for rape at the time that the claimant committed the rapes, ie life imprisonment. The sentence of 12 years' imprisonment, with release on licence after serving eight years, imposed on the claimant under the 1991 Act, was manifestly less severe than the sentence of life imprisonment which could have been imposed on him under the regime applicable in 1983. Accordingly, there had been no infringement of art 7(1), and the appeal would therefore be allowed (see [1], [21], [22], [28]–[30], [38], [39], [43], [49], [57], [61], [62], [64], [65], [67], below).

Coeme v Belgium [2000] ECHR 32492/96 and dicta of Lord Rodger of Earlsferry and Lord Carswell in *Flynn v HM Advocate* 2004 SCCR 281 at [85], [109] adopted.

Decision of the Court of Appeal [2003] 4 All ER 891 reversed.

Notes

For the convention prohibition on heavier retrospective penalties and for release on licence, see respectively 8(2) *Halsbury's Laws* (4th edn reissue) para 148 and 36(2) *Halsbury's Laws* (4th edn reissue) para 617.

For the Criminal Justice Act 1991, see 34 *Halsbury's Statutes* (4th edn) (2001 reissue) 803.

For the Human Rights Act 1998, Sch 1, Pt 1, art 7, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

Cases referred to in opinions

Coeme v Belgium [2000] ECHR 32492/96, ECt HR.

Flynn v HM Advocate [2004] UKPC D1, 2004 SCCR 281.

Practice Note (sentence: early release of prisoners) [1992] 4 All ER 307, [1992] 1 WLR 948, CA.

R v Cunningham [1993] 2 All ER 15, [1993] 1 WLR 183, CA.

R v Sullivan, R v Gibbs, R v Elener [2004] EWCA Crim 1762, [2004] All ER (D) 133 (Jul).

a Article 7(1) is set out at [7], below

Welch v UK (1995) 20 EHRR 247, [1995] ECHR 17440/90, ECt HR.

Cases referred to in list of authorities

Engel v Netherlands (No 1) (1976) 1 EHRR 647, [1976] ECHR 5100/71, ECt HR.
Ezeh v UK (2003) 15 BHRC 145, ECt HR.
Findlay v Secretary of State for the Home Dept [1984] 3 All ER 801, [1985] AC 318, [1984] 3 WLR 1159, HL.
Hogben v UK (1986) 46 DR 231, E Com HR.
Ibbotson v UK (1999) 27 EHRR CD 332, E Com HR.
Jamil v France (1995) 21 EHRR 65, [1995] ECHR 15917/89, ECt HR.
R v Billam [1986] 1 All ER 985, [1986] 1 WLR 349, CA.
R v Field, R v Young [2002] EWCA Crim 2913, [2003] 3 All ER 769, [2003] 1 WLR 882.
R v Graham (Edward) [1999] 2 Cr App R (S) 312, CA.
R v R [2003] EWCA Crim 2199, [2003] 4 All ER 882, [2004] 1 WLR 490.
R v Secretary of State for the Home Dept, ex p François [1998] 1 All ER 929, [1999] AC 43, [1998] 2 WLR 530, HL.
R v Sharkey [2000] 1 All ER 15, [2001] 1 WLR 160, CA.
R v T [2003] EWCA Crim 1011, [2003] 4 All ER 877.
R (on the application of Anderson) v Secretary of State for the Home Dept [2002] UKHL 46, [2002] 4 All ER 1089, [2003] 1 AC 837, [2002] 3 WLR 1800.
R (on the application of Giles) v Parole Board [2003] UKHL 42, [2003] 4 All ER 429, [2004] 1 AC 1, [2003] 3 WLR 736.
R (on the application of McCann) v Crown Court at Manchester, Clingham v Kensington and Chelsea Royal London BC [2002] UKHL 39, [2002] 4 All ER 593, [2003] 1 AC 787, [2002] 3 WLR 1313.
R (on the application of McFetrich) v Secretary of State for the Home Dept [2003] EWHC 1542 (Admin), [2003] 4 All ER 1093.
R (on the application of West) v Parole Board [2002] EWCA Civ 1641, [2003] 1 WLR 705.
R (Smith) v Parole Board (No 2) [2003] EWCA Civ 1269, [2004] 1 WLR 421.
Raimondo v Italy (1994) 18 EHRR 237, ECt HR.
S (children: care plan), Re, Re W (children: care plan) [2002] UKHL 10, [2002] 2 All ER 192, [2002] 2 AC 291, [2002] 2 WLR 720.
Stafford v UK (2002) 13 BHRC 260, ECt HR.

Appeal

The Secretary of State for the Home Department appealed with permission of the Court of Appeal (Pill, Longmore LJJ and Maurice Kay J) from its decision on 30 July 2003 ([2003] EWCA Civ 1130, [2003] 4 All ER 891, [2003] 1 WLR 2590) allowing an appeal by the respondent, Brian Uttley, from the decision of Moses J on 8 April 2003 ([2003] EWHC 950 (Admin), [2003] All ER (D) 130 (Apr)), dismissing his proceedings for judicial review in which he sought a declaration that certain provisions of the Criminal Justice Act 1991 were incompatible with his rights under art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The facts are set out in the opinion of Lord Phillips of Worth Matravers.

David Pannick QC and *Jenni Richards* (instructed by the *Treasury Solicitor*) for the appellant.
Anthony Scrivener QC and *Phillipa Kaufmann* (instructed by *Bhatt Murphy*) for the respondent.

Their Lordships took time for consideration.

22 July 2004. Their Lordships announced that the appeal would be allowed for reasons to be given later.

30 July 2004. The following opinions were delivered.

LORD STEYN.

[1] My Lords, I have read the opinions of my noble and learned friends Lord Phillips of Worth Matravers, Lord Rodger of Earlsferry and Lord Carswell. I agree with those opinions. I would also allow the appeal.

LORD PHILLIPS OF WORTH MATRAVERS.

[2] My Lords, over a period prior to 1983 the respondent Mr Uttley committed a number of sexual offences, including three rapes. My noble and learned friend Lord Rodger of Earlsferry has described these in detail, together with the maximum sentence which, in 1983 could have been imposed for each offence. It suffices to note that rape carried a maximum sentence of life imprisonment.

[3] The respondent was not prosecuted for these offences until 1995. He pleaded guilty to some of the offences, was convicted of the others and was sentenced to a total of 12 years' imprisonment. The practical consequences of that sentence differed significantly from those that would have followed had the respondent been sentenced to 12 years' imprisonment in 1983, which has been treated for the purposes of this case as the date upon which he committed the offences in question. This was because the release regime applicable to prisoners had been changed by the Criminal Justice Act 1991 which had come into effect on 1 October 1992. I shall describe the post-October 1992 regime as 'the new regime' and the regime that applied in 1983 as 'the old regime'.

[4] Had the respondent been sentenced to 12 years' imprisonment under the old regime he would, subject to good behaviour have been released on remission after serving two-thirds of his sentence, which would then have expired. That would have been the effect of s 25(1) of the Prison Act 1952 and r 5 of the Prison Rules 1964, SI 1964/388, which remained applicable up to the introduction of the 1991 Act. In accordance with the provisions of the 1991 Act the respondent was released on 24 October 2003 after serving two-thirds of his sentence, but he was released on licence, the terms of which will remain in force until he has served three-quarters of his sentence, that is for a year. Those terms place the respondent under supervision and impose certain restrictions on his freedom.

[5] While subject to the conditions of the licence the respondent is at risk of recall to serve the balance of his sentence, should he fail to comply with those conditions. Furthermore, should he commit a further imprisonable offence before the 12-year term of his sentence has expired, the court dealing with that offence will be entitled to add all or part of the outstanding period of his 12-year sentence to any new sentence imposed.

[6] In December 2002 the respondent made an application for judicial review. The remedy that he sought was a declaration that the provisions of the 1991 Act which would make his release subject to licence were incompatible with art 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[7] Article 7(1) provides:

> *'No punishment without law*
>
> 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

[8] The respondent's case has never, so far as I can see, been fully formulated. On analysis it necessarily involves the following propositions. (i) The 1991 Act had the effect that the 12-year sentence imposed on the respondent under the new regime was a heavier penalty than a 12-year sentence would have been had it been imposed under the old regime. (ii) From this, it follows that art 7(1) was infringed. (iii) From this, it follows that the 1991 Act is incompatible with art 7(1).

[9] It appears to have been accepted by all before this case reached your Lordship's House that, if proposition (i) was established, propositions (ii) and (iii) followed as a matter of course. Thus the sole issue canvassed in the courts below was whether a 12-year sentence imposed under the new regime constituted a heavier penalty than a 12-year sentence imposed under the old regime.

[10] As to this issue, the argument before Moses J, who on 8 April 2003 gave judgment on the application for judicial review, appears to have concentrated exclusively on the restrictions imposed by the licence: [2003] EWHC 950 (Admin), [2003] All ER (D) 130 (Apr). It was argued that these constituted an additional penalty, imposed during the one-year period between release after two-thirds of the sentence had been served and the expiry of the licence after three-quarters of the sentence had been served. Under the old regime the respondent would not have been exposed to these restrictions.

[11] Moses J rejected the application for judicial review on the ground that the imposition of the licence restrictions did not constitute a penalty. He concluded that a sentence of 12 years' imprisonment under the new regime was no heavier a penalty than a sentence of 12 years' imprisonment under the old regime.

[12] Before the Court of Appeal the respondent took a further point. Not only did the licence impose restrictions on his freedom, while on licence he was subject to the risk of recall to serve the balance of his sentence. During that period his sentence had not expired but was, in effect, suspended. It followed that the sentence was a heavier penalty than a 12-year sentence under the old regime, which would have expired after service of two-thirds of the term.

[13] The Court of Appeal reversed the decision of Moses J: [2003] EWCA Civ 1130, [2003] 4 All ER 891, [2003] 1 WLR 2590. They concluded that the changes to the release regime effected by the 1991 Act had the effect that the 12-year sentence imposed on the respondent was a heavier penalty than a 12-year sentence imposed under the old regime would have been. As Longmore LJ put it (at [36]):

> 'Any prisoner would regard the penalty of 12 years as harsher after 1992 than before. So, in my view, would the ordinary informed observer.'

The court allowed the appeal and granted the respondent the declaration of incompatibility that he sought.

[14] Before this House Mr Pannick QC for the Secretary of State for the Home Department argued that the reasoning of Moses J was correct and that of the

Court of Appeal erroneous. He contended that the imposition of the licence conditions was designed to protect the public and to prevent further offending. It followed that the licence conditions did not constitute a 'penalty' within the meaning of art 7(1). He went on to advance two novel points, the latter of which was not even presaged in the Secretary of State's written case. I have found these new arguments conclusive. They render it unnecessary to decide whether a sentence of 12 years' imprisonment under the new regime constitutes a heavier penalty than a 12-year sentence under the old regime. I do not propose to attempt to resolve that issue. To do so would be to encroach on issues raised in at least one other appeal that is pending before your Lordship's House.

[15] Argument in the lower courts proceeded on the premise that the sentence of 12 years imposed on the respondent was a sentence of the same term of years that would have been imposed on the respondent under the old regime. Before this House Mr Pannick challenged that premise. He drew attention to *Practice Note (sentence: early release of prisoners)* [1992] 4 All ER 307, [1992] 1 WLR 948, issued by Lord Taylor of Gosforth CJ on the day that the 1991 Act came into force. This provided as follows:

> '1. Sections 32 to 40 of the Criminal Justice Act 1991 come into force on 1 October 1992. They make radical changes with regard to sentences.
>
> 2. Remission is abolished.
>
> 3. Parole will affect only those sentenced to four years' imprisonment and above.
>
> 4. Where the sentence of the court is less than four years the Secretary of State will be under a duty to release the prisoner after he has served one-half of his sentence. Thus, where the sentence is three years, eighteen months will be served. This is significantly longer than would normally have been served before the new provisions came into force. Furthermore, on release the prisoner will in effect be subject to a continuing suspended sentence. If between his release and the end of the period covered by the original sentence, he commits any offence punishable by imprisonment, he will be liable to serve the balance of the original sentence outstanding at the date of the fresh offence.
>
> 5. For determinate sentences of four years or longer the Secretary of State will have a continuing but reduced element of discretion on release. Prisoners will be released on licence after serving two-thirds of the sentence. Whereas hitherto they became eligible for parole after serving one-third of the sentence, they will not now become eligible until they have served half. The "at risk" provisions following release will be the same for long-term as for short-term prisoners.
>
> 6. It is therefore vital for all sentencers in the Crown Court to realise that sentences on the "old" scale would under the "new" Act result in many prisoners actually serving longer in custody than hitherto.
>
> 7. It has been an axiomatic principle of sentencing policy until now that the court should decide the appropriate sentence in each case without reference to questions of remission or parole.
>
> 8. I have consulted the Lords Justices presiding in the Court of Appeal, Criminal Division and we have decided that a new approach is essential.
>
> **9. Accordingly, from 1 October 1992, it will be necessary, when passing a custodial sentence in the Crown Court, to have regard to the actually period likely to be served, and as far as practicable to the risk of**

offenders serving substantially longer under the new regime than would have been normal under the old.

10. Existing guideline judgments should be applied with these considerations in mind.

11. I stress however that, having taken the above considerations into account, sentencers must, of course, exercise their individual judgment as to the appropriate sentence to be passed and nothing in this statement is intended to restrict that independence.'

[16] Mr Pannick submitted that, in accordance with this direction, the respondent's sentence must have been appropriately reduced from the term of years that would have been imposed under the old regime in order to reflect the fact that the conditions of release under the new regime were more onerous. Mr Scrivener QC for the respondent challenged this contention. He submitted that the thrust of the practice note was directed at short-term sentences where, under the new regime, defendants would serve 'significantly longer' than under the old regime. It was certainly not aimed at the punitive effect of the licence conditions themselves. In any event it was not possible to adjust the sentence so as precisely to compensate for the new release regime. In support of this last contention Mr Scrivener drew attention to the following passage from the judgment of Lord Taylor CJ in *R v Cunningham* [1993] 2 All ER 15 at 17, [1993] 1 WLR 183 at 186:

> 'The practice direction does not require an arithmetically precise calculation to be made. Its object was to give general guidance by alerting sentencers to the changed regime of early release and requiring them to have regard to the possible effects of passing sentences after October 1992 of the same length as those they would have passed before. Precise and calculated comparisons are not possible.'

[17] I am persuaded that it is at least possible that the sentence imposed on the respondent was shorter, in terms of years, than the sentence that would have been imposed on him in 1983. It does not, however, seem to me that it is material to the issue before your Lordships, namely the compatibility of the 1991 Act with art 7(1), whether or not the trial judge in fact reduced the sentence that he imposed on the respondent in order to reflect the extent to which the release conditions were more onerous under the new regime. The important question is whether it was open to him to do so. If it was necessary for him to do so in order to avoid infringing art 7(1) and the 1991 Act left him free to do so, it cannot be said that the 1991 Act is incompatible with art 7(1). At first blush it would seem evident that, by reducing the term of years imposed, it was possible for the trial judge to compensate, or certainly to over compensate, for the more onerous release conditions under the new regime. If so, then that in itself is reason to allow this appeal. Mr Scrivener argued, however, that because release under licence, introduced by the 1991 Act, was a novel constituent of any sentence of imprisonment imposed under the new regime, art 7(1) was necessarily infringed where such a sentence was imposed in respect of offences committed before October 1992. This brings me to the point that in my opinion is determinative of this appeal.

[18] Article 7(1) prohibits the imposition of a penalty which is heavier than the one that was 'applicable' at the time that the offence was committed. No one in the hearings below appears to have focussed on the meaning of the word

'applicable'. There appears to have been an assumption that this meant 'that which would have been applied' and that the sentence that 'would have been applied' was one of 12 years' imprisonment. I have already stated my conclusion that the latter assumption may have been unfounded. I now turn to consider the meaning of 'applicable' in art 7(1).

[19] This question was recently considered by the Judicial Committee of the Privy Council in *Flynn v HM Advocate* [2004] UKPC D1, 2004 SCCR 281. The issue in that case was whether changes made by Scottish legislation to the release regime applicable in the case of mandatory life sentences infringed art 7(1). My noble and learned friend Lord Carswell, who was a member of the Committee, will in his speech, which I have had the privilege of reading in draft, describe the difference of opinion as to the meaning of 'applicable' expressed by members of the Committee.

[20] Had the Committee had cited to them, as we have had cited to us, the decision of the European Court of Human Rights (the Court of Human Rights) in *Coeme v Belgium* [2000] ECHR 32492/96 their task might have been made the easier. Ours certainly is, for at para 145 the court said this in relation to art 7:

> 'The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.'

[21] This passage lends strong support to the opinions as to the meaning of 'applicable' expressed by my noble and learned friends Lord Rodger and Lord Carswell in *Flynn*'s case. I am persuaded that those opinions correctly state the law. It follows that art 7(1) will only be infringed if a sentence is imposed on a defendant which constitutes a heavier penalty than that which *could* have been imposed on the defendant under the law in force at the time that his offence was committed. I observe, in passing, that if statutory changes are made to the release regime of those serving mandatory life sentences those changes may affect the severity of the sentence that the law requires. That is not this case.

[22] The maximum sentence which could be imposed for rape at the time that the respondent committed the rapes for which he was convicted was life imprisonment. That was the 'applicable' penalty for the purposes of art 7(1). The sentence of 12 years' imprisonment imposed on the respondent would seem, manifestly, a less heavy penalty than life imprisonment. Mr Scrivener sought to challenge this conclusion. He submitted that, for the purposes of art 7(1) a 'penalty' was an autonomous concept. He further submitted that the fact that a sentence of imprisonment under the new regime included a new constituent, namely release on licence, it was a heavier penalty than one which could be imposed under the old regime.

[23] I accept that, for the purposes of art 7(1), a penalty is an autonomous concept. I also accept that the addition of a new constituent to a sentence can have the effect of making the sentence a heavier penalty. It may be that had the trial judge imposed on the respondent a sentence of life imprisonment, this would have constituted a heavier penalty than life imprisonment under the old regime. This was not a matter that was explored before your Lordships. The suggestion, however, that a sentence of 12 years' imprisonment under the new regime was a heavier penalty than life imprisonment under the old regime would seem manifestly unsound. Before dismissing it, however, it is necessary to

consider the effect of the decision of the Court of Human Rights in *Welch v UK* (1995) 20 EHRR 247.

[24] On 12 January 1987 the Drug Trafficking Offences Act 1986 came into force in the United Kingdom. This Act, for the first time, gave the court power, when a defendant was convicted of drug trafficking offences, to make, when sentencing him, a confiscation order. A confiscation order required the defendant to pay such sum as the court determined constituted the proceeds of drug trafficking received by the defendant, whether received before or after the 1986 Act came into force. The applicant Welch was convicted in August 1988 of drug trafficking offences committed in 1986. He was given an overall sentence of 22 years' imprisonment. In addition the judge imposed a confiscation order pursuant to the 1986 Act in the sum of £66,914 in respect of the proceeds of drug trafficking received before the 1986 Act came into force. In default of payment of this sum he would be liable to serve a further two years' imprisonment.

[25] The applicant claimed that the imposition of the confiscation order violated art 7(1) as it could not have been imposed at the time that he committed the offences for which he was convicted. The Court of Human Rights agreed. The court observed (at 261 (para 26)) that:

> '... the retrospective imposition of the confiscation order is not in dispute in the present case. The order was made following a conviction in respect of drugs offences which had been committed before the 1986 Act came into force. The only question to be determined therefore is whether the order constitutes a penalty within the meaning of Article 7(1), second sentence.'

The court went on to conclude that the confiscation order did constitute a penalty and that, in consequence, art 7(1) had been infringed.

[26] In *Welch v UK* the United Kingdom did not argue that the sentence of 22 years' imprisonment, coupled with the confiscation order, was a less heavy penalty than that which could have been imposed for the offences for which Welch was convicted, namely life imprisonment. Nor does this point appear to have been considered by the European Commission on Human Rights or by the Court of Human Rights. The confiscation order was considered in isolation as a discrete penalty.

[27] I do not believe that the decision in *Welch v UK* requires your Lordships' House to consider the conditions of the respondent's licence as a discrete penalty, divorced from his sentence of imprisonment. One cannot properly consider in isolation that part of a sentence of imprisonment which will be spent released on licence. The remission regime is an integral feature of the sentence of imprisonment. When considering how heavy a penalty has been imposed by the sentence it is necessary to consider the overall effect of the sentence. That, indeed, has been the respondent's case throughout.

[28] The release of a prisoner on licence, albeit subject to onerous conditions, mitigates rather than augments the severity of the sentence of imprisonment which would otherwise be served. A sentence of 12 years' imprisonment, with release on licence after serving two-thirds, is a less heavy penalty than a sentence of 12 years' imprisonment, all of which has to be served. The sentence of 12 years' imprisonment, with release on licence after serving eight years, imposed on the respondent under the new regime, was a less heavy penalty than a sentence of 15 years, with unconditional release after ten years, which could have been imposed on him under the old regime, and manifestly less severe than

the sentence of life imprisonment which could have been imposed on him under that regime. a

[29] For these reasons I conclude that there has been no infringement of art 7(1) and I would allow the appeal.

LORD RODGER OF EARLSFERRY.

[30] My Lords, I have had the privilege of reading in draft the speeches of my noble and learned friends, Lord Phillips of Worth Matravers and Lord Carswell. I agree with them and for the reasons they give I too would allow the appeal. Since your Lordships are differing from the Court of Appeal, however, I add some observations of my own on the first argument presented by Mr Pannick QC, which is dispositive of the appeal. b

[31] Before 1983 the respondent, Mr Uttley, committed a large number of sexual offences: three rapes; six indecent assaults on a woman, contrary to s 14(1) of the Sexual Offences Act 1956; one act of sexual intercourse with a girl under 16, contrary to s 6(1) of the same Act; and four acts of gross indecency with a child, contrary to s 1(1) of the Indecency with Children Act 1960. On one occasion he took an indecent photograph or pseudo-photograph of a child, contrary to s 1(1)(a) of the Protection of Children Act 1978 and on two occasions he distributed a photograph or pseudo-photograph of a child, contrary to s 1(1)(b) of the same Act. Although all the offences are said to have been committed before 1983, both counsel argued the appeal on the basis of the penalties that applied in 1983. c d

[32] The respondent was not caught and tried for the offences until 1995. In October of that year, at the Crown Court at Leeds, the respondent either pleaded guilty to, or was convicted of, counts relating to all of these acts. On 24 October 1995 he was sentenced for the offences. In respect of the three rapes, he was sentenced to 11 years' imprisonment on one count and to two periods of nine years, concurrently, on the two other counts. On each of the six counts of indecent assault on a woman, he was sentenced to two years' imprisonment, to run concurrently with one another and with the other sentences. On the count of sexual intercourse with a girl under 16, he was sentenced to one year's imprisonment, again concurrently with the other sentences. On three of the counts of committing gross indecency with a child, the respondent was sentenced to 18-months' imprisonment, and on the other to 12-months' imprisonment, all to run concurrently with the other sentences. On the count relating to the taking of the indecent photograph or pseudo-photograph of the child, he was sentenced to one year's imprisonment to run concurrently. On one of the two counts relating to distributing such a photograph or pseudo-photograph, he was sentenced to one year's imprisonment to run consecutively, on the other to one year's imprisonment to run concurrently. The overall practical effect was, accordingly, that the respondent was sentenced to a period of 11 years' imprisonment on one of the rapes plus a further one year's imprisonment consecutively in respect of one of the counts of distributing an indecent photograph. This made a total of 12 years' imprisonment. The respondent did not appeal against the sentences. e f g h j

[33] At the time when he committed the acts, they all constituted offences under the various statutory provisions to which I have referred. Similarly, at that time, in terms of the relevant legislation, a court was entitled to impose periods of imprisonment for the offences which exceeded the periods actually imposed by the court for them in 1995. In particular, by reason of s 37(3) of, and para 1(a) of Sch 2 to, the 1956 Act, the maximum sentence for rape was life imprisonment at

the time of the offences. In 1995 rape remained punishable with life imprisonment under the same provisions of the 1956 Act. When the respondent distributed the indecent photograph or pseudo-photograph of the child, under s 6(2) of the 1978 Act the maximum penalty for that offence was a sentence of three years' imprisonment. That remained the position in October 1995.

[34] The respondent complains that his rights under art 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) have been violated. Article 7 is headed 'No punishment without law' and art 7(1) provides:

> 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

As I have just explained, the provisions criminalising the offences in question and prescribing the punishments that could be imposed for them did not change in any relevant respect between 1983 and 1995. The only authority for the court's sentence of 11 years' imprisonment for rape was to be found in s 37(3) of, and para 1(a) of Sch 2 to, the 1956 Act, while the court's only authority for imprisoning him for the offence of taking an indecent photograph or pseudo-photograph was to be found in s 6 of the 1978 Act. The provisions of these two Acts were not only the basis in law for the court imposing the total sentence which it did: they would have allowed the court to impose a heavier sentence. The provisions of the 1956 Act alone would have given the court power, in 1983 as in 1995, to impose any sentence of imprisonment for the rapes up to, and including, life imprisonment. Similarly, s 6(2) of the 1978 Act would have authorised the court to impose a consecutive sentence of up to three years' imprisonment for taking the indecent photograph or pseudo-photograph. None of these provisions prescribes a minimum sentence and the case therefore raises no issue of the kind considered by the Court of Appeal in *R v Sullivan, R v Gibbs, R v Elener* [2004] EWCA Crim 1762, [2004] All ER (D) 133 (Jul).

[35] The respondent does not base his complaint on the provisions that I have just narrated, however. Which is presumably why the courts below make no mention of them. He says, rather, that there has been a violation of art 7(1) because, by virtue of the relevant provisions of the Criminal Justice Act 1991 which came into force in 1992, a heavier penalty was imposed on him than the one that was applicable at the time when the criminal offences in question were committed. The argument is based on a comparison of the effect of these provisions on the 12-year sentence imposed by the court in 1995 and the effect which s 25(1) of the Prison Act 1952, r 5 of the Prison Rules 1964, SI 1964/388, and s 60 of the Criminal Justice Act 1967 would have had on any equivalent sentence imposed by a court in 1983.

[36] It is agreed that, if the pre-1991 Act provisions had remained in force, then, provided he had been of good behaviour, the respondent would have been entitled to be released when he had completed two-thirds of his sentence, on 24 October 2003. Thereupon his sentence would have expired under s 25(1) of the 1952 Act. Instead, by virtue of s 33 of the 1991 Act the respondent was released on the same day, 24 October 2003, when he had completed two-thirds of his 12 year sentence—but his release was on licence. The licence contains a number of conditions and remains in force until 24 October 2004. During that period, under

s 39 of the 1991 Act, the respondent is liable to be recalled to prison if he fails to comply with the conditions. Even after the end of the licence period, if the respondent is convicted of an imprisonable offence, under s 40 the court dealing with the new offence has the power to require him to serve the whole, or part, of the remainder of his 12-year sentence. The argument for the respondent, which the Court of Appeal accepted, is that, because he remains subject to the licence period and liable to be required to serve the remainder of his 12-year sentence, in terms of art 7(1) the sentence of 12 years imposed on him in 1995 is 'heavier' than a sentence of 12 years would have been if it had been imposed on him in 1983, before the 1991 Act came into force.

[37] Since the alleged violation of the respondent's rights under art 7(1) would not have materialised until he was released in October 2003, Mr Pannick accepted that, if there was a violation, the Human Rights Act 1998 would apply even though the sentence had been imposed before 2 October 2001.

[38] The respondent's argument is misconceived. For the purposes of art 7(1) the proper comparison is between the penalties which the court imposed for the offences in 1995 and the penalties which the legislature prescribed for those offences when they were committed around 1983. As I have explained, the cumulative penalty of 12 years' imprisonment that the court imposed for all the offences in 1995 was not heavier than the maximum sentence which the law would have permitted it to pass for the same offences at the time they were committed in 1983. There is accordingly no breach of art 7(1).

[39] In applying art 7(1) in this way, I interpret the word 'applicable' as referring to the penalties which the law authorised a court to impose at the time of the offences. Section 20(1) of the Constitution of India expresses the same idea when it says that no person is to be subjected to a penalty 'greater than that which might have been inflicted under the law in force' at the time of the commission of the offence. These and similar provisions embody a principle of comparatively modern origin: there can be no room for it in legal systems which do not use statutes to prescribe a particular punishment or range of punishments for individual offences, but rely instead on the court to choose the appropriate punishment for any given offender. That was once the case with most legal systems. Therefore, although traces of the doctrine can be found in the writings of Bartolus de Saxoferrato in the fourteenth century (*Commentaria ad digestum vetus, de iustitia et iure*, 1.9.49–51), it really came to prominence only towards the end of the eighteenth century when developments in constitutional thinking led to the idea that crimes and their punishments should be regulated by statutes passed by the legislature. Article 8 of the French Declaration of the Rights of Man 1791 famously proclaimed that 'nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit et légalement appliquée'. Ten years later, in his *Lehrbuch des gemeinen in Deutschland geltenden peinlichen Rechts*, p 20, para 24, von Feuerbach gave the principle its familiar and enduring Latin form, nulla poena sine lege. From these beginnings the principle came to be generally recognised and eventually to take its place in many constitutions, as well as, for example, in art 7(1) of the convention and art 15 of the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmnd 6702). There is some discussion of the limits to the principle in English law in Glanville Williams *Criminal Law: The General Part* (2nd edn, 1961) pp 606–608.

[40] The idea that one should not be punished for doing an act that was lawful at the time meets with ready acceptance. Leaving aside the general argument against retroactive legislation, it is perhaps less obvious why, if his conduct was

criminal, a court should not be able to impose on the offender a sentence that is authorised by law and otherwise appropriate, simply because it is heavier than the sentence which the law authorised for that offence at the time when it was committed. Even if the perpetrator was aware of the penalty that the law prescribed for the offence at the time he committed it, in the case of a crime such as rape, at least, it will scarcely lie in his mouth to claim that he would not have carried out the rape if he had known that the new heavier penalty would be applied to him and that it is, accordingly, unfair to impose it. In practice, however, changes in the law which are designed to allow a heavier punishment for an offence that has already been committed may tend to be made for the purpose of unfairly penalising the past acts of particular individuals, for political or other reasons. Article 7(1) eliminates that risk.

[41] The wording of art 7(1) is indeed well adapted to counteract such dangers. The European Court of Human Rights (the Court of Human Rights) has therefore been able to give proper effect to the article while interpreting its wording in a straightforward fashion. In *Coeme v Belgium* [2000] ECHR 32492/96 at para 145 the court held:

> 'The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed did not exceed the limits fixed by that provision.'

One has to identify the legal provision which made the act punishable at the time it was committed and make sure that the punishment which the court imposes does not exceed the limits fixed by that provision. Although the decision of the Court of Human Rights was not cited to the Privy Council in *Flynn v HM Advocate* [2004] UKPC D1, 2004 SCCR 281, Lord Carswell encapsulated the same interpretation when he said (at [109]):

> 'It seems to me difficult to escape the conclusion that the meaning of the provision is that the penalty which was "applicable" at the time the criminal offence was committed is that which a sentencer could have imposed at that time, ie the maximum sentence then prescribed by law for the particular offence ... The object of the provision appears to have been to prevent a sentence being imposed which could not have been imposed at the time of the offence, because the maximum was then lower.'

Putting the matter within the specific context of the Scottish system for mandatory life sentence prisoners, I adopted the same construction (at [85]).

[42] Mr Scrivener QC reminded your Lordships that under s 2 of the 1998 Act decisions of the Court of Human Rights are not binding. It respectfully appears to me, however, that not only is no other interpretation required in order to give effect to art 7(1), but indeed no other interpretation is feasible in the present case. Mr Scrivener could not begin to paraphrase art 7(1) so as to specify which penalties were 'applicable' at the time of the offences if they were not the penalties or range of penalties that the law permitted a court to impose at that time. As Lord Carswell shows, there are obvious difficulties in any attempt to interpret 'applicable' as referring to the penalty that the court could in practice have been expected to impose for an offence at the time it was committed. The decision of the European Court demonstrates, however, that art 7(1) does not envisage such speculative excursions into the realm of the counter-factual. Its purpose is not to ensure that the offender is punished in exactly the same way as

he would have been punished at the time of the offence, but to ensure that he is not punished more heavily than the relevant law passed by the legislature would have permitted at that time. So long as the court keeps within the range laid down by the legislature at the time of the offence, it can choose the sentence which it considers most appropriate. The principle of legality is respected.

[43] Here there was no change in the relevant penalties which the law permitted a court to impose. What changed between 1983 and 1995 were the arrangements that were to apply on the prisoner's early release from any sentence of imprisonment imposed by the court. In particular, since 1992 a prisoner such as the respondent has remained subject to his sentence for its entire duration of 12 years, whereas before 1992 an equivalent sentence would have expired when he was released after serving eight years. The respondent says that, for this reason, the sentence of 12 years imposed on him in 1995 was 'heavier' than a sentence of 12 years imposed at the time of the offences in 1983. Leaving aside all the other possible objections, this argument simply involves a misinterpretation of art 7(1). Of course, if legislation passed after the offences were to say, for instance, that a sentence of imprisonment was to become a sentence of imprisonment with hard labour, then issues would arise as to whether the article was engaged, even where the maximum sentence had been life imprisonment at the time of the offences. But in this case there is no suggestion that the actual conditions of the respondent's imprisonment changed. The very worst that could have happened to him under the 1991 Act was that he would have required to serve the whole of his 12-year sentence in gaol. Happily for him, that has not in fact happened. But, even if it had, he would still have spent only 12 years in prison—which is well within the limits of the penalty that was allowed by law for the three rapes and many other offences at the time when he committed them. There is no violation of art 7(1).

BARONESS HALE OF RICHMOND.

[44] My Lords, I too have reached the conclusion that the change from the remission and parole system to the licence system for early release of prisoners was not a 'heavier penalty ... than the one that was applicable at the time' when these offences were committed. I believe that this conclusion is not incompatible with the views I expressed in *Flynn v HM Advocate* [2004] UKPC D1 at [99], [100], 2004 SCCR 281 at [99], [100], but I certainly owe the respondent an explanation.

[45] It is quite clear that the words 'penalty ... applicable' in art 7(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) refer to the penalty or penalties *prescribed by law* for the offence in question at the time when it was committed. It does not refer to the *actual* penalty which would probably have been imposed upon the individual offender had he been caught and convicted shortly after he had committed the offence. The court does not have to make a comparison between the sentence he would have received then and the sentence which the court is minded to impose now. In *Flynn*'s case, I did not accept the argument that it did. As I said (at [100]), '[My] conclusion does not cast doubt upon the validity of sentencing guidelines which may indicate that the existing applicable sentence is to be applied in a more severe way than had been the previous practice'. As the European Court of Human Rights said in *Coeme v Belgium* [2000] ECHR 32492/96 (para 145):

'The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, and that the punishment imposed *did not exceed the limits fixed* by that provision.' (My emphasis.)

[46] However, it is clear from the court's decision in *Welch v UK* (1995) 20 EHRR 247 that art 7 of the convention is not limited to the sentences prescribed by the law which creates the offence. It can also apply to additional penalties applied to that offence by other legislation. The concept of a penalty is an autonomous convention concept. When considering what are the 'limits fixed' by the law, the maximum duration of any permitted sentence of imprisonment (or the maximum fine which may be payable) may not be the only relevant factor. There may be changes in the essential quality or character of such a sentence which make it unquestionably more severe than any sentence which might have been imposed at the time of the offence. Examples might be the reintroduction of hard labour with every sentence of imprisonment or the automatic conversion of a sentence of imprisonment into a sentence of transportation. These may seem fanciful today. Less fanciful might be the replacement, for certain juvenile offenders, of committal to the care of a local authority with determinate sentences of detention in prison department establishments. The care order was ostensibly a welfare disposal, rather than a penalty, although of indefinite duration up to the age of 18. The detention order was unquestionably punitive in intent and effect, although of definite duration. There must, at the very least, be an argument that art 7 is engaged by such a change.

[47] *Flynn*'s case concerned a radical change in the legal effect of a mandatory life sentence, through the introduction of a fixed 'punishment part' into what had previously been in reality an indeterminate sentence. The nature of the sentence begged the question of what it was that the law prescribed, notional imprisonment for life or imprisonment for a term to be fixed. As there was only one penalty for murderers, it mattered what it meant. I readily acknowledge that, as with the care order example, there is room for argument about whether this change made that penalty *in itself* more severe than it had previously been. Some might think that it did and some might think that it did not. It was, after all, introduced to protect the human rights of offenders. Nevertheless, the equivalent legislation for England and Wales took the precaution of protecting those sentenced to life imprisonment for offences committed before the change from a longer tariff than that already fixed or likely to have been fixed under the previous regime: see Sch 22 to the Criminal Justice Act 2003. Without that protection, some offenders might do better than they might previously have done whereas others might do worse. But for the reasons given earlier, that is not the question. The question, as I believe all your lordships agree, is whether the penalty now legally applicable (and applied) to the offence is heavier than (or exceeds the limits of) the penalty which was legally applicable at the time it was committed.

[48] In this case we are concerned with a sentence of imprisonment which could have been of any duration up to life imprisonment. I am persuaded that a change in the arrangements for determining how much of that time is actually spent in prison and how much in the community does not make the penalty heavier than it previously was. A longer term of imprisonment was always

available. It can be distinguished from a mandatory life sentence, which is the only penalty available, where the consequences prescribed by law might become heavier than those which previously obtained. (Whether I was right to consider that they had done is another matter.) Just as there might once have been some forms of death penalty which were heavier than others, there may be forms of incarceration which are heavier than others. But in this case the complaint is essentially about duration and a longer duration has always been available. I therefore agree art 7(1) is not breached.

[49] It follows that I too would allow this appeal.

LORD CARSWELL.

[50] My Lords, the respondent Brian Uttley was on 24 October 1995 sentenced to an effective total of 12 years' imprisonment for a series of sexual offences committed over a period prior to 1983. He had pleaded guilty to several counts of sexual assault and was convicted on three counts of rape and also on charges of taking indecent photographs.

[51] Upon sentence the respondent became subject to the provisions of the Criminal Justice Act 1991, whereby he was entitled to release on licence after serving two-thirds of his term of imprisonment (having been eligible for consideration for parole after serving half of the term) and was then subject to a number of restrictions under the licence until the expiry of three-quarters of the term.

[52] In accordance with these statutory provisions he was released on licence on 24 October 2003, the date of expiry of two-thirds of his term of imprisonment, and will remain on licence until 24 October 2004, when three-quarters of the term will have expired. The conditions of the licence (with which he must comply, as provided by s 37(4) of the 1991 Act) impose a number of significant restrictions on his freedom and require him to place himself under the supervision of a probation officer, keep in touch with him and receive visits from him. Under s 39 of the 1991 Act where a prisoner is released on licence the Secretary of State for the Home Department may revoke his licence and recall him to prison, if so recommended by the Parole Board. By virtue of s 40 of the 1991 Act (now replaced by s 116 of the Powers of Criminal Courts (Sentencing) Act 2000), if he is convicted of a new offence during the currency of the licence the sentencing court may, in addition to passing any other sentence, order him to be returned to prison to serve out the whole or any part of the original sentence unexpired at the date of commission of that offence.

[53] The respondent points to the fact that if he had been convicted and sentenced before the 1991 Act came into operation on 1 October 1992 he would, subject to good behaviour, have been unconditionally discharged after serving two-thirds of his sentence, which would then have expired by virtue of s 25(1) of the Prison Act 1952. He would have been eligible for parole after serving one-third of his sentence. It is not necessary for present purposes to delve into the refinements of remission and prisoners' legitimate expectations, for it was not in dispute that the release provisions would have operated as I have outlined.

[54] The respondent maintains that the effect of subjecting him to the regime of the 1991 Act was to violate the provisions of art 7(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), the material part of which reads:

'Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.'

He brought an application for judicial review of the decision to release him on licence on 24 October 2003, claiming declarations that Sch 12 to the 1991 Act is incompatible with art 7 of the convention and that the imposition of a period of licence and/or the imposition of conditions of licence under the provisions of the 1991 Act are incompatible with art 7. Moses J in the Administrative Court rejected the respondent's arguments and dismissed the application ([2003] EWHC 950 (Admin), [2003] All ER (D) 130 (Apr)), but the Court of Appeal (Pill and Longmore LJJ and Maurice Kay J) allowed his appeal: see [2003] EWCA Civ 1130, [2003] 4 All ER 891, [2003] 1 WLR 2590. The Secretary of State for the Home Department has appealed to your Lordships' House against the decision of the Court of Appeal.

[55] The decisions of the Administrative Court and the Court of Appeal centred round the issue whether the licence provisions constituted a heavier penalty for the purposes of art 7(1). Moses J held that they did not, concluding (at [15]) that—

'the nature and purpose of the licence are such that they dominate the factors which go to the conclusion as to whether the imposition of the licence is a penalty or not. The imposition of the licence is designed to protect the public once a prisoner is released, and assist in preventing the prisoner from committing further offences.'

The Court of Appeal differed from Moses J in their classification of the licence provisions. They held that, whatever the purpose of those provisions, their effect was onerous as a part of the sentence imposed. Viewing the matter as a matter of substance rather than form, the sentence was thereby increased and the penalty imposed was heavier. The transitional provisions in the 1991 Act for release on licence of prisoners whose offences had been committed at a time before the introduction of such licences were accordingly incompatible with art 7(1) of the convention. They made a declaration in the following terms:

'A declaration pursuant to s 4(2) of the Human Rights Act 1998 that s 33(2), s 37(4A) and s 39 of the Criminal Justice Act 1991 are incompatible with the applicant's rights under art 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 in so far as they provide that he will be released at the two-thirds point of his sentence on licence with conditions and be liable to be recalled to prison (he having committed the index offences before the 1991 Act came into force), and at a time when he would have expected (subject to good behaviour) to be released at the two-thirds point of any sentence unconditionally, pursuant to the practice that had developed in implementing r 5 of the Prison Rules 1964, SI 1964/388.'

[56] Mr Pannick QC on behalf of the Secretary of State advanced a new argument before your Lordships' House, based on the construction of the word 'applicable' in art 7(1), in addition to those relied on in the courts below. He marshalled his arguments into four main contentions. (i) The penalty imposed was well within the maximum allowed by law in 1983 and therefore did not violate the terms of art 7(1) of the convention, when properly construed. (ii) The respondent's complaints are about early release provisions, which

concern the administration of sentences and are not covered by art 7. (iii) The trial judge was required by the *Practice Note (sentence: early release of prisoners)* [1992] 4 All ER 307, [1992] 1 WLR 948 to take the changes in early release provisions into account when sentencing. (iv) Licensing provisions are not a penalty, but are designed to assist the offender in his rehabilitation and protect the public against the risk of his re-offending.

[57] In the course of developing his first contention Mr Pannick argued that the word 'applicable' in art 7(1) means the sentence which could have been imposed on the offender at the time when he committed the offence, ie the maximum sentence then fixed by law for that offence. The object of art 7(1) was to prevent persons from being subjected to penalties heavier than those which could have been imposed at the time of commission of the crime. An obvious example is the increase in the maximum sentence for indecent assault on a woman from two years to ten years by the Sexual Offences Act 1985: persons convicted after the date on which that Act came into operation of indecent assaults committed before that date could not be sentenced to a term of imprisonment longer than two years.

[58] The wording of art 7(1) of the convention has its origins in the early constitutional documents of the human rights movement. It was purposely framed so as to follow closely the terms of art 11(2) of the Universal Declaration of Human Rights (Paris, 10 December 1948; UNTS 2 (1949); Cmd 7226), approved by the General Assembly of the United Nations in 1948, save that in the English version of the convention the phrase 'penal offence' became 'criminal offence'. In the International Covenant on Civil and Political Rights (New York, 19 December 1966; TS 6 (1977); Cmnd 6702) (the ICCPR) the first two sentences of art 15(1) are identical in wording to art 7(1) of the convention. A third sentence, however, was added which is of significance for present purposes:

> 'If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.'

This sentence gives support to the interpretation propounded on behalf of the appellant, that in the previous sentence in art 15(1) of the ICCPR, like the second sentence of art 7(1) of the convention, the word 'applicable' was intended to refer to the maximum sentence which could be imposed by law. That interpretation is also borne out by the references in the travaux préparatoires to a penalty 'authorised by the law' and the 'maximum penalty under the law in force at the time'.

[59] Further support for the appellant's proposition may be derived from the decision of the European Court of Human Rights in *Coeme v Belgium* [2000] ECHR 32492/96, which was cited on behalf of the appellant. The major issue with which the case was concerned was whether the defendants could properly have been tried in the Court of Cassation. Two of the applicants claimed that the extension of the limitation period for trial of criminal offences under Belgian law which was brought in after the commission of the offences with which they were charged was in breach of art 7(1) of the convention. In para 145 of its judgment the court observed that offences and the relevant penalties must be clearly defined by law and went on:

> 'The court must therefore verify that at the time when an accused person performed the act which led to his being prosecuted and convicted there was in force a legal provision which made that act punishable, *and that the*

punishment imposed did not exceed the limits fixed by that provision.' (My emphasis.)

[60] This issue was considered by the Judicial Committee of the Privy Council in a devolution appeal from Scotland, *Flynn v HM Advocate* [2004] UKPC D1, 2004 SCCR 281. The appeal concerned complaints from prisoners sentenced to imprisonment for life in Scotland prior to the passing of the Convention Rights (Compliance) (Scotland) Act 2001 that under the regime brought into operation by that Act—their complaint being directed specifically to para 13 of the Schedule to that Act, which dealt with transitional provisions—they would serve a longer period in prison than they would have expected to serve under the arrangements in force at the time when they were originally sentenced. It is not necessary for present purposes to go into details of the issues in the appeal and it is sufficient to say that the Judicial Committee rejected the appellants' claim. They were able to give an interpretation to para 13 whereby the reviewing court would be entitled to avoid the necessity to impose a higher 'sentence'. It followed that no breach of art 7(1) could be involved and para 13 was within the competence of the Scottish Parliament. It had been argued on behalf of the appellants that the 'applicable' sentence in art 7(1) of the convention is that which would have been imposed by a court if it had passed sentence under the law in force at the time of the commission of the offence. It followed from this reasoning that if the length of the punishment part of the life sentence (previously known in common parlance as the 'tariff') exceeded that which they could realistically have expected under the previous arrangements for fixing that part, art 7(1) could be engaged.

[61] In the course of reaching our conclusions my noble and learned friend Lord Rodger of Earlsferry and I specifically rejected this construction of art 7(1). Lord Rodger stated in his judgment at [85] that he was not persuaded that art 7(1) was engaged in the circumstances of the appeals. Adopting the construction propounded on behalf of the appellant in the present appeal he said in that paragraph:

> 'Under paragraph 13 the appellants are liable to be required to serve a longer period than would have been likely, but not a longer period than would have been competent, before the first review under the previous system. That is not incompatible with article 7(1).'

[62] I adopted the same construction of art 7(1) as did Lord Rodger. I stated in a passage of my judgment (at [109]), which I venture to repeat:

> 'I am unable, however, to accept the construction of article 7(1) propounded by the appellants. It seems to me difficult to escape the conclusion that the meaning of the provision is that the penalty which was "applicable" at the time the criminal offence was committed is that which a sentencer could have imposed at that time, ie the maximum sentence then prescribed by law for the particular offence. I may observe in passing that resort to the French text of article 7 is of little avail, since the word used is "applicable", which does not throw any further light on the draftsman's intention. The object of the provision appears to have been to prevent a sentence being imposed which could not have been imposed at the time of the offence, because the maximum was then lower.'

[63] Mr Scrivener QC for the respondent supported the construction of art 7(1) which had been advanced on behalf of the appellants in *Flynn's* case. He

argued that the licensing provisions introduced a new component into the system, which did not exist at the time when the respondent committed the offences. This was in reality, as Longmore LJ indicated in his judgment in the Court of Appeal, (see [2003] 4 All ER 891 at [36]) a lengthening of the sentence which would have been imposed before 1992. It accordingly violated the terms of art 7(1).

[64] Mr Scrivener reminded the House that art 7, like all provisions of the convention, must be construed autonomously, purposively and giving primacy to substance. I have borne this in mind, but I still believe that the construction of art 7(1) which Lord Rodger and I adopted in *Flynn's* case is correct and I adhere to the views which I expressed in that case. As I there stated, in my opinion other interpretations fail to give due effect to the fact that art 7(1) refers to the time when the offence was committed, not the time when the sentence was passed. If the interpretation propounded on behalf of the respondent were correct, it would frequently be necessary to attempt to divine what sentence a court would have passed if sentencing at the time of commission of the offence, a quest fraught with obvious difficulties. For example, the guidelines for length of sentences appropriate for the offence may have changed and the general level of sentence may have been increased, as may be seen to have occurred in the case of such offences as dangerous driving causing death.

[65] When one applies this conclusion of law to the facts of the present case, the answer is entirely clear. The maximum sentence for rape, the most serious of the offences committed by the respondent, was imprisonment for life both before and after 1983 and so remains. A court sentencing the respondent before 1983 could if it thought fit have imposed imprisonment for life or for a term very much longer than 12 years. It is in my opinion impossible to regard a sentence of 12 years, even with the new element of a licence, as a heavier penalty than that which could have been imposed at the time when the offence was committed. Accordingly on this ground alone I consider that the judge was right to dismiss the application for judicial review.

[66] I do not find it necessary to express an opinion on the issue whether the effect of the 1991 Act was to impose a heavier penalty on the respondent, as the Court of Appeal held, and I should prefer not to do so.

[67] For the reasons which I have given I would allow the appeal and affirm the judge's dismissal of the respondent's application for judicial review.

Appeal allowed.

Dilys Tausz Barrister.

Manchester City Council v Romano
Manchester City Council v Samari

[2004] EWCA Civ 834

COURT OF APPEAL, CIVIL DIVISION
BROOKE, JACOB LJJ AND SIR MARTIN NOURSE
18, 19 MAY, 29 JUNE 2004

Housing – Local authority houses – Possession – Possession order for causing nuisance or annoyance – Disability discrimination – Local authority seeking possession order against secure tenants for causing nuisance or annoyance to neighbours – Tenants claiming to be suffering from mental impairments which constituted disability for purposes of disability discrimination legislation – Approach to be adopted in such cases – Housing Act 1985, Sch 2, ground 2 – Disability Discrimination Act 1995, ss 22, 24 – Human Rights Act 1998, Sch 1.

In two cases raising a common issue relating to the interface between the housing legislation and the Disability Discrimination Act 1995, the claimant local authority sought orders for possession against the defendant secure tenants. It relied, inter alia, on Ground 2[a] of Sch 2 to the Housing Act 1985, namely that the tenant or a person residing in or visiting the dwelling house had been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality. The court could not make an order for possession on that ground unless it considered it reasonable to do so. There was medical evidence that one of the tenants was suffering from a depressive illness and that the other had a borderline personality disorder. However, there was also evidence that the tenants' behaviour had resulted in neighbours suffering great stress or depression. In the first case the judge dismissed an appeal from an order of a district judge dismissing an application to suspend execution of a warrant of possession. In the second case the judge made an order for possession. On their appeals, the tenants contended that they were suffering from a disability for the purposes of the 1995 Act. They relied on s 22(3)(c)[b] of the Act which rendered it unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by, inter alia, evicting him. Section 24(2)[c] provided that such treatment was justified only if, in the discriminator's opinion, one or more of the conditions mentioned in sub-s (3) were satisfied, and it was reasonable, in all the circumstances, for him to hold that opinion. The sub-s (3) conditions included, at para (a), that the treatment was necessary in order not to endanger the health or safety of any person. The Court of Appeal was therefore required to consider the correct approach to s 24(3)(a) of the 1995 Act in the context of possession proceedings under ground 2 of Sch 2 to the 1985 Act, having regard to the rights of both tenants and neighbours under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

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a Ground 2, so far as material, is set out at [1], below
b Section 22(3) is set out at [49], below
c Section 24, so far as material, is set out at [52], below

Held – Where a landlord was seeking possession under ground 2 of Sch 2 to the 1985 Act, the court, in order to interpret s 24(3)(a) of the 1995 Act in a way that was compatible with the convention, had to ask: (i) whether the landlord held the opinion that it was necessary to serve a notice seeking possession and/or to bring possession proceedings in order that the health of an identified person or persons would not be put at risk, and (ii) whether that opinion was objectively justified. In that context, health meant a state of complete physical, mental and social well-being, not merely the absence of disease and infirmity. Trivial risks to a person's health should be disregarded. In the instant cases, the requirements of s 24(2) and (3)(a) of the 1995 Act were satisfied. Accordingly, the appeals would be dismissed (see [69], [75], [93], [112]–[114], below).

North Devon Homes Ltd v Brazier [2003] 2 EGLR 14 considered.

Per curiam. (1) Where a disabled secure or assured tenant wishes to assert that the landlord's reason for bringing possession proceedings related to his disability, it is preferable for the tenant to assert the matter on which he relies as part of his case that it will be unreasonable for the court to make a possession order, rather than to complicate the proceedings by adding a formalistic counterclaim for a declaration or injunction (see [63], [64], below).

(2) Sending a warning letter to a tenant about his conduct does not subject him to a detriment within the meaning of the 1995 Act, but it may well be that at such a stage it might be wise for a local housing authority to start considering whether it will be able in due course to hold in good faith an opinion of one of the kinds mentioned in s 24(3) of the Act and to set about obtaining the necessary evidence for that purpose. Such evidence will not simply involve obtaining evidence about the mental condition of the tenant. If the council believes that tenant suffers or may be suffering from a mental impairment of the type described in the Act, it will be prudent for it to obtain evidence of the effect of the tenant's behaviour on the health or safety of one or more of the complainants if s 24(3)(a) is to be relied upon. In the first instance, a statement by that complainant, supported by a short letter from the complainant's GP or other medical adviser, is likely to suffice (see [118], below).

Notes

For disability discrimination in relation to premises, see 13 *Halsbury's Laws* (4th edn reissue) paras 511–512, and for grounds for possession generally and possession on the ground of nuisance or annoyance in particular, see 27(2) *Halsbury's Laws* (4th edn reissue) paras 1170, 1174.

For the Housing Act 1985, Sch 2, ground 2, see 21 *Halsbury's Statutes* (4th edn) (1997 reissue) 456.

For the Disability Discrimination Act 1995, ss 22, 24, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 320, 322.

For the Human Rights Act 1998, Sch 1, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 553.

Cases referred to in judgment

Abadeh v British Telecommunications plc [2001] ICR 156, EAT.
Ashworth v UK App No 39561/98 (20 January 2004, unreported), ECt HR.
Clark v TDG Ltd (t/a Novacold) [1999] 2 All ER 977, CA.
Cresswell v Hodgson [1951] 1 All ER 710, [1951] 2 KB 92, CA.
Croydon London BC v Moody (1998) 31 HLR 738, CA.
Goodwin v Patent Office [1999] IRLR 4, [1999] ICR 302, EAT.

Hatton v UK (2003) 15 BHRC 259, ECt HR.
Hutchison 3G UK Ltd v Mason (16 July 2003, unreported), EAT.
Morgan v Staffordshire University [2002] IRLR 190, [2002] ICR 475, EAT.
North Devon Homes Ltd v Brazier [2003] EWHC 574 (QB), [2003] 2 EGLR 14.
Power v Panasonic UK Ltd [2003] IRLR 151, EAT.
Portsmouth City Council v Bryant (2000) 32 HLR 906, CA.
Rose v Bouchet [1999] IRLR 463, Sh Ct.
Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] 2 All ER 26, [2003] ICR 337, HL.
Webb v EMO Air Cargo (UK) Ltd Case C-32/93 [1994] 4 All ER 115, [1994] QB 718, [1994] 3 WLR 941, ECJ.
Webb v EMO Air Cargo (UK) Ltd (No 2) [1995] 4 All ER 577, [1995] ICR 1021, [1995] 1 WLR 1454, HL.
Woking BC v Bistram (1993) 27 HLR 1, CA.

Appeals

Manchester City Council v Romano

The defendant, Sharon Romano, appealed from the decision of Judge Armitage QC in the Manchester County Court on 11 November 2003 dismissing her appeal from the decision of District Judge Jones on 14 February 2003 dismissing her application to suspend the execution of a warrant of possession of a house in Moorcroft Road, Northern Moor, Manchester, which Ms Romano held as a secure tenant of the claimant, Manchester City Council. The Disability Rights Commission (DRC) intervened on the appeal. The facts are set out in the judgment of the court.

Manchester Council v Samari

The defendant, Yvonne Samari, appealed from the order of Judge Armitage QC in the Manchester County Court on 13 November 2003 granting the claimant, Manchester City Council, possession of premises in Harmer Close, Newton Heath, Manchester, which Ms Samari held as a secure tenant of the council. The Disability Rights Commission (DRC) intervened on the appeal. The facts are set out in the judgment of the court.

Jan Luba QC and *Alyson Kilpatrick* (instructed by *Glaisyers*, Manchester) for Ms Romano.
Jan Luba QC and *Alex Durance* (instructed by *Glaisyers*, Manchester) for Ms Samari.
Andrew Arden QC and *Michael Lemmy* (instructed by *Susan Orrell*, Manchester) for the council in the Romano case.
Andrew Arden QC and *Robert Darbyshire* (instructed by *Susan Orrell*, Manchester) for the council in the Samari case.
Jill Brown (instructed by the *Legal Services Department of the Disability Rights Commission*, Manchester) for DRC.

Cur adv vult

29 June 2004. The following judgment of the court was delivered.

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BROOKE LJ.

1. INTRODUCTION

[1] These are appeals by the two defendants Sharon Romano and Yvonne Samari from orders made against them by Judge Armitage QC at the Manchester County Court on 11 and 13 November 2003 respectively. The orders were made in favour of their landlords, Manchester City Council (the council). The defendants were both secure tenants, and in each case one of the grounds for the possession order was ground 2 of Sch 2 to the Housing Act 1985 as amended, which provides a ground for possession where—

> '[t]he tenant or a person residing in or visiting the dwelling-house—(a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality ...'

and where it is reasonable to make the order. In Ms Romano's case the judge dismissed an appeal from the earlier order by District Judge Jones to which we refer in [6], below. In Ms Samari's case he made an order for possession as the trial judge.

[2] The judge made an order for possession against Ms Samari because he considered it reasonable to do so in all the circumstances. He dismissed Ms Romano's appeal because he did not consider that the district judge had been

wrong to refuse to suspend the execution of the warrant of possession. The only issue which arises on these appeals—and it is a very important one—relates to the interface between housing legislation and the Disability Discrimination Act 1995 (and in particular, ss 22(3) and 24 of that Act). The court permitted the Disability Rights Commission (DRC) to intervene in the appeals, and we have benefited from the argument of Ms Jill Brown on its behalf.

2. MS ROMANO: THE FACTS

[3] The facts in each case can be stated relatively briefly. Ms Romano became the council's tenant at a house in Moorcroft Road, Northern Moor, Manchester in November 1998, and her tenancy became a secure tenancy a year later. In May 2001 Mr Recorder Leeming QC granted an injunction restraining her anti-social behaviour towards her neighbours, Mr and Mrs Schofield, and on 13 June this injunction was continued in force for a further period of six months.

[4] Prior to 13 June Ms Romano had been convicted of an assault on Mrs Schofield which occasioned actual bodily harm in an incident involving the throwing of a brick. Her conviction was later set aside on appeal because the Crown Court did not accept Mrs Schofield's evidence, at any rate to the requisite standard of proof.

[5] On 16 November 2001 the council issued possession proceedings, founded on rent arrears and 60 incidents of anti-social behaviour on the part of Ms Romano and her son W between the last week of April and the first week of November 2001. Apart from the assault, the council's allegations related to the playing of loud music at inappropriate times, foul and abusive language, rowdy and abusive behaviour on the part of her sons and visitors, and loud banging and noise as a result of 'do it yourself' work in the early hours of the morning. On 10 January 2002 an order for possession was made against her, suspended for two years on condition that she complied with four of her tenancy conditions which were mentioned on the face of the order, and also on condition that no person residing in or visiting her house caused a nuisance or annoyance to anyone residing, visiting or otherwise engaging in a lawful activity in the locality.

[6] On 11 November 2002 the council sought permission to apply for a warrant of possession because there had been breaches of the conditions of the suspended possession order. They relied on 13 allegations of nuisance (by loud music and hammering) between 20 February 2002 and 26 October 2002. On 7 January 2003 District Judge Jones made an order permitting the council to issue a warrant of possession on the basis of admissions by Ms Romano that she had committed breaches of the conditions in the suspended possession order. The warrant was issued on 30 January, and on 14 February District Judge Jones dismissed Ms Romano's application to suspend the execution of the warrant. He gave a reserved judgment on each occasion. Ms Romano then appealed to Judge Armitage.

[7] At the hearing on 7 January, District Judge Jones heard oral evidence from Mr Schofield and Ms Perilla (who spent some time in Mr Schofield's house) on behalf of the council, and from Ms Romano and one of her neighbours, and from Mr Wade, who helped her with DIY work, on behalf of the defence. The district judge preferred the claimants' evidence, and found 12 of the allegations proved. In particular, he found that on 5 November 2002 loud music had been emitted from her property, for which she apologised the following day on behalf of her sons. She offered to 'cut off all the plugs' in order to appease Mr Schofield. In

general, the district judge said that the evidence concerning excessive noise from loud music appeared to be overwhelming.

[8] In his February judgment the district judge said that on the basis of the number of incidents the nuisance from loud music had abated since January 2002, but he had found in January 2003 that there was still a substantial volume of noise coming from Ms Romano's premises. He was not persuaded that she was able to prevent her children from causing further nuisance from noise, despite her apologies for what had happened in the past. There had been three further matters of complaint since his judgment in January 2003, two of them involving loud noise (most recently at 3.25 am one morning).

[9] On this occasion the district judge had received a report from Ms Romano's GP, Dr Capek, who said she was unable to deliver what she promised, and that she might have outbursts which she did not recall clearly. The district judge was particularly impressed, when deciding to make his order, by Ms Romano's recent admissions that the earlier allegations about noise that had been made against her were true, and by Dr Capek's evidence that she was unable to deliver what she promised.

[10] In spite of contrite witness statements from Ms Romano and her two sons, and witness statements from two other neighbours to the effect that they did not find the noise a nuisance, the district judge refused to suspend the execution of the warrant. No point on the 1995 Act was taken before him. We will refer in [76]–[86] below to the medical evidence before Judge Armitage and his approach to that evidence.

3. MS SAMARI: THE FACTS

[11] Ms Samari took a tenancy of premises in Harmer Close, Newton Heath, Manchester in March 2001, and became a secure tenant a year later. She has two children, who were aged ten and nine at the date of Judge Armitage's judgment. In this case, too, it was the next-door neighbours who complained to the council about her conduct.

[12] On 11 June 2002 an injunction was granted against her, effective for one year, prohibiting five distinct types of misconduct directed towards anyone residing, visiting or engaging in lawful activity in the vicinity of her home. On 29 October, on an application for her committal, she admitted to the court two breaches of this order, but no order was made consequent on these breaches.

[13] On 26 June 2003 the council served a notice seeking possession on her. It relied on specific incidents in April, May, and August 2002 and in April 2003. It then commenced proceedings for possession, relying on ground 2 of Sch 2 to the 1985 Act and on breaches of two clauses of her tenancy agreement. In essence the council was relying on a long list of complaints about nuisance and annoyance and harassment of Ms Samari's next-door neighbours.

[14] On 13 October 2003 Judge Armitage QC conducted the trial of the claim for possession and also a complaint that by her conduct in April 2003 she had again broken the terms of the injunction.

[15] At the hearing the judge received oral evidence from Mr and Mrs Jones (who lived next door) on behalf of the council and from two witnesses on behalf of the defendant. The defendant submitted a recent witness statement: she did not give oral evidence herself.

[16] The judge accepted the evidence of Mr and Mrs Jones. Mrs Jones had made three witness statements describing the matters of which they made complaint, and she also submitted her diary description of one incident. She said

that she had become suicidal as a result of the conduct of the defendant and her children. On one occasion she had heard the defendant say that her daughter should be drowned in the canal. Mr Jones said that they had had to remove three of their children from the school which the defendant's children attended, and that his wife was now unwilling to spend much time at home because of all the problems the defendant was causing and permitting. The judge was satisfied from this evidence that the defendant had been extremely abusive and threatening in her conduct and language to Mr and Mrs Jones and their children. The defendant had even threatened to fight Mrs Jones when she was pregnant.

[17] The judge accepted that Ms Samari's children behaved well when they were with their grandmother, and that she had friends and allies in the local community. He found, however, that Ms Samari had broken the terms of the injunction on 11 occasions, and that she was in breach of the terms of her tenancy agreement. There had been misconduct amounting to a serious and wearing type of nuisance for a considerable proportion of her tenancy.

4. REASONABLENESS AND THE 1995 ACT

[18] In each of these cases the defendant was a secure tenant, and the council had established an entitlement to possession pursuant to grounds 1 and 2 of Sch 2 to the 1985 Act. The court, however, might not make an order for possession on either of those grounds unless it considered it reasonable to do so (s 84(2)(a) of the 1985 Act). It has long been held that this statutory language gives the judge a very wide discretion (see *Cresswell v Hodgson* [1951] 1 All ER 710, [1951] 2 KB 92). In relation to a tenant's mental illness, in *Croydon London BC v Moody* (1998) 31 HLR 738 this court held that a judge had failed to give proper weight to the fact that the defendant suffered from a mental disorder which might be susceptible to treatment, and it set aside an order for possession for this reason.

[19] There is a long line of authority which shows that a very pertinent factor to be taken into account may be a housing authority's obligations to other tenants on a housing estate and the interests of those other tenants (see, for example, *Woking BC v Bistram* (1993) 27 HLR 1 and *Portsmouth City Council v Bryant* (2000) 32 HLR 906). In a judgment in the High Court on appeal from the county court in *North Devon Homes Ltd v Brazier* [2003] EWHC 574 (QB), [2003] 2 EGLR 14, however, David Steel J drew attention to the possible effect of the 1995 Act when a judge is considering whether it is reasonable to make an order for possession against a tenant who suffers from a mental impairment. This judgment post-dated the rulings of District Judge Jones in the Romano case, and we were told by very experienced leading counsel that it was the publicity given to this judgement in March 2003 which attracted general attention for the first time to the possible need for a court to take the 1995 Act into account when assessing the reasonableness of making a possession order.

[20] That case was in some respects markedly different from those with which we are now concerned. The defendant was described as a 'problem tenant'. She had formerly lived in one of the claimants' properties in Barnstaple where there were records of disturbed behaviour which disclosed a 'chronic state of conflict' with her neighbours. A consultant psychologist considered that she was suffering from a paranoid psychosis. More than 18 months later, following a high level of police and social service involvement occasioned by her bizarre conduct, she was transferred to another of the claimants' properties in Bursington, where she continued to be disagreeable and aggressive towards her neighbours. She shouted at them, kept them awake at night by banging and shouting, used foul

language in front of them, and made rude gestures at them. Eventually the claimants embarked on possession proceedings, and the recorder considered it reasonable in all the circumstances to make an order for possession. In that case there was not the slightest doubt that she was suffering from a psychotic illness, and on the appeal David Steel J said that the evidence showed that the overwhelming preponderance of her bizarre and unwelcome behaviour was attributable to that illness.

[21] He upheld the judge's finding that the claimants had failed to justify their conduct in seeking her eviction. There was no evidence that they had considered the step necessary 'in order not to endanger the health or safety of any person' (for this statutory test, see [52], below). Although the judge was satisfied that one neighbour in particular could not tolerate the defendant's conduct for much longer, he had found that there was no evidence that the defendant had ever been an actual physical risk. Because the eviction was therefore unlawful in terms of the 1995 Act, David Steel J held that it was inappropriate to make an order for possession. The three factors which influenced him were: (i) the 1995 Act furnished its own code for justified eviction which required a higher threshold than merely to say that the degree of misbehaviour was significant and there was not much prospect of it abating; (ii) since the eviction was unlawful in terms of the 1995 Act, the court was being invited to exercise its discretion by way of promotion of unlawful conduct; (iii) furthermore, the limitations on interference with the defendant's right to respect for her home were set out in the 1995 Act and the court's powers accorded by the Housing Act 1988 had to be read in a manner that was compatible with her convention rights.

5. THE 1995 ACT

[22] Because this is the first occasion on which this court has had to examine the provisions of the 1995 Act in the context of possession proceedings, it is necessary to consider this statutory scheme in some detail.

5.1 The meaning of 'disability'

[23] The first matter a court will have to determine is whether the person who complains about disability discrimination is a 'disabled person' within the meaning of the 1995 Act. Assistance in this regard is to be found in Pt I (ss 1–3) of and Sch 1 to the 1995 Act, in the Disability Discrimination (Meaning of Disability) Regulations 1996, SI 1996/1455, and in the *Guidance on matters to be taken into account in determining questions relating to the definition of disability* (the Guidance) issued by the Secretary of State pursuant to powers conferred by s 3 of the 1995 Act: see s 3(3) for the duty of an adjudicating body to take into account any guidance which appears to it to be relevant.

[24] So far as these two appeals are concerned, certain of the provisions of Pt I of and Sch 1 to the 1995 Act are material. Section 1 provides:

> '**1.**—(1) Subject to the provisions of Schedule 1, a person has a disability for the purposes of this Act if he has a physical or mental impairment which has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities.
>
> (2) In this Act "disabled person" means a person who has a disability.'

[25] The words 'physical or mental impairment' are not defined. Paragraph 1(1) of Sch 1, however, provides that 'mental impairment' includes an impairment resulting from or consisting of a mental illness only if the illness is a

'clinically well-recognised illness'. Paragraph 1(2) provides that regulations may make provision for conditions of a prescribed description to be treated as amounting to impairments, or as not amounting to impairments, for the purposes of the 1995 Act. In this context the 1996 regulations have prescribed that the following are not to be regarded as 'impairments' for the purposes of the 1995 Act:

> '... (a) a tendency to set fires, (b) a tendency to steal, (c) a tendency to physical or sexual abuse of other persons, (d) exhibitionism, and (e) voyeurism.' (See reg 4(1).)

In addition an addiction (which includes a dependency) to alcohol, nicotine or any other substance is to be treated as not amounting to an impairment for the purposes of the 1995 Act unless the addiction was originally the result of administration of medically-prescribed drugs or other medical treatment (regs 2 and 3).

[26] Schedule 1 to the 1995 Act contains assistance on the meaning of the phrases 'long-term effect' and 'effect on his ability to carry out normal day-to-day activities', which are found in s 1(1). Paragraph 2(1) provides that the effect of an impairment is a long-term effect if—

> '(a) it has lasted at least 12 months; (b) the period for which it lasts is likely to be at least 12 months; or (c) it is likely to last for the rest of the life of the person affected.'

[27] Paragraph 4(1), for its part, provides that an impairment is to be taken to affect the ability of the person concerned to carry out 'normal day-to-day activities' if it affects one of the following:

> '... (a) mobility; (b) manual dexterity; (c) physical co-ordination; (d) continence; (e) ability to lift, carry or otherwise move everyday objects; (f) speech, hearing or eyesight; (g) memory or ability to concentrate, learn or understand; or (h) perception of the risk of physical danger.'

On the present appeals it was common ground that only items (g) and (h) were of relevance, and that the disability of each appellant, if established, was of long-term effect.

[28] Paragraph 6(1) of Sch 1 provides that an impairment which would be likely to have a substantial adverse effect on the ability of the person concerned to carry out normal day-to-day activities, but for the fact that measures are being taken to treat or correct it, is to be treated as having that effect. The word 'measures' includes 'medical treatment'.

[29] The Guidance consists of an introduction, followed by three sections (A–C) which are concerned, respectively, with assistance on the meanings of the words 'substantial', 'long-term' and 'normal day-to-day activities' and the way in which those charged with interpreting s 1 of the 1995 Act should approach the meaning of these concepts in that statutory context. In these appeals, the following parts of the Guidance were drawn to our attention as being of particular relevance.

Introduction

> '11. It is not necessary to consider how an impairment was caused, even if the cause is a consequence of a condition which is excluded. For example,

liver disease as a result of alcohol dependency would count as an impairment ...

13. Mental impairment includes a wide range of impairments relating to mental functioning, including what are often known as learning disabilities (formerly known as "mental handicap") ...

14. A clinically well-recognised illness is a mental illness which is recognised by a respected body of medical opinion ... this would include those specifically mentioned in publications such as the World Health Organisation's International Classification of Diseases.'

Section A

'A1. The requirement that an adverse effect be substantial reflects the general understanding of "disability" as a limitation going beyond the normal differences in ability which may exist among people. A "substantial" effect is more than would be produced by the sort of physical or mental conditions experienced by many people which have only minor effects. A "substantial" effect is one which is more than "minor" or "trivial".'

Para A12 refers to para 6 of Sch 1 (see [28], above) and explains that its principles are to be applied 'even if the measures result in the effects being completely under control or not at all apparent'.

Section B

Paragraph B6 relates to much the same matter:

'B6. If medical or other treatment is likely to cure an impairment, so that recurrence of its effects would then be unlikely even if there were no further treatment, this should be taken into consideration when looking at the likelihood of recurrence of those effects. However, as Section A describes, if the treatment simply delays or prevents a recurrence, and a recurrence would be likely if the treatment stopped, then the treatment is to be ignored and the effect is to be regarded as likely to recur.'

Section C

On these appeals, on the question whether the appellants' 'impairments' had an adverse effect on their ability to carry out normal day-to-day activities, the following parts of this section were said to be of particular relevance:

'C5. In many cases an impairment will adversely affect the person's ability to carry out a range of normal day-to-day activities and it will be obvious that the overall adverse effect is substantial or the effect on at least one normal day-to-day activity is substantial ...

C7. Where a person has a mental illness such as depression account should be taken of whether, although that person has the physical ability to perform a task, he or she is, in practice, unable to sustain an activity over a reasonable period.'

C20 and C21 provide guidance on the two elements in Sch 1, para 4(1) (see [27], above) which are at the forefront of these appeals:

'Memory or ability to concentrate, learn or understand

C20. Account should be taken of the person's ability to remember, organise his or her thoughts, plan a course of action and carry it out, take in

a new knowledge, or understand spoken or written instructions. This includes considering whether the person learns to do things significantly more slowly than is normal …

Examples

It would be reasonable to regard as having a substantial adverse effect:

… Inability to adapt after a reasonable period to minor change in work routine …

b *Perception of the risk of physical danger*

C21. This includes both the underestimation and overestimation of physical danger, including danger to well-being. Account should be taken, for example, of whether the person is inclined to neglect basic functions such as eating, drinking, sleeping, keeping warm or personal hygiene; reckless behaviour which puts the person or others at risk; or excessive avoidance behaviour without a good cause …'

c

[30] Mr Luba QC, who appeared for the appellants, relied in particular on the words 'reckless behaviour which puts the person or others at risk'.

d **[31]** Reference is also made in some of the cases to the Code of Practice on Rights of Access to Goods, Facilities, Services and Premises (the code of practice) which was issued in a new form by the DRC with effect from 27 May 2002. Section 53A of the 1995 Act provides that if a provision of a code of practice appears to a court, tribunal or other body hearing any proceedings under Pts II, III or IV of the Act to be relevant, it must take that provision into account. We e will refer to parts of the code of practice in [53]–[55] and [57]–[58], below.

[32] Because the language of the 1995 Act and of the Guidance is so clear, it is not surprising that there has been relatively little case-law on the meaning of 'disability'. In *Goodwin v Patent Office* [1999] IRLR 4, [1999] ICR 302 the Employment Appeal Tribunal (EAT) gave general guidance on the proper f approach which employment tribunals should adopt towards issues arising under s 1 of the 1995 Act. Morison J said ([1999] IRLR 4 at 6 (paras 22 and 23), [1999] ICR 302 at 307):

'22 (2) The tribunal should bear in mind that with social legislation of this kind, a purposive approach to construction should be adopted. The g language should be construed in a way which gives effect to the stated or presumed intention of Parliament, but with due regard to the ordinary and natural meaning of the words in question. With this legislation, tribunals are given explicit assistance in two forms, which should detract from the need to adopt a loose construction of the language:

h – Guidance issued on 25 July 1996 under s.3 of the Act by the Secretary of State (Statutory Instrument No.1996/1996) with statutory effect from 31 July 1996; and

– Code of Practice issued on 25 July 1996 but with statutory effect from 2 December 1996.

23 The EAT repeats what it has said on a previous occasion, namely that, j at least during the early period of the Act's operation, reference should *always* be made, explicitly, to any relevant provision of the Guidance or Code which has been taken into account in arriving at its Decision …'

[33] Morison J said ([1999] IRLR 4 at 7–8 (paras 40–42), [1999] ICR 302 at 310):

'40 … On the assumption that the impairment and adverse effect conditions have been fulfilled, the tribunal must consider whether the

adverse effect is substantial. This is a word which is potentially ambiguous. "Substantial" might mean "very large" or it might mean "more than minor or trivial". Reference to the Guide shows that the word has been used in the latter sense: see paragraph A1.

41 The tribunal may, where the applicant still claims to be suffering from the same degree of impairment as at the time of the events complained of, take into account how the applicant appears to the tribunal to "manage", although tribunals will be slow to regard a person's capabilities in the relatively strange adversarial environment as an entirely reliable guide to the level of ability to perform normal day-to-day activities.

42 The tribunal will wish to examine how the applicant's abilities had actually been affected at the material time, whilst on medication, and then to address their minds to the difficult question as to the effects which they think there would have been but for the medication: the *deduced* effects. The question is then whether the actual and deduced effects on the applicant's abilities to carry out normal day-to-day activities is *clearly more than trivial*'.

[34] In *Power v Panasonic UK Ltd* [2003] IRLR 151 an employment tribunal had held that the applicant was not a disabled person within the meaning of the 1995 Act because she had an addiction to alcohol which was not to be treated as an impairment (see [25], above). She also suffered from depression, and the EAT held that the tribunal should have determined whether the depression constituted an impairment within the meaning of the 1995 Act without inquiring into its cause. Ms Recorder Slade QC said (at 152 (para 12)):

'Further, in our judgment, the employment tribunal erred in its approach, as evidenced in the last sentence of paragraph 24 of its decision. It is not material to a decision as to whether a person is suffering a disability within the meaning of the Act, to consider how the impairment from which they are suffering was caused. What is material is to ascertain whether the disability from which they are suffering at the material time is a disability within the meaning of the Act or whether, where it is relevant as in this case, it is an impairment which is excluded by reason of the Regulations from being treated as such a disability.'

[35] This decision was followed by the EAT in *Hutchison 3G UK Ltd v Mason* (16 July 2003, unreported), a case concerned with a cocaine addict who suffered from clinical depression. Burton J said (at para 28) that it was plain that there was expert medical evidence before the employment tribunal which had entitled it to conclude that, irrespective of the cocaine addiction, the applicant had 'a depressive disorder, which was sufficiently causative of the absence from work that the dismissal because of such absence from work *related to* such a disability' .

[36] In *Morgan v Staffordshire University* [2002] IRLR 190, [2002] ICR 475 the EAT gave guidance on the approach to be adopted in cases where a mental impairment is alleged. After referring to para 1 of Sch 1 to the 1995 Act (see [25], above) and paras 12–15 of the Guidance (parts of which are set out in [29], above) Lindsay J said ([2002] IRLR 190 at 192, [2002] ICR 475 at 479 (para 9)):

'Accordingly, in general there will be three or possibly four routes to establishing the existence of "mental impairment" within the [1995 Act], namely: (i) proof of a mental illness specifically mentioned as such in the World Health Organisation's International Classification of Diseases ... (ii) proof of a mental illness specifically mentioned as such in a publication

a "such as" that classification, presumably therefore referring to some other classification of very wide professional acceptance; (iii) proof by other means of a medical illness recognised by a respected body of medical opinion.'

For the purposes of this judgment it is unnecessary to describe the possible fourth route, which Lindsay J said was likely to be rarely if ever invoked.

b

5.2 The meaning of 'discrimination'

[37] Sections 5, 14, 20, 24, 28B and 28S of the 1995 Act are all concerned with explaining the meaning of 'discrimination'. Section 5 relates to the employment field, s 14 to discrimination in relation to trade organisations, s 20 to the provision of goods, facilities and services, s 24 to matters relating to premises, and ss 28B c and 28S to schools and bodies responsible for further and higher education. Each of these sections contains the same basic definition of 'discrimination', although some of them also contain a secondary definition (which is absent from s 24, the provision at the centre of these appeals), and the justification defence is different in some cases (compare, for instance, s 5(3) with s 24(2)). The basic definition is d in these terms:

> 'For the purposes of [this part/s 22 etc], [an employer/a person] discriminates against a disabled person if—(a) for a reason which relates to [the disabled person's] disability, [he] treats him less favourably than [he] treats or would treat others to whom that reason does not or would not e apply; and (b) [he] cannot show that the treatment in question is justified.'

[38] Earlier statutory definitions of 'discrimination' appeared in s 1(1) of the Sex Discrimination Act 1975: '... a person discriminates against a woman if—(a) on the ground of her sex he treats her less favourably than he treats or would treat a man'. And in s 1(1) of the Race Relations Act 1976: 'A person f discriminates against another ... if—(a) on racial grounds he treats that other less favourably than he treats or would treat other persons'. It will be seen that instead of the simple language 'on the ground of her sex' or 'on racial grounds' the draftsman of the 1995 Act adopted the phrase 'for a reason which relates to the disabled person's disability'.

g [39] In *Clark v TDG Ltd (t/a Novacold)* [1999] 2 All ER 977 this court was concerned with the interpretation of the basic definition in a case in the employment field. The applicant had soft tissue injuries around the spine as a consequence of a back injury at work. He was absent from work for a long time as a result of his injuries, and he was eventually dismissed when his medical h advisers could provide no clear idea of when it would be possible for him to return to work.

[40] The employment tribunal held that an employee who was absent for such a long time for a non-disablement reason would have been treated no differently in these circumstances, and that there had therefore been no unlawful j discrimination on grounds of disability. The EAT agreed with this general approach, holding that the tribunal had correctly adopted the identity of the comparator who was unable to fulfil all the requirements of his job, but whose inability was not related to disability as defined by the job.

[41] This court, however, disagreed. It placed emphasis not so much on the phrase 'for a reason which relates to the disabled person's disability' as on the later phrase 'to whom that reason does not or would not apply' (see [37], above).

Mummery LJ (with whom Beldam and Roch LJJ agreed) explained (at 986) how the contrary argument was put: *a*

> 'A contrary interpretation is submitted on behalf of Mr Clark. His argument is that "*that* reason" refers only to the first three words of the paragraph—"for a reason". The causal link between the reason for the treatment and the disability is not the reason for the treatment. It is not included in the reason for the treatment. The expression "which relates to the disability" are words added, not to identify or amplify the reason, but to specify a link between the reason for the treatment and his disability which enables the disabled person (as opposed to an able bodied person) to complain of his treatment. That link is irrelevant to the question whether the treatment of the disabled person is for a reason which does not or would not apply to others. On this interpretation, the others to whom "*that* reason" would not apply are persons who would be capable of carrying out the main functions of their job. Those are the "others" proposed as the proper comparators. This comparison leads to the conclusion that Mr Clark has been treated less favourably; he was dismissed for the reason that he could not perform the main functions of his job, whereas a person capable of performing the main functions of his job would not be dismissed.' *b c d*

[42] After reminding himself that the statute had to be construed according to its legislative purpose, and saying that the approach of the lower tribunals was a natural one in the historical context of discrimination legislation, Mummery LJ continued (at 987): *e*

> 'But, as already indicated, the 1995 Act adopts a significantly different approach to the protection of disabled persons against less favourable treatment in employment. The definition of discrimination in the 1995 Act does not contain an express provision requiring a comparison of the cases of different persons in the same, or not materially different, circumstances. The statutory focus is narrower: it is on the "reason" for the treatment of the disabled employee and the comparison to be made is with the treatment of "others to whom that reason does not or would not apply". The "others" with whom comparison is to be made are not specifically required to be in the same, or not materially different, circumstances: they only have to be persons "to whom that reason does not or would not apply".' *f g*

[43] In an earlier part of his judgment Mummery LJ (at 983–984) had warned that it might be positively misleading to approach the 1995 Act with assumptions and concepts familiar from experience of the workings of the 1975 and 1976 Acts. In this context he mentioned the absence of 'the crucial distinction between direct and indirect discrimination on specified grounds'; a justification defence of a type not provided in the earlier Acts; and the failure to replicate— *h*

> 'the express requirement of the 1975 Act (s 5(3)) and the 1976 Act (s 3(4)) that, when a comparison of the cases of persons of different sex or persons of different racial groups falls to be made, the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.' *j*

[44] Mummery LJ added (at 987) a reference to the fact that in s 55 of the 1995 Act (which is concerned with victimisation) there is an express requirement of

comparison with the treatment of other persons 'whose circumstances are the same'. He then commented (at 987–988):

> 'The result of this approach is that the reason would not apply to others even if their circumstances are different from those of the disabled person. The persons who are performing the main functions of their jobs are "others" to whom the reason for dismissal of the disabled person (ie inability to perform those functions) would not apply. In the context of the special sense in which "discrimination" is defined in s 5 of the 1995 Act, it is more probable that Parliament meant "that reason" to refer only to the facts constituting the reason for the treatment, and not to include within that reason the added requirement of a causal link with disability: that is more properly regarded as the cause of the reason for the treatment than as in itself a reason for the treatment. This interpretation avoids the difficulties which would be encountered in many cases in seeking to identify what the Employment Appeal Tribunal referred to as "the characteristics of the hypothetical comparator". It would avoid the kind of problems which the English (and Scottish) courts and the tribunals encountered in their futile attempts to find and identify the characteristics of a hypothetical non-pregnant male comparator for a pregnant woman in sex discrimination cases before the decision of the European Court of Justice in *Webb v Emo Air Cargo (UK) Ltd* Case C-32/93 [1994] 4 All ER 115, [1994] QB 718 (see *Webb Emo Air Cargo (UK) Ltd (No 2)* [1995] 4 All ER 577, [1995] 1 WLR 1454). This interpretation is also consistent with the emphasis on whether the less favourable treatment of the disabled person is shown to be justified. That defence is not available in cases of direct discrimination under the other discrimination Acts.'

[45] He drew support for this approach from an example provided by the minister who presented the Bill to Parliament, in the context of discrimination in the provision of services. A blind person with a guide dog might be denied access to a café because no dogs are allowed in the café. But the reason why he has a guide dog relates to his disability, and a café owner denying him access would have to provide justification for this policy in his case:

> 'On the Novacold interpretation of the comparison to be made, the blind person with his guide dog would *not* be treated less favourably than the relevant comparator, ie "others to whom that reason would not apply" would be sighted persons who had their dogs with them. There could not therefore be any, let alone prima facie, discrimination. But the minister specifically stated that this would be a prima facie case of disability discrimination, ie less favourable treatment, unless justified. It could only be a case of less favourable treatment and therefore a prima facie case of discrimination, if the comparators are "others" *without dogs*: "that reason" for refusing access to refreshment in the café would not apply to "others" without dogs.' (See [1999] 2 All ER 977 at 988–989.)

[46] Mummery LJ continued (at 989):

> 'The same point can be made on the example given in the Code of Practice on Rights of Access to Goods, Facilities, Services and Premises (1996) issued by the Secretary of State at para 2.12: "A waiter asks a disabled customer to leave the restaurant because she has difficulty eating as a result of her

disability. He serves other customers who have no difficulty eating. The waiter has therefore treated her less favourably than other customers. The treatment was for a reason related to her disability—her difficulty when eating. And the reason for her less favourable treatment did not apply to other customers. If the waiter could not justify the less favourable treatment, he would have discriminated unlawfully." It is clear from this example that the comparison to be made is with other diners who have no difficulty in eating and are served by the waiter, and not with other diners who may be asked to leave because they also have difficulty eating, but for a non-disability reason, eg because the food served up by the waiter is disgusting. This interpretation of s 20(1) provides support for Mr Clark's interpretation of s 5(1). The reason for his dismissal would not apply to others who are able to perform the main functions of their jobs; he has been treated less favourably than those others. He was dismissed for not being able to perform the main functions of his job. The "others" would not be dismissed for that reason.'

[47] During the course of the hearing we discussed with counsel whether it might be possible for the basic definition to be interpreted differently in s 24 of the 1995 Act (where the conduct of a disabled person may impact adversely on the European Convention art 8 rights (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) of the occupiers of neighbouring premises) as compared with s 5 of the 1995 Act (where difficulties of the same intensity may not arise). But since the statutory language is identical, and since Parliament has provided a justification defence which can be invoked to protect neighbours whose health or safety is endangered, we do not consider that it would be appropriate to pursue that possibility any further. We are therefore bound by the decision in the *Novacold* case.

5.3 Sections 22 and 24 of the 1995 Act

[48] Part II of the 1995 Act is entitled 'Employment' and Pt III 'Discrimination in Other Areas'. Within Pt III, ss 19–21 are headed 'Goods, facilities and services', and ss 22–24 'Premises'. We are not concerned in these appeals with s 23, which relates to an exemption for small dwellings.

[49] Section 22 is headed 'Discrimination in relation to premises'. Section 22(1) and (2) are concerned with the disposal of premises, an issue that does not arise on these appeals. Section 22(3) protects a disabled person in occupation of premises. It provides:

'(3) It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises—(a) in the way he permits the disabled person to make use of any benefits or facilities; (b) by refusing or deliberately omitting to permit the disabled person to make use of any benefits or facilities; or (c) by evicting the disabled person, or subjecting him to any other detriment.'

[50] An issue arose on these appeals as to whether it was the court, as opposed to the person managing the premises, who performed the act of eviction, but it appeared to be common ground that in deciding to serve a notice seeking possession or to cause a claim for possession to be issued the council was performing one or other of the acts identified in s 22(3)(c). For the meaning of

the word 'detriment' see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] 2 All ER 26, [2003] ICR 337.

[51] It follows that if the reason why the council took this course related to the appellants' disabilities, it would be unlawful unless it could justify its conduct pursuant to s 24(2).

[52] Section 24(1) restates the basic definition of 'discrimination' (see [37], above) '[f]or the purposes of section 22'. The discriminator is described as 'A'. Section 24(2)–(5) provide, so far as is material to these appeals:

> '(2) For the purposes of this section, treatment is justified only if—(a) in A's opinion, one or more of the conditions mentioned in subsection (3) are satisfied; and (b) it is reasonable, in all the circumstances of the case, for him to hold that opinion.
>
> (3) The conditions are that—(a) in any case, the treatment is necessary in order not to endanger the health or safety of any person (which may include that of the disabled person) ...
>
> (4) Regulations may make provision, for purposes of this section, as to circumstances in which—(a) it is reasonable for a person to hold the opinion mentioned in subsection 2(a); (b) it is not reasonable for a person to hold that opinion.
>
> (5) Regulations may make provision, for purposes of this section, as to circumstances (other than those mentioned in subsection (3)) in which treatment is to be taken to be justified.'

No relevant regulations were drawn to our attention.

[53] Paragraphs 3.11–3.13 of the code of practice address the question whether a discriminatory act may be performed even though the relevant service provider did not know that the person in question was disabled. It makes it clear that the answer is Yes. In para 3.12 recognition is given to the fact that some disabilities are not visible, or that the extent of an impairment may be masked. In para 3.13 this general advice is given:

> 'Service providers seeking to avoid discrimination, therefore, should instruct their staff that their obligations under the Act extend to everyone who falls within the definition of "disability" and not just to those who appear to be disabled. They may also decide that it would be prudent to instruct their staff not to attempt to make a fine judgment as to whether a particular individual falls within the statutory definition, but that they should focus instead on meeting the needs of each customer.'

[54] Paragraph 9.26 of the code of practice is headed 'Eviction'. It states:

> 'It is unlawful for a person managing any premises to discriminate against a disabled person occupying those premises by evicting the disabled person. This prohibition does not prevent the eviction of a disabled tenant where the law allows it, for example, where he or she is in arrears of rent or has breached other terms of the tenancy, and where the reason for the eviction is not related to disability. However, in each case, appropriate court action needs to be taken to obtain an eviction order.'

And then this example is given:

'A tenant of a house has recently been diagnosed with AIDS. His landlord gives him a week's notice to quit the house, although he is not in arrears of rent or otherwise in breach of his tenancy. This is likely to be unlawful.'

[55] However inept the example may be in the eyes of anyone who knows anything about the law relating to residential tenancies, this passage reinforces the conclusion that if the landlord wishes to obtain possession for a breach of tenancy agreement that has been committed for reasons relating to a disabled tenant's disability, he will have to show that his action is justified on one of the grounds identified in s 24.

5.4 Justification: s 24(2)–(3).

[56] In the context of these appeals, the council's treatment of the two appellants (if they are proved to be disabled persons within the meaning of the 1995 Act) would only be justified if in the council's opinion the treatment (viz the decision to set in motion proceedings for possession) was necessary in order not to endanger the health or safety of any of the people living in the houses next door and it was reasonable, in all the circumstances of the case, for the council to hold that opinion.

[57] It is apparent from the language of s 24(2) that the test is both subjective and objective: (i) did the council hold the opinion? and (ii) was it reasonable for it to hold that opinion in all the circumstances of the case? Paragraphs 7.8 and 7.9 of the code of practice give clear guidance on the approach to be adopted:

'*The general approach to justification*

7.8 The test of justification is twofold; what did the service provider believe? (a subjective test) and was that belief reasonably held? (an objective test). A service provider does not have to be an expert on disability, but it should take into account all the circumstances, including any information which is available, any advice which it would be reasonable to seek, and the opinion of the disabled person ... The lawfulness of what a service provider does or fails to do will be judged by what it knew (or could reasonably have known), what it did and why it did it *at the time* of the alleged discriminatory act.

7.9 In some instances, it will not be clear whether any of the justifications apply. It may be shown subsequently that a service provider was mistaken in its opinion in a particular case. Coming to an incorrect conclusion does not necessarily mean that the service provider has discriminated unlawfully against a disabled person. In such cases, a service provider may be able to justify less favourable treatment or failure to make reasonable adjustments if it can show that it was reasonable, in all the circumstances of the case, for it to hold that opinion at the time.'

[58] Paragraphs 7.11 and 7.12 of the code of practice address the question of a justification based on health or safety grounds, but they confine their treatment of this topic to questions relating to the disabled person's own health or safety and not, as in these two cases, to questions relating to the health or safety of other people.

[59] In the Scottish case of *Rose v Bouchet* [1999] IRLR 463 Sheriff Principal Nicholson explained (at 467 (paras 32–36)) how the test required by s 24(2) of the 1995 Act should be operated in practice. In particular, when he considered the need for the alleged discriminator to show that it was reasonable in all the

circumstances of the case for him to hold the opinion in question, he said (at 467 (paras 34–37)):

> '34 ... In my opinion, that part of the test requires an objective assessment of all the relevant circumstances. But that, of course, raises a question as to what circumstances are relevant for this purpose; and in particular it raises the question of whether a person in the defender's position is under some sort of obligation to make inquiries of a disabled person before forming any opinion.
>
> 35 In considering this aspect of the case, it may be helpful at the outset to make clear that "the relevant circumstances" do not extend to include all of the facts which may be established at a much later stage, for example during proof in a litigation. Counsel for the pursuer did not suggest that the reasonableness of an opinion should be tested, ex post facto as it were, by objective reference to all of the facts which might come to light at a later stage, and I am of opinion that counsel was correct to adopt that position. However, as I have noted earlier, he founded strongly on the submission that the defender should have engaged in dialogue with the pursuer so as to obtain more relevant facts than were immediately available to him. The submission bore, of course, to be founded on the Code of Practice, and in particular on the passage which I have already quoted from paragraph 1.7.
>
> 36 In my opinion, counsel's submission on this point is crucial if the pursuer is to succeed because, like the sheriff, I consider that the opinion reached by the defender, *on the facts as then known to him*, was a reasonable one for him to reach ...
>
> 37 The question then is whether the defender should have endeavoured to obtain more information before finalising his opinion. The Act itself does not impose any such duty, but I accept that the Code contains a suggestion that some inquiry may be desirable. In my opinion, however, the need for further inquiry will depend very much on the facts and circumstances of a particular case ...'

[60] Mr Arden QC, who appeared for the council, suggested that the sheriff principal was wrong when he held that the reasonableness of the alleged discriminator's opinion had to be tested by reference to the facts known to him at the time he embarked on the alleged discriminatory treatment. We reject that submission. The language of s 24(2) ('treatment is justified ... if ... in A's opinion, one ... of the conditions ... [is] satisfied') compels one to adopt the sheriff principal's construction, and does not admit of justification after the event. Needless to say, if the situation contained features that A did not appreciate at the time, and the court was satisfied that he had made sufficient inquiry, his opinion may be objectively justified but the court might subsequently consider that it was not reasonable to make a possession order because circumstances had changed or because there were other relevant features of the situation that could not reasonably have been known by A at the relevant time which fell to be weighed in the balance at the time of the hearing.

5.5 Disability discrimination: how Pt III of the 1995 Act is enforced

[61] Section 25 of the 1995 Act provides, so far as is material:

'(1) A claim by any person that another person—(a) has discriminated against him in a way which is unlawful under this Part ... may be made the subject of civil proceedings in the same way as any other claim in tort ...

(2) For the avoidance of doubt it is hereby declared that damages in respect of discrimination in a way which is unlawful under this Part may include compensation for injury to feelings whether or not they include compensation under any other head.

(3) Proceedings in England and Wales shall be brought only in a county court ...

(5) The remedies available in such proceedings are those which are available in the High Court ...'

[62] Schedule 3, para 5 provides:

'(1) Except as provided by section 25 no civil or criminal proceedings may be brought against any person in respect of an act merely because the act is unlawful under Part III.

(2) Sub-paragraph (1) does not prevent the making of an application for judicial review.'

[63] It will be evident that the 1995 Act does not explicitly provide a defence for a disabled person who wishes to assert that the reason why his landlord brought possession proceedings related to his disability. On the other hand, it is open to him to counterclaim for a declaration that he has been unlawfully discriminated against and/or to counterclaim for injunctive relief. Furthermore, as David Steel J observed in *Brazier*'s case, if the tenant can prove that the landlord's conduct amounts to unlawful discrimination, this is bound to be a relevant factor when the court is determining whether it is reasonable to make an order for possession.

[64] In our judgment, it would be preferable, in a case involving a secure tenancy or an assured tenancy, for the tenant to assert the matter on which he relies as part of his case that it would be unreasonable for the court to make a possession order, rather than to complicate the proceedings by adding a formalistic counterclaim for a declaration or an injunction.

6. THE RELATIONSHIP BETWEEN THE 1995 ACT AND THE HOUSING LEGISLATION

[65] Mr Arden made the bold submission that because no changes were made to the Housing Acts when ss 22–24 of the 1995 Act were added to that legislation during the course of its parliamentary passage, Parliament must have intended that the statutory schemes whereby a landlord recovered possession of his premises should remain unaffected by these provisions of the 1995 Act. At a time when Parliament has been introducing more and more remedies for anti-social behaviour, social landlords have been placed, he said, in an extremely difficult position as a result of the judgment in *Brazier*'s case. On the one hand they are bound (and wish) to tackle anti-social behaviour. On the other hand they are bound (and wish) to offer as much protection and support as possible to those with mental health problems.

[66] In his judgment in the *Novacold* case [1999] 2 All ER 977 at 979 Mummery LJ suggested that anyone who thought that there was an easy way of achieving a sensible, workable and fair balance between the competing interests in the employment market when issues of disability discrimination fall to be considered had probably not given much serious thought to the problem. The complexities introduced into the social landlord's task by this legislation (on the assumption that

Brazier's case was correctly decided) were illuminated by Mr Arden's submissions and by the evidence which the court permitted the DRC to adduce.

[67] Like much policy-driven modern legislation which has not been subjected to rigorous scrutiny of the type customarily undertaken by the Law Commission, there are evident difficulties in ss 22 and 24 of this legislation which call for remedy at an early date. One difficulty lies in the fact that these sections are not confined to residential tenancies, so that a business tenant might invoke the 1995 Act if he asserts that the reason he has broken the conditions of his lease relates to his mental disability. A further difficulty arises from the fact that a tenant could assert that his landlord could not recover possession for non-payment of rent because the reason why he could not manage his financial affairs efficiently relates to his mental disability. Another difficulty lies in the fact that a private landlord who does not have to establish a 'reasonableness' ground for possession may nevertheless be confronted by an assertion that he has caused detriment to a disabled tenant by selecting him for eviction.

[68] Unless Parliament takes rapid remedial action—and regulations made under s 24(5) of the 1995 Act (see [52], above) might provide a convenient route to a satisfactory remedy—the courts may be confronted with a deluge of cases in which disabled tenants are resisting possession proceedings by these and other similar means. These considerations, however, should not compel us to conclude that in the areas with which we are concerned on these appeals Parliament must be understood to have taken the stance suggested by Mr Arden. For many years the county courts have had to take the health of both landlord and tenant into consideration when determining whether it is reasonable to make an order for possession (see *Cresswell v Hodgson* [1951] 1 All ER 710 at 713–714, [1951] 2 KB 92 at 97 per Singleton LJ). All that the 1995 Act has done is to state that if a tenant is disabled and the reason why the landlord is seeking possession relates to the tenant's disability, then the landlord must believe that he is justified in taking this action on s 24(3) grounds and his justification must be objectively reasonable.

[69] In the present appeals, the council must prove that if it did not take this action someone's health or safety would be endangered. It does not have to prove that that person's health or safety has actually been damaged. The World Health Organisation has since 1948 adopted the following definition of the word 'health': 'Health is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'

[70] If health is endangered, that state is put at risk. The statute does not use the words 'seriously endangered', and when interpreting the 1995 Act compatibly with the European Convention on Human Rights, it is necessary to bear in mind not only the convention rights of the disabled person but also the convention rights of his neighbours. It may be useful in this context to compare the evidence given by Mr Schofield, the owner-occupier of the house next door to Ms Romano, with the approach of the Grand Chamber of the European Court of Human Rights in *Hatton v UK* (2003) 15 BHRC 259.

[71] Mr Schofield works as a driving examiner. No statement earlier than 23 November 2002 is with the court's papers, but the long history of nuisance from noise is evident from [6] and [7], above. District Judge Jones heard him give evidence. In his February 2003 judgment he said that no doubt there were times when Mr Schofield's occupation was stressful and that he had reached the end of his tether. He added that the effect of the nuisance on Mr Schofield, as described in his various witness statements, was self-evident. Paragraph 6 of his final

witness statement, in which he records a very high volume of noise which woke him up at 3.25 am, is in these terms:

> 'These incidents have been continuous over the last few years ... I am going to work tired because my sleep has been disturbed. This makes my work difficult as I have explained. I am a Driving Examiner and need to be fully aware of what is going on around me ... I have been to the courts to obtain some peace and rest ... The stress this has caused me in my marriage and in my work is unmeasurable. These latest incidents have taken place since the last court hearing which makes me wonder what exactly does one have to do or where does one go from here.'

[72] In his statement dated 23 November 2002 he described the noise nuisance on bonfire night which continued until 12.32 am. He said he woke feeling really tired at 6 am. He had told Ms Romano that morning that he was working and that five hours sleep was not enough.

[73] In *Hatton v UK* (2003) 15 BHRC 259 at 277 (para 96) the European Court of Human Rights said that severe environmental pollution might prevent individuals from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health. In other words, their art 8(1) rights would be infringed in these circumstances.

[74] In the later case of *Ashworth v UK* App No 39561/98 (20 January 2004, unreported) the European Court of Human Rights said that the responsibility of the state may be engaged where an applicant is directly and seriously affected by noise pollution, even where the nuisance emanated from the activities of private individuals.

[75] In our judgment, s 3 of the Human Rights Act 1998 constrains the court to interpret s 24(3)(a) of the 1995 Act in the following way. The court should ask: (1) Did the landlord hold the opinion that it was necessary to serve a notice seeking possession and/or to bring possession proceedings in order that the health of A (an identified person or persons) would not be put at risk? (2) Was that opinion objectively justified? For the meaning of the word 'health' in this context see [69], above. Trivial risks to a person's health should be disregarded.

7. MS ROMANO

7.1 The medical evidence

[76] Ms Romano's lawyers placed no medical evidence before the court in January 2002 (when the suspended order for possession was made) or in January 2003 (when the council was granted permission to cause a warrant of possession to be issued). For the hearing on 14 February, when the district judge refused to stay the execution of the warrant, a very full report by her GP, Dr Capek, was placed before the court (see [9], above).

[77] Dr Capek said that since Ms Romano had joined his medical practice in December 1999 she had never been fully free from a depressive illness. She had also described certain features which suggested that at a time her illness had become psychotic. In July 2001 she was referred to the community mental health team, but her follow-up had been poor. Her motivation to help herself was poor, and she did not take her medication regularly.

[78] For the purposes of the appeal to Judge Armitage, her lawyers obtained a number of reports from Dr Bhatt, who is a senior house officer in psychology at her local hospital. He recorded that Ms Romano had suffered from depression

since 1993 and had been treated by her GP with anti-depressants since 1998. Although she was seen for a period of time by the community mental health team in 2001, her attendance at an outpatient clinic had been erratic, and she had not been seen by the psychiatrist there since February 2002. On 14 April 2003 she saw Dr Bhatt, who said she presented with lowness in mood since November 2002. Dr Bhatt described the new treatment plan he had devised.

[79] On examination of her mental state, Dr Bhatt found that she was fully orientated to time, place and person. Her long-term memory was intact, but she had some mild impairment of her short-term memory. She had good insight into her condition, and she knew her diagnosis was depression. She had been spending £20 a week on cannabis, but was not dependent on it.

[80] Dr Bhatt had access to two earlier reports on her condition in 2001. His conclusion was expressed in these terms:

> 'This 38 year old lady has been suffering from depression of mood associated with suicidal thoughts, auditory pseudo hallucinations, persecutory ideas, poor appetite, weight loss, lassitude, difficulty getting off to sleep, early morning wakening, poor concentration and memory. This constellation of symptoms represents a moderate to severe depressive episode in keeping with the World Health Organisation (WHO, 1992) and American Psychiatric Association (APA, 1994) guidelines. She has had previous episodes of depression and therefore satisfies the criteria for a diagnosis of a Recurrent Depressive Disorder. In this setting of depressed and irritable mood she has misinterpreted other people's intentions and behaved in a hostile manner.'

He concluded that she was suffering from a recurrent depressive disorder, of a type recognised by the ICD-10 (WHO *International Statistical Classification of Diseases and Related Health Problems* (10th rev)) and DSM-IV (American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders* (4th edn)) classifications of mental disease.

[81] In a further short report dated 27 June 2003 Dr Bhatt said that he felt that Ms Romano could carry out her normal day-to-day activities (eg shopping, cooking, cleaning and budgeting) but her depressive disorder made these tasks very difficult. Because her depressive illness predated the allegation in these proceedings, he felt that her disability had affected her normal day-to-day activities throughout the relevant period. Irritability of mood (a well-recognised feature of depression) and paranoid ideation (a common component of cannabis misuse) had contributed to her misinterpreting other people's intentions and had caused her to behave in a hostile and anti-social manner.

[82] On 21 July 2003 Dr Bhatt answered a number of questions focused on the effect of the 1995 Act. He said that Ms Romano's recurrent depressive disorder had affected her short-term memory by interfering with her ability to concentrate and learn new information. When her illness was severe it could have a significant effect on her normal day-to-day activities, but at times when her depressive symptoms were relatively stable it could have a minor effect.

[83] Dr Bhatt considered that her disorder played no part in the playing of loud music or noisy DIY activities in her property. The reference to hostile behaviour related to the incident in April 2001 (see [4], above). He said that her irritability might have caused her to behave in an anti-social manner, for example by performing DIY. He said that it appeared from the evidence that the majority of the complaints of nuisance behaviour had been caused by her two sons whilst

she was out of the house, although her anti-social behaviour at odd hours could be attributable to her impaired judgment in the context of her depressive illness.

[84] The council's solicitors instructed Dr Robins, a locum consultant psychiatrist, to prepare a report at short notice in July 2003. Dr Robins did not have access to any of Ms Romano's medical notes, apart from two psychiatric reports prepared in 2001, or to Dr Bhatt's reports. She was dependent to a great extent on what she gleaned from her examination of Ms Romano on 18 July 2003 and on the contents of the statements by Ms Romano and her two sons. Dr Robins saw her five months after the district judge had refused to suspend the execution of the warrant of possession. She was currently showing features of an adjustment disorder with mixed anxiety and depression reaction, and Dr Robins considered that the relevant 'stressful life event' related to difficulties with her neighbours and the eviction order.

[85] Dr Robins said that an adjustment disorder with prolonged depressive and anxiety features was a clinically-recognised illness. She considered that Ms Romano's mental impairment had a significant effect on her ability to carry out normal day-to-day activities: in this context she relied on what Ms Romano had told her about her lifestyle since receiving the 'Eviction order' (sic) in November 2001. Dr Robins said that there was a possibility that her disability might have given rise to some of the nuisances detailed in the enclosures to two reports written during 2001. It was clear, on the other hand, that her mental impairment could not play any part in loud music by her sons or DIY activities by her friends.

7.2 The judge's findings

[86] After summarising the effect of this evidence the judge concluded that there was ample evidence that Ms Romano had a well-recognised mental illness. This amounted, he assumed, to a mental impairment within the meaning of the 1995 Act. He added that there was evidence that Mr Romano's mild impairment of short-term memory resulted, in an unquantifiable way, from the illness and cannabis use, and that this condition had persisted for at least 12 months. He said, however, that it was clear to him that the expert evidence, at its highest, pointed to only slight or marginal effects, if any, of the illness, on Sch 1 activities. He was therefore satisfied that the mental impairment which had been diagnosed did not have a substantial effect on her ability to carry out any of the day-to-day activities set out in para 4(1) of Sch 1 (see [27], above) and that Ms Romano did not therefore have a disability for the purpose of s 1(1).

7.3 The submissions of the parties

[87] Mr Luba argued that the psychiatric evidence clearly showed that Ms Romano's depressive disorder affected her short-term memory by interfering with her ability to concentrate and learn new information, and that her impairment affected her activities such as 'self-care'. He said that an ability to concentrate and to learn includes an ability to learn what is or is not appropriate behaviour; and that 'self-care' includes an ability to understand and conform to appropriate behaviour so as to avoid causing such nuisance to others as might lead to one's eviction from one's home.

[88] He added that the judge ought not to have substituted his own findings on issues calling for psychiatric expertise for the findings of the expert witnesses. The judge had also been wrong to adopt a literal interpretation of the words 'substantial ... effect'. If he had adopted a purposive approach to the construction

of the statute he would have been bound to find that Ms Romano's impairment had a substantial and long-term effect on her carrying out of day-to-day activities. He ought to have found that her disability was the cause of, or a contributing factor in, the behaviour which formed the basis for inviting the court to refuse to suspend the warrant of possession.

[89] Mr Arden, for his part, submitted that the court should be slow to interfere with the judge's decision on a question of fact. The judge had been entitled to take the view that the expert witnesses had not focussed their minds on the legal issues he had to determine. Their reports did not specify clearly which of Ms Romano's Sch 1 activities were substantially affected by her disability. Dr Robins' passing reference to 'poor concentration' did not advance matters very far in the middle of a list of activities which had no other obvious connection with Sch 1 activities, and Dr Bhatt answered questions relating to 'day-to-day activities' without reference to the exclusive definition contained in para 4 of Sch 1 to the 1995 Act. This had been the judge's view, and Mr Arden argued that he was entitled to hold it and to conclude that Ms Romano's impairment did not have a substantial effect on her ability to carry out day-to-day activities by reference to the list in that schedule.

[90] In any event, the matters that were being complained of during 2002 and early 2003 which had led to the district judge making the order under appeal arose out of the noisy DIY activities and also the loud music in which Ms Romano's sons indulged. Neither psychiatrist had been able to find any connection between these activities and Ms Romano's mental impairment (see [83] and [85], above), and in those circumstances Mr Arden submitted that she had not been treated less favourably for a 'reason which relates to [her] disability'.

7.4 Conclusions

[91] The introduction of arguments based on the 1995 Act (which were supported by new expert evidence but no other new evidence) at the first appeal stage in Ms Romano's case raises formidable difficulties for this court as a second appeal court. Under the CPR procedural scheme primacy is accorded to the trial court, and although the 1995 Act was on the statute book no point on it was taken when the suspended possession order was made in January 2002, or when permission was granted in January 2003 for the issue of the warrant of possession, or when Ms Romano's application for the suspension of the execution of the warrant was dismissed in February 2003.

[92] In those circumstances none of the witnesses before the district judge in January and February 2003 had been invited to turn their minds to issues that might arise from ss 22 and 24 of the 1995 Act, and he did not make any findings on any such issues. When medical evidence was sought from Dr Bhatt and Dr Robins during 2003 the trial process was over and those two experts were not focusing their minds clearly on what should have been the central issues in the case, namely how exactly it could be said that Ms Romano's undoubted mental impairment had had a substantial effect on her memory or on her ability to concentrate, learn or understand, and in any event how, if at all, the noisy activities involving loud music and hammering had been causally connected with that impairment.

[93] We have no difficulty in concluding that the appeal should be dismissed because Mr Schofield's evidence (summarised in [71] and [72], above) would have led properly to a conclusion that his health was endangered (in the sense we have explained in [60]–[70] and [75], above) by his frequent loss of sleep, and that if a

s 22 point had been taken so that the council's opinion to this effect had been tested at the trial stage, it would have been held to have been objectively reasonable. On the present state of the medical evidence, moreover, it would have been difficult to relate the loud hammering and music (which were the only matters complained of in connection with the last two stages of these proceedings before the district judge) to Ms Romano's mental impairment. The single allegation of violent behaviour which predated the making of the possession order formed no part of the evidence for the district judge to consider in January or February 2003.

[94] In these circumstances it is not really necessary to address the more difficult question as to whether the judge was wrong when he concluded that, speaking generally, Ms Romano was not a disabled person within the meaning of the 1995 Act. We have a strong suspicion that if one or other or both of the expert witnesses had attended court and if the uncertainty arising from their written evidence had been explored with them, the judge would have been able to conclude confidently that her mental disability did have the characteristics identified in s 1(1) of the 1995 Act as explained by para 4(1)(g) of Sch 1, but in the present unsatisfactory state of the evidence it is unnecessary to go further than this. The judge was certainly entitled, indeed bound, to satisfy himself that the medical evidence satisfied the statutory criteria, and if he considered it did not, he was both entitled and bound to say so.

8. MS SAMARI

8.1 Medical evidence

[95] Professor McWilliam, who is a consultant psychiatrist, furnished three reports in this case. The first was a joint report dated 14 October 2002. He said Ms Samari was suffering from a personality disorder which fell within the DSM-IV criteria for borderline personality disorder. Her chaotic lifestyle, interacting with her personality disorder, produced violent behaviour, depression and anxiety. He felt that most of her symptoms would gradually disappear if her social circumstances stabilised, and her personality disorder should cause less problems with time. He did not think that she was an active risk to others although she could be abusive when stressed.

[96] Professor McWilliam examined Ms Samari again in May 2003, and wrote his second report at the request of her solicitors on 11 June 2003. There had been no significant change in her condition. He considered that her ongoing symptoms of depression and anxiety represented her reaction to adverse social circumstances, but her tendency to aggressive behaviour pertained more to her underlying personality problems than to a mental illness per se. She was competent in managing her affairs and could understand the terms of an injunction order.

[97] Professor McWilliam's third report, dated 27 July 2003, recorded his opinion that Ms Samari was suffering a mental impairment which had a substantial and long-term effect on her ability to carry out normal day-to-day activities within the meaning of the 1995 Act. He explained that she was suffering from a constitutional disorder of long duration with antecedents in childhood and adolescence. In her case, paras 4(1)(g) and (h) of Sch 1 to the 1995 Act (see [27], above) were of relevance. Her disorder impaired her ability to learn to cope with stressful situations and to react appropriately. Her perception of risk of physical danger was shown by her impulsive acts when she would put herself and others

at risk, for example when taking an overdose or when physically attacking others. Her impulsivity prevented her from moderating her actions even if she was fully aware of the possible consequences.

[98] On 23 August 2003 Professor McWilliam gave written answers to a number of questions that had been put to him. To a great extent his answers took matters little further. However, when he was asked to express his views on Ms Samari's alleged behaviour on several occasions in April 2003, he said that if the allegations were true they provided the court with a very good illustration of the effects of the borderline personality disorder on her social interactions with others, especially those whose behaviour she perceived to be threatening to herself.

8.2 The judge's findings

[99] The judge analysed the effect of the professor's evidence without being referred to the Guidance or the code of practice. He accepted that Ms Samari was suffering from a well-recognised disorder which qualified as a mental impairment and that it was a long-term condition for the purpose of para 2(1) of Sch 1 (see [26], above). He went on, however, to analyse the effect of her condition on the two aspects of her day-to-day activities considered by Professor McWilliam.

[100] He was unwilling to accept that the evidence disclosed any inability to learn or understand. He felt that because there was no evidence of a general learning impairment, the fact that Ms Samari did not react appropriately to particular circumstances did not mean that she had not learned what was generally acceptable behaviour. Professor McWilliam considered that her reaction to events was dictated by her personality disorder and not by any failure to comprehend the need for restraint in the face of adversity. The judge analysed what she had told the professor and concluded that she knew what the consequences of her conduct were and tried to avoid them. The professor had concluded that the impulsivity arising from her condition at times overrode her ability to make rational 'on the spot' decisions when she was stressed, and acute behavioural problems then resulted. Her conduct was triggered by 'blind rage' which affects almost every person's memory and not by any memory deficit connected with her mental impairment.

8.3 The submissions of the parties

[101] Mr Luba argued that the judge should have held that an 'ability to … learn or understand' includes an ability to learn or understand what is, or is not, appropriate behaviour in any given situation. Someone who had difficulties in understanding normal social interaction amongst people could properly be regarded as having their understanding affected. He said that the judge took an unduly restrictive approach to the concepts of understanding and learning. On the para 4(1)(h) point (see [27] and [97], above) the professor had expressed his expert opinion and the judge had not been at liberty to reject it, as he lacked the professor's specialist expertise.

[102] Mr Arden, for his part, submitted that the judge was properly entitled to reach his own conclusions on the effect of Ms Samari's own statement. In this context the judge had quoted part of this extract from her final statement:

> 'I can feel when a mental health episode comes on and I know that when I do have an episode I can get very violent. Sometimes I cannot recall what I have done during the episode and the episodes scare me and I try to keep

myself to myself because I know what I can do. Such an episode generally starts with having bad thoughts, feeling panicky and feeling angry. I am trying very hard to combat my mental health which includes taking medication but I try and keep myself to myself because I know that if an episode occurs there is very little I can do to stop it from happening.'

[103] Mr Arden said that the judge was entitled to consider that Professor McWilliam had adopted an artificial application of a single element of para 4(1)(g) and that since he had referred to Ms Samari's witness statement when questioned about his opinion the judge was entitled to form his own view on the meaning and effect of that statement. On the totality of the evidence the judge was also entitled to conclude that Ms Samari's perception of risk of physical danger (para 4(1)(h)) was unimpaired. In particular, after he had read that Ms Samari had often contemplated self-harm but said she would not do anything because of her children, the judge had been entitled to consider that this was some evidence that Ms Samari was able to assess the risks and to balance the consequences of a particular highly emotionally-charged decision.

8.4 Conclusions on the medical evidence

[104] We do not consider that the judge's approach was wrong in relation to para 4(1)(h): the attempt to force the facts of this case into that particular straitjacket always appeared to us a bit forced. We part company with him on para 4(1)(g), however, and since neither Ms Samari nor Professor McWilliam appeared in the witness box this court is in just as good a position as the judge to appraise the effect of their evidence. If by reason of her illness Ms Samari was unable to learn how to cope with stressful situations and to react appropriately, this would bring her within the ambit of para 4(1)(g) and the judge received no evidence to contrary effect. Although the ultimate decision is for the court, not the expert (see *Abadeh v British Telecommunications plc* [2001] ICR 156 at 160 (para 10)) the evidence on this issue was really all one way.

8.5 Justification

[105] We have summarised the judge's findings about Ms Samari's anti-social behaviour in [11] to [17], above. He said (in para 19 of his judgment) that Mr and Mrs Jones were truthful and reasonably accurate witnesses when they were speaking about the effect Ms Samari's conduct had on them. In a witness statement dated 18 June 2003 Mrs Jones said:

'I am at the end of my tether and I feel that I can no longer cope with the behaviour of the defendant and her family. I am sick of my children having to listen to their abusive language. The comments that the defendant makes to my family and myself are very insulting and hurtful. I feel very vulnerable and worried for the safety of my family and myself.'

[106] When she gave evidence at the trial, Mrs Jones said that Ms Samari's behaviour had affected her a great deal in recent months. She was on anti-depressants now because of it. The last eight months (February to October 2003) had been 'really, really bad' for her. The whole situation had really made her suicidal. She could not go out of her house without being called names. This evidence was not challenged. Mr Jones confirmed in cross-examination that his wife was being treated for depression. She had her prescription with her. Counsel for Ms Samari chose not to pursue this issue.

[107] Ms Samari's amended defence averred that 'the claimant cannot justify the eviction because the eviction is not necessary in order not to endanger the health or safety of any person'. In the course of his final submissions counsel for Ms Samari developed the point that the council had to show that it had formed the requisite belief when it determined to pursue the proceedings. The judge then allowed the council to call the requisite evidence from a witness who was present in court. This was Miss Bryant, the council's nuisance response officer.

[108] Miss Bryant produced a nuisance case information update sheet dated 10 September 2003. This record addressed the justification for the council continuing with the application for possession. After recording the effect of Professor McWilliam's latest report, the paper continued:

> '... [T]he complainant ... is suffering from serious depression which she is now on medication for. [Her] depression is a direct result of the behaviour of Yvonne Samari. As the landlord's representative I have considered the health and safety of Sharon Jones and believe it is justified for legal action to continue.'

[109] Miss Bryant explained the nature of her duties. Once all the relevant evidence had been collected, it was her duty to decide what action to initiate. After *Brazier*'s case, the council had decided how they would proceed with justifying their actions in this case. She had spoken to Mrs Jones on the phone and was told that her serious depression had started when she began to have problems with Ms Samari. She was in possession of Mrs Jones's prescription for anti-depressants, and if she had known that evidence from a GP was required, she would have obtained it.

[110] An application was then made by Ms Samari's counsel that Mrs Jones should be re-called. She was no longer at court, and the judge refused to adjourn the case so that she could attend. It is evident from the transcript that he considered that unless it was being suggested that Mrs Jones had misled the court—and she had not been challenged when she gave evidence about the cause of her depression—there was nothing to be gained by re-calling her. The issues he had to decide were whether her health and safety had been endangered and whether the council's opinion was reasonable, and it did not matter if nobody had actually been made ill.

[111] In our judgment the judge's two decisions—to allow Miss Bryant to be called and to refuse to require Mrs Jones to be re-called—were well within the wide ambit of his discretion as the trial judge and we would not interfere with his judgment on the grounds of procedural irregularity. We are also unimpressed by Mr Luba's argument that Miss Bryant's evidence did not go back to the initiation of the possession process. It is perfectly obvious that if the council had decided in September 2003 that it could not justify the continuation of the proceedings they would have been abandoned at that stage.

[112] In these circumstances the judge was entitled to conclude as he did on the evidence that the council held the opinion that the continuation of eviction proceedings was justified in order not to endanger Mrs Jones's health and that it was reasonable in all the circumstances of the case for the council to hold that opinion. Given that Mrs Jones's evidence about the effect of Ms Samari's conduct on her health was not challenged in cross-examination, we are unimpressed by the suggestion that the council should have adduced independent medical evidence on the issue.

[113] We are also unimpressed by the contention that there was no evidence that the council held the requisite opinion when it served the notice seeking possession in June 2003. Even if technically this might have constituted an act of unlawful discrimination, it is perfectly obvious that once the council had absorbed the effect of the judgment in *Brazier*'s case, it carefully considered its position in September 2003, and the order for possession would not have been sought at the hearing in October but for the opinion it formed then. In other words, while the act of unlawful discrimination in June might technically have given rise to a complaint justiciable under s 25 of the 1995 Act (see [61], above), if made timeously, it could not have provided a substantive defence at the hearing because the 1995 Act did not in itself invalidate the notice seeking possession. The law would get itself in a hopelessly technical tangle if any other conclusion on this contention was to be reached.

[114] It follows that in our judgment the council was justified in seeking a possession order at the hearing, and this appeal, too, must be dismissed.

9. CONCLUDING COMMENTS

[115] Our attention was drawn to the fact that this judgment is of particular contemporary importance because by virtue of s 218A of the Housing Act 1996 (as inserted by s 12 of the Anti-Social Behaviour Act 2003) every local housing authority, housing action trust and registered social landlord must with effect from 1 July 2004 prepare a policy in relation to anti-social behaviour and also procedures for dealing with occurrences of anti-social behaviour, and they must also no later than 31 December 2003 publish a statement of their policy and procedures (see s 218A(1)–(3)). In preparing their policy and procedures such landlords must have regard to guidance issued in accordance with s 218A(7). In the case of a local housing authority the Secretary of State is to issue the requisite guidance.

[116] We have already referred (in [67]–[68], above) to certain apparent difficulties in the statutory scheme contained in ss 22 and 24 of the 1995 Act. Other difficulties might arise from the fact that if a landlord obtains an injunction restraining a mentally disabled tenant from anti-social behaviour it will not be able to enforce that injunction by committal proceedings unless it can establish to the criminal standard of proof that it held an opinion on one of the matters specified in s 24(3) of the 1995 Act and that it was reasonable in all the circumstances of the case for it to hold that opinion. Simply by way of example, if complaints by a former council tenant of robust temperament who has bought his property under the 'right to buy' scheme have induced the local housing authority to seek and obtain an injunction against his neighbour in the council house next door restraining his anti-social behaviour, the council as the person managing the tenant's premises may not subsequently embark on enforcement proceedings unless it can establish statutory justification to the requisite standard of proof. In other words the owner-occupier whose health or safety is not endangered by his next-door neighbour's breach of a court order will have to watch the value of his property deteriorating because the injunction cannot in these circumstances be enforced by the neighbour's landlord through the courts.

[117] This judgment shows that landlords whose tenants hold secure or assured tenancies must consider the position carefully before they decide to serve a notice seeking possession or to embark on possession proceedings against a tenant who is or might be mentally impaired. This is likely to compel a local housing authority to liaise more closely with the local social services authority at

an earlier stage of their consideration of a problem that might lead to an eviction than appears to be the case with many authorities, to judge from some of the papers the DRC placed before the court. To remove someone from their home may be a traumatic thing to do in the case of many who are not mentally impaired. It may be even more traumatic for the mentally impaired.

[118] To send a warning letter to a tenant about his conduct is not to subject him to a detriment within the meaning of the 1995 Act, but it may well be that at such a stage it might be wise for a local housing authority to start considering whether it would be able in due course to hold in good faith an opinion of one of the kinds mentioned in s 24(3) of the Act and to set about obtaining the necessary evidence for that purpose. Such evidence will not simply involve obtaining evidence about the mental condition of the tenant. If the council believes that the tenant suffers or may be suffering from a mental impairment of the type described in s 1 of the 1995 Act (see [24], above and the succeeding paragraphs), then it will be prudent for it to obtain evidence of the effect of the tenant's behaviour on the health or safety of one or more of the complainants (for which see [69]–[75], above) if s 24(3)(a) of the Act is to be relied upon. In the first instance a statement by that complainant supported by a short letter from the complainant's GP or other medical adviser is likely to suffice. The importance of taking these steps in a careful manner is buttressed by research evidence which shows the significant proportion of sufferers with mental health problems among those who are guilty of anti-social behaviour. Paragraph [53], above draws attention to the fact that a landlord may perform a discriminatory act even if it does not know that the person in question is disabled: hence the need for a careful appraisal.

[119] In this judgment we have been concerned only with issues affecting secure or assured tenants, where a court is obliged to consider the reasonableness of making a possession order or where a court has a discretion to exercise in deciding whether a possession order should be enforced. We have not been concerned with the more formidable interpretive difficulties that may relate to the treatment of other tenants which may lead to an eviction or to the enforcement of injunctions obtained against tenants suffering from mental impairment, but those who are concerned with the difficulties presented by this legislation may care to give urgent consideration to what we have said in [67]–[68] and [116], above.

[120] Needless to say, if expert medical evidence is to be sought in a case of this type, it is essential for the expert's attention to be drawn to the specific issues that need to be addressed on the facts of the particular case. The story of the evidence furnished in the Romano case bears vivid testimony to the problems that may arise if this is not done.

[121] One final word. We wish to emphasise again what we said in [67] and [68], namely that Parliament ought to review this legislation at an early date. That it can lead to absurd and unfair consequences as it stands may be illustrated by one further example, taken from another topic within Pt III of the 1995 Act. The code of practice issued by the DRC, under the heading 'Must a service provider know that a person is disabled?', states, it would seem accurately: 'A service provider may have treated a disabled person less favourably for a reason related to their disability even if it did not know the person was disabled.' (See para 3.11.)

[122] The code goes on to give the following example:

'A pub employee orders a customer who is lying prone on a bench seat to leave the premises because he assumes she has had too much to drink. However, the customer is lying down as a result of a disability rather than alcoholic consumption. The refusal of further service [which we take it means further service of drink] is for "a reason which relates to the disabled person's disability." This will be unlawful unless the service provider is able to show that the treatment in question is justified, as defined by the Act.' a b

[123] But publicans and those who work for them commit criminal offences if they allow disorderly conduct on licensed premises (s 140 of the Licensing Act 2003) or sell alcohol to a person who is drunk (s 141). (The 2003 Act is not yet in force, but is due to become so in 2005, and there are equivalent earlier provisions in force under the Licensing Act 1964.) There is a real possibility that the publican is bound to be in the wrong if he refuses to serve an apparently drunken person—if that person is only apparently drunk due to a disability, then by not serving him he will commit an unlawful act which may sound in damages for discrimination; on the other hand, if the publican is concerned about this possibility and proceeds to serve the person when he is in fact drunk, then he will commit an offence (and may put his licence in jeopardy too). If we are correct in this analysis, such a situation cries out for a fresh look by Parliament. c d

Appeals dismissed.

Dilys Tausz Barrister.

Perotti v Collyer-Bristow (a firm)

[2004] EWCA Civ 639

COURT OF APPEAL, CIVIL DIVISION

BROOKE AND MAURICE KAY LJJ

16 MARCH, 21 MAY 2004

Vexatious proceedings – Litigant in person – Persistent unmeritorious litigation – Restriction on oral application to Court of Appeal.

The claimant brought an unsuccessful action for damages for professional negligence against the defendant firm of solicitors arising out of the claimant's dissatisfaction with the way in which the estate of his uncle had been administered. During the course of the trial, in which the claimant appeared in person, the judge had refused his applications for an adjournment; for permission to allow the claimant to amend his statement of case and to issue various witness summonses; and for the judge to recuse himself. The claimant filed various applications for permission to appeal. In February 2004, the Court of Appeal dismissed 11 applications. Fourteen further applications to the Court of Appeal were for permission to appeal against the rulings made by the judge, and his judgment and against a decision by the master whereby he refused to direct that transcripts of certain parts of the trial proceedings be prepared at public expense in order to assist the claimant in preparing his grounds of appeal. The court's attention was drawn to the fact that since 1997 the claimant had made 80 different applications to the court in different matters, of which only two had been allowed. On 74 occasions he had been exempted from paying a fee, so that the entire cost of processing his applications had fallen on the taxpayer or other fee paying litigants. The claimant also had had civil restraint orders and an extended civil restraint order made against him. The Civil Appeals Office, at the direction of the Court of Appeal, had notified that claimant that the court might wish to consider, on the hearing of his applications, whether to make any further orders restraining his litigious activities in the Court of Appeal.

Held – (1) The nuisance posed by the claimant's litigious activities was so extreme that the court was entitled to take unusual steps to protect its own processes and the interests of other litigants. As the range of the claimant's persistent and vexatious litigation went much further than litigation against the persons protected by the extended civil restraint order any application to the Court of Appeal by the claimant in any matter not embraced by the terms of the extended civil restraint order should, for the next two years, be considered only by a judge of the Court of Appeal on paper, unless that judge considered that an oral hearing would be appropriate. That decision on paper would be final and not subject to any reconsideration at a hearing (see [61], [65], below).

(2) It was for the litigant, and particularly a litigant who had attended the whole of a trial and received a written copy of the judgment, to identify in his notice of appeal the grounds on which he contended that the judge's order was wrong. If the court considered that the appeal had a real prospect of success on one or more of those grounds, it would then determine what further transcripts, if any, might be required for the full hearing. But it would be wasteful of public resources for the court to bespeak further transcripts before it was satisfied about

the viability of the appeal. In the instant case, the master's decision had been correct (see [33], [34], [65], below).

(3) All the orders made by the judge had been well within the ambit of his discretion and there were no viable grounds for interfering with them. The applications would accordingly be dismissed (see [35], [43], [49], [52], [53], [65], below).

Notes

For the sources of civil procedural law, see 37 *Halsbury's Laws* (4th edn reissue) paras 5–14.

Cases referred to in judgments

Bhamjee v Forsdick (No 2) [2003] EWCA Civ 1113, [2004] 1 WLR 8.
Ebert v Venvil, Ebert v Birch [2000] Ch 484, [1999] 3 WLR 670, CA.
Grepe v Loam (1887) 37 Ch D 168, CA.
McPhilemy v Times Newspapers Ltd (No 2) [2001] EWCA Civ 933, [2001] 4 All ER 861, [2002] 1 WLR 934, CA.
Nestle v National Westminster Bank plc [1994] 1 All ER 118, [1993] 1 WLR 1260, CA.
Taylor v Lawrence [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528, [2002] 3 WLR 640

Applications

Angelo Perotti applied: for permission to appeal against (i) the judgment of Lindsay J on 21 January 2003 ([2003] EWHC 25 (Ch), [2003] All ER (D) 149 (Jan)) dismissing his claim for damages for professional negligence against Collyer-Bristow, a firm of solicitors; (ii) twelve rulings made by Lindsay J in the course of the trial between 22 October 2002 and 21 November 2002; and (iii) for reconsideration of the decision of Master Venne on 3 April 2003 refusing to direct that certain parts of the trial proceedings be prepared at public expense. The facts are set out in the judgment of Brooke LJ.

Mr Perotti appeared in person.
The defendants were not represented.

Cur adv vult

21 May 2004. The following judgments were delivered.

BROOKE LJ.

1. INTRODUCTORY

[1] There are before the court no fewer than 14 applications by Mr Angelo Perotti arising out of or connected with an unsuccessful claim for damages for professional negligence against Messrs Collyer-Bristow, a firm of solicitors. The trial started on 21 October 2002 and continued until 29 November. On 21 January 2003 Lindsay J delivered a very long judgment ([2003] EWHC 25 (Ch), [2003] All ER (D) 149 (Jan)). He refused permission to appeal, but he extended Mr Perotti's time for appealing to 42 days, which ended on 4 March 2003. On 14 March Mr Perotti filed 11 applications for permission to appeal. One of them (no 0562) was against Lindsay J's judgment and the other ten (nos 0553–0561) were against rulings the judge made in the course of the trial between 22 October and 4 November.

[2] Much later, on 17 July 2003, Mr Perotti filed applications for permission to appeal against rulings made by the judge on 21 November 2002 (nos 1608 and 1610). The final matter before us (no 0552A) is an application under CPR 52.16(6) to reconsider a decision by Master Venne on 3 April 2003 whereby he refused to direct that transcripts of certain parts of the trial proceedings be prepared at public expense. Although most of these applications were made seriously out of time, Mr Perotti told us that he had experienced difficulty in persuading court staff to draw up many of the orders he was challenging, and that he could not persuade the staff at the Civil Appeals Office to accept his notices of appeal in their absence. In the circumstances we decided to consider all these proposed appeals on their merits rather than take up further time in inquiring into these matters.

[3] It will not be possible to understand the issues on these applications unless I say something about the underlying litigation. It all arises out of Mr Perotti's dissatisfaction with the way in which the estate of his uncle Lorenzo Perotti was administered. His uncle was born in England, spent his childhood in Italy, and then made his home in England between about 1920 and his death in April 1984. On 27 August 1976 he made a will in Italian by which he left his real estate in an Italian municipality to Angelo Perotti and his brother Peppino. His final will was made in English in August 1983, and he appointed a friend of his, Mr Impanni, his sole executor. Angelo Perotti, his brother Peppino and his sister Maria Abbate were each to receive one twelfth of his residuary estate. Mr Impanni originally granted a power of attorney to Mr Rudolph, a partner in the firm of London solicitors who prepared the will, to enable him to take out letters of administration in England with the English will annexed. At a time when the Italian land was thought to be worthless and no other property in Italy or elsewhere was known to him, Mr Rudolph swore the gross estate at just over £30,000 and the net estate at just under £20,000. Shortly afterwards two Swiss bank accounts were drawn to his attention which held about £700,000. Following Mr Rudolph's death in August 1985 Mr Rudolph's partner Mr Watson was appointed Lorenzo Perotti's personal representative in England.

[4] Unhappily, although most of the beneficiaries were content with the way in which the estate was being administered, Mr Angelo Perotti was not, and from January 1985 onwards until the time when he started administration proceedings in March 1992 he made his dissatisfaction very clear. As early as March 1985 he told Mr Rudolph that when solicitors were not patently corrupt, deceitful and fraudulent, they were downright incompetent, and when Mr Watson had nearly completed the administration of the estate five years later Mr Perotti charged him with being corrupt and fraudulent. The estate account, sent to him on 20 May 1991, revealed a gross estate of about £812,000 and a net estate of about £510,000. £291,500 had been paid to the income tax authorities by way of a back duty settlement (including a penalty) for tax on undeclared income, and over £195,000 had been paid in respect of inheritance tax and interest. The fees due to Mr Watson's firm were shown as £32,500 plus VAT. On 20 June 1991 Mr Perotti's brother Peppino died, and he was now entitled to two-twelfths of the residuary estate. It is unnecessary for the purposes of this judgment to set out many of the details of the intervening history which Lindsay J set out clearly in his judgment.

[5] Mr Perotti continued to complain that the estate should have included a liability owed by Mr Impanni to repay a 200 million lira loan (together with 17 years' compound interest), a Rolls Royce, a lot of gold coins with a minimum

value of £100,000, and other things. In September 1991 he contended that Mr Watson was not entitled to recover any fees at all because he had been a witness to the testator's will. *a*

[6] In October 1991 Mr Watson suggested to the beneficiaries a way of distributing the estate on a consensual basis which would have given Mr Perotti rather more than his strict entitlement under the English will. However, when he wrote to Mr Perotti on 20 January 1992 inviting his agreement, Mr Perotti riposted three days later by telling Mr Watson that he would be starting administration proceedings, and that these would include allegations of fraud. *b*

[7] The writ, prepared by Mr Perotti as a litigant in person and issued on 17 March 2002, not only presaged an ordinary administration action but also contained in its general indorsement allegations that Mr Watson, Mr Impanni, and Mr and Mrs Abbate had attempted or conspired to defraud him in the course of the administration. *c*

[8] Between April 1984 and March 1992 Mr Perotti had consulted Messrs Collyer-Bristow on one occasion. On 10 December 1985 Mr Saner, a partner in the firm, gave him written advice under the green form scheme on the steps he might take to assert his rights in the administration. He told him that insulting solicitors and accusing them of incompetence was not the most practical way of getting justice done. He also advised him to apply for legal aid, and discouraged him from contemplating criminal proceedings. He then returned the papers to Mr Perotti, and Mr Perotti did not return to the firm until September 1992. *d* *e*

[9] By this time the administration proceedings had run into serious difficulties. Mr Perotti had served a home-made statement of claim with the writ on 10 April 1992, and the three different firms of solicitors acting for Mr Watson, Mr Impanni, and Mr and Mrs Abbate respectively had each applied to strike out the action. Two orders were made requiring Mr Perotti to serve a statement of claim in compliance with the rules, but the time for compliance with those orders was extended until Mr Roger Kaye QC, sitting as a deputy high court judge, heard all the then current appeals and applications at a two-day hearing on 24–25 November 1992. Mr Kaye held that the existing pleading did not comply with the rules and that there was nothing in Mr Perotti's point that Mr Watson was not entitled to recover fees because he had witnessed the will. He made an order to the effect that the action would be struck out if a statement of claim complying with the rules was not served by 9 December 1992. He refused leave to appeal and made a number of orders for costs against Mr Perotti. *f* *g*

[10] During September 1992 Mr Perotti had been involved in correspondence with Mr Saner of Collyer-Bristow. This achieved nothing because Mr Perotti was unable to reach agreement with Mr Saner on the terms on which Mr Saner and his firm would be willing to assist him. On 25 November 1992, when Mr Perotti's plight was a great deal more serious, Mr Perotti telephoned Mr Saner again. There is an agreed transcript of the conversation, and Lindsay J in due course made a finding that Mr Perotti then agreed with Messrs Collyer-Bristow that (so long as Mr Perotti paid £500 on account of costs, as he did on 26 November when he delivered the papers) the firm were to have the general conduct and consideration of the administration proceedings and of related possible claims by Mr Perotti. This professional relationship was to continue until either the firm lawfully suspended or terminated it, or Mr Perotti lawfully terminated it, or the action was brought to an end by judgment or compromise. The judge rejected *h* *j*

Mr Perotti's contention that there was an entire contract. He said that it had long been accepted that administration actions were a class apart.

[11] Although Messrs Collyer-Bristow acted for Mr Perotti until 14 April 1993, when their senior partner terminated the retainer, and they did not formally come off the record as acting for him until early in 1994, Mr Perotti's principal complaints against them centred around their failure to ensure that two important issues (which I will call the 'administration fees issue' and the 'investment issue') were included in the new statement of claim which was settled and served in time to meet Mr Kaye's deadline of 9 December 1992. A lot of the time spent at the trial was devoted to an examination of what happened or did not happen in the 12 days between 26 November (when the papers were delivered) and 8 December (when the new statement of claim was served).

[12] During this period Miss Ayling, a junior solicitor in the firm's litigation department, had the conduct of the case. She started her consideration of the papers on Monday 30 November. The transcript of Mr Kaye's judgment was available two days later, and by Thursday 3 December she had prepared and sent instructions to junior counsel (Mr Frank Hinks) and arranged a conference to enable him to meet Mr Perotti on Friday 4 December.

[13] The judge found that at this conference Mr Hinks advised that there was a good arguable case for a new personal representative to be appointed, although he thought Mr Perotti had not helped his case by the allegations of fraud he had made. He considered that Mr Watson's draft estate accounts were defective. He advised that the writ as well as the statement of claim would have to be amended, and he said he would draft as strong a statement of claim as possible. The main claim would be for the replacement of Mr Watson and Mr Impanni from the conduct of the administration. He advised Mr Perotti to settle the case if he could because the costs of the litigation were out of proportion to what Mr Perotti might possibly gain from the proceedings.

[14] The judge found that nothing was said at this conference about the administration fees issue or about the way in which the estate funds had been invested. Miss Ayling, who gave evidence at the trial, said that the tone of the conference had been unpleasant. Mr Perotti had been difficult and argumentative, and unusually she sent a note of gratitude to Mr Hinks after the conference for the way he had handled her client. She had earlier told the judge that she had thought to herself that this client was going to be big trouble when she walked with him from the firm's offices in Bedford Row to Lincoln's Inn. Mr Perotti had been vehement in his indignation about the fact that he would be obliged to pay substantial costs to the defendants whatever the outcome of the proceedings. The judge accepted Miss Ayling's evidence.

[15] By Tuesday 8 December Mr Hinks had prepared the draft amended writ and statement of claim. He sent them across to Miss Ayling accompanied by a short advice to the effect that Mr Perotti should be asked to check them carefully. Miss Ayling had three telephone conversations with Mr Perotti that day. The judge found that she told him that the statement of claim could always be amended later, and that the most important thing was to meet Mr Kaye's deadline. She also told him that she did not think he would be able to have the costs orders made by Mr Kaye reversed.

[16] The amended statement of claim was duly served on 8 December, when Messrs Collyer-Bristow formally came onto the court record. It made the claims Mr Hinks had referred to in conference. The contention that Mr Watson was not

entitled to recover fees because he had witnessed the will found no place in the new pleading. a

[17] The remaining events during the retainer period can be described quite quickly. Mr and Mrs Abbate served their defence on 22 December 1992, Mr Watson on 12 February 1993 (his defence included a counterclaim for an order for the administration of the testator's estate, 'if and in so far as it be necessary') and Mr Impanni on 30 April. Although Miss Ayling was criticised at b the trial by Mr Perotti for agreeing to extensions of time, the judge found that she considered that the court would have been bound to grant extensions in view of the length of time Mr Perotti had taken before he produced a viable statement of claim. The judge found that it was not at all unlikely that extensions would have been granted, and that in any event Mr Perotti had suffered no loss. On c 23 December Miss Ayling told Mr Perotti that she had ascertained that the first two defendants had already incurred costs of £31,000, and that serious consideration should now be given to the question whether he would recover anything at all at the end of the day. She sent him at the same time her firm's standard letter about costs, which made reference to their complaint procedures.

[18] On 4 January 1992 Mr Perotti wrote a letter of complaint to Mr Marsh, d Miss Ayling's supervisor, enclosing £1,000 towards his liability for the firm's and counsel's fees to date. He was really asking for clarification that the costs he had to pay the firm would all be recoverable in the action. On 14 January Mr Marsh disabused him. He told him in a long letter that he could not expect to recover more than 50–75% of what he had to pay Messrs Collyer-Bristow. The e defendants had by now incurred costs of £43,000 between them, and on the present evidence it was very unlikely that Mr Perotti would receive anything from the proceedings. He said that the statement of claim could always be amended if more evidence came to light. He also made it clear that his firm was not willing to act for Mr Perotti on the understanding that all the costs he f incurred would be recoverable if he won the action, and that it would not deal with outstanding matters while there was a complaint outstanding and the matter of costs was unresolved.

[19] Although Mr Perotti signed the costs letter and settled the firm's outstanding account on 25 January, he also wrote a letter generally refuting what Mr Marsh had written. He did not withdraw his complaint. On 5 February the g firm told him that they could not continue to represent him unless he was prepared to accept their advice and confirm unequivocally that his complaint was no longer outstanding. On 12 February Mr Perotti wrote to the firm's senior partner seeking clarification of the position. On 17 March 1993 the senior partner repeated the advice which, as the judge found, Miss Ayling had already given h Mr Perotti on the costs issues. He said that having no discretion in the way Mr Perotti's case was run, and having to refer to him and explain to him every minor aspect of the case was very time-consuming and costly. He suggested that Mr Perotti might wish to instruct a firm in which he had more confidence. On 25 March Mr Perotti wrote back. He said that the letter of 17 March had j contained indecipherable waffle, and he inquired whether Messrs Collyer-Bristow had unilaterally terminated their instructions. By a reply dated 14 April the senior partner formally terminated the retainer. He said that the firm had no confidence that Mr Perotti was willing to accept their advice, and that this situation was unlikely to improve. It would be much better if he were to find another firm to act for him.

[20] Although Mr Perotti consulted two other firms of solicitors before the end of 1993, he was acting in person by the time the administration action came for trial before Rimer J in early 1997. By this time Mr Perotti had raised a more meritorious point about Mr Watson's fees as administrator (namely that there was no charging clause in the will), and Mr Watson had initiated quite separate proceedings (known as the representation proceedings) in May 1996, which eventually culminated in a finding that he was entitled to recover £30,000 by way of fees, together with VAT, in respect of his professional services to the estate.

[21] In his judgment Lindsay J described the effect of Rimer J's judgment in the administration action. Although he had found in favour of Mr Perotti on some issues and had been critical of certain aspects of the administration, he rejected his contentions that Mr and Mrs Abbate had stolen property from the testator's flat or that they had been involved in a conspiracy with Mr Impanni. While Mr Watson's conduct of the administration had been defective in some respects, none of the other beneficiaries wished to see him removed, and the Public Trustee was unwilling to act. Furthermore, Mr Perotti had not suggested any alternative institution or individual who might act.

[22] Rimer J said that Mr Watson's integrity and honesty were not in question. He therefore decided not to replace him as administrator. Although Mr Perotti had won on some issues, he ordered him to pay 80% of Mr Watson's costs of the action. At a later hearing in April 1998 the same judge directed that Mr Watson was entitled to an indemnity from the estate for 75% of his costs (which were in excess of £300,000). Since the undistributed estate was then worth £175,000–£200,000, it was swallowed up by this order for costs, and Mr Perotti gained nothing at all from the proceedings.

[23] The writ in the present action was issued against Messrs Collyer-Bristow and Mr Hinks on 18 September 1998. It referred to instructions given by Mr Perotti on 25 November 1992 and contained a claim for damages for negligence in respect of the period between late November 1992 and about April 1993. The particulars of claim were served on 11 December 1998. Although they contained a number of allegations of negligence, the judge identified the administration fees issue and the investment issue as raising the main matters of which Mr Perotti made complaint. These issues were expressed in these terms:

> 'Failing to advise and plead that administrators cannot charge for their services to the estate in the absence of a charging clause in the will, there being none.
>
> Failing to advise and/or plead for an inquiry to establish the loss to the estate owing to the manner the estate funds were managed (ie the whole allegedly invested in bank money market deposit accounts with fixed interest and none in equities) and claiming damage/compensation.'

[24] On 16 April 1999 Master Moncaster dismissed an application by Messrs Collyer-Bristow to the effect that the action should be struck out against them, and in June 2000 Neuberger J dismissed their appeal against this decision. In his judgment in the action Lindsay J said that Neuberger J had not had the opportunity, as he had had, to study the full correspondence and all the papers in the case. Neuberger J had thought that when he learned of the administration fees issue in June 1996 Mr Watson had stood down as administrator. He had also believed that Messrs Collyer-Bristow had retained all the papers between early September and 26 November 1992 and had had the opportunity to consider them at leisure. Finally, he had been told, although there was no evidence for this, that

Mr Hinks had been in a great hurry. Although he said that the firm might successfully base their defence at the trial on their reliance on counsel, he said that it could not be said that there was no realistic prospect that this defence might fail.

[25] Mr Hinks, on the other hand, succeeded in his much later application for summary judgment to be entered in his favour, Master Moncaster having on 16 April 1999 refused to strike out the action against him as well. Lloyd J said that it was highly doubtful that even if the investment issue had been raised, it would have given rise to a viable claim. In any event there was not even the beginnings of a claim made out by Mr Perotti that it was a breach of Mr Hinks's duty to think of, work out the facts for, and plead a case based on the authority on which Mr Perotti relied. (This was the decision of this court in *Nestle v National Westminster Bank plc* [1994] 1 All ER 118, [1993] 1 WLR 1260, which had come to Mr Perotti's attention in 1997.) Nothing in Mr Perotti's long pleading against Mr Hinks offered him the slightest chance of success.

[26] On 11 October 2002 the Court of Appeal (Potter and Carnwath LJJ) dismissed Mr Perotti's appeal ([2002] EWCA Civ 1350). On the administration fees point Carnwath LJ said that quite plainly Mr Perotti had suffered no loss, because as soon as the point was raised Mr Watson had accepted that in the absence of a charging clause he could not recover any fees from the estate. He had had to institute separate proceedings for that purpose. Carnwath LJ added that the crucial point on the appeal related to the way in which the matter had come before Mr Hinks in December 1992. It was then necessary to get the case back on track to avoid it being struck out completely. There would have been plenty of time afterwards, if the matter had come back to Mr Hinks, when he could have considered what, if any, other claims Mr Perotti might advance.

[27] Two months earlier, on 8 August 2002, Master Moncaster had ordered that the trial of the action against Messrs Collyer-Bristow should be limited to issues of liability. He ordered standard disclosure to be made by 14 August and witness statements to be exchanged by 6 September. Mr Perotti complied with neither of these orders. When the trial started on 21 October, Mr Perotti immediately applied for an adjournment so that he might receive legal representation. He also applied for a direction that such representation should be afforded to him. His written application of that date has been attached as an appendix to virtually all the notices of appeal that are before us.

[28] The judge's careful decision on this application is the first of the 12 rulings he made during the course of the trial which Mr Perotti now seeks to challenge. They can be summarised briefly as follows:

No 0552—22 October 2002

The judge refused to adjourn the trial to allow Mr Perotti to be legally represented, and refused permission to appeal.

No 0553—24 October 2002

The judge refused to adjourn the trial on the grounds that Mr Perotti wished to appeal against his order of 22 October.

No 0554—25 October 2002

The judge directed Mr Perotti to attend the defendants' offices with a number of documents so that they could be disclosed and photocopied.

No 0555—29 October 2002

The judge refused permission to appeal against his order on 25 October and refused to adjourn the trial for the purposes of an appeal.

No 0556—29 October 2002

The judge refused to allow Mr Perotti to amend his statement of case to include allegations relating to events in 1985 and September 1992 and refused permission to appeal.

No 0557—30 October 2002

The judge refused to allow Mr Perotti to issue witness summonses against Mr Saner, Mr Marsh and Miss Ayling (two of whom were scheduled to give evidence for the defence in any event) for the purpose of cross-examining them. He also refused permission to appeal.

No 0558—31 October 2002

The judge refused to adjourn the trial to enable Mr Perotti to obtain legal representation and to allow him to instruct his former counsel without the intervention of solicitors. He also refused permission to appeal.

No 0559—31 October 2002

The judge refused to adjourn the trial to enable Mr Perotti to seek permission to appeal against the order he had just made. He also refused permission to appeal.

No 0560—31 October 2002

The judge refused an application by Mr Perotti that he should recuse himself, and that another judge should conduct the trial at another time. He also refused permission to appeal.

No 0561—4 November 2002

The judge refused an application by Mr Perotti for a variety of orders, including a direction that he should recuse himself, a direction that the defendants should swear an affidavit about their insurance arrangements, and a direction that another action should be joined to the present action. He also refused permission to appeal, and refused to adjourn the trial while Mr Perotti sought to appeal.

No 1608—21 November 2002

The judge refused an application by Mr Perotti for orders that various witnesses should be ordered to attend the trial, namely an accountant expert witness; Mr Watson (the defendant in the administration proceedings); his former counsel (to give evidence about the law and to assist Mr Perotti) an expert on Italian law; and a tax inspector.

No 1610—21 November 2002

The judge refused to allow Mr Perotti to amend his statement of case to add allegations of negligence against the defendants arising out of their advice concerning the Italian will and a loan.

[29] With the court's papers are not only transcripts of the judge's rulings on these applications, but also a transcript of his very long judgment in which he

addressed the issues he had to decide in painstaking detail. The trial itself had taken an unusual course in that after Mr Perotti had given some oral evidence, he discovered a tape recording of his telephone conversation with Mr Saner on 25 November 1992. After an agreed transcript of this conversation had been prepared, Mr Perotti told the judge that he did not wish to give any further evidence and that he did not wish to be cross-examined. In the end a formula was arrived at, by agreement, to the effect that Mr Perotti should be treated as having given no oral evidence at all. The judge said that he would allow this course to be followed on the basis that whenever Mr Perotti wished him to draw an adverse inference from the documentary material before him, the force of that adverse inference might be discounted by reason of the fact he had not proffered himself for cross-examination.

[30] The judge devoted great care to his consideration of the two main issues. On the administration fees issue he said that Mr Perotti's arguments were hopeless, because if Mr Perotti had raised the issue in the administration action it was not improbable that Mr Watson would have pursued the matter in other proceedings (as he did), and there was no reason to see why the outcome would have been more advantageous to Mr Perotti if the issue had been raised when Mr Hinks resettled the pleadings.

[31] On the investment issue, which he analysed at length, he said that he had received no evidence about the contemporary investment practices of competent legal or lay personal representatives, or of stockbrokers during the relevant period. Although he had been shown evidence that investment in equities was more profitable than investment in interest-bearing deposits between 1985 and 1997, it would be impossible to form any judgment on an appropriate investment policy for this estate without knowing very much more about the facts. And even if Mr Perotti might have succeeded on this issue in the administration action, this was still a long way of showing that Messrs Collyer-Bristow were negligent because it had not been raised during the short time they were acting for him. The matter could always have been raised later, if so advised. Mr Perotti had already incurred substantial irrecoverable costs, so that the wisdom of raising any new point would have to be carefully weighed. In any event the firm was entitled to rely on the advice of the competent junior counsel they had instructed.

[32] During the course of his judgment the judge made careful rulings, adverse to Mr Perotti, on 14 further allegations of negligence he made. I will return to Mr Perotti's grounds for appealing this judgment (no 0562) in [38], below.

[33] On 3 April 2003 Master Venne directed that any application by Mr Perotti for a transcript other than that which was already being provided at public expense would be dealt with by the court at the hearing of the application for permission to appeal. On 8 May 2003 Mr Perotti asked that this direction should be reconsidered. He wished to be provided at public expense with the transcripts of the evidence of the defendants' two witnesses and the whole of the proceedings on the last day of the trial. He said that he relied heavily on the contents of that evidence for providing his full and proper grounds of appeal from the judge's order.

[34] In my judgment Master Venne's order (no 0552A) was correct. The court has to balance the interests of litigants against the interests of taxpayers. It is for the litigant (and particularly a litigant who like Mr Perotti has attended the whole of a trial and received a written copy of the judgment) to identify in his notice of appeal the grounds on which he says that the judge's order was wrong. If the

court considers that the appeal has a real prospect of success on one or more of those grounds, it will then determine what further transcripts, if any, may be required for the full hearing. But it would be wasteful of public resources for the court to bespeak further transcripts before it is satisfied about the viability of the appeal. I would therefore dismiss this application.

[35] I turn back now to the 12 appeals against orders Lindsay J made during the course of the hearing. It would be possible to dispose of them all quite briefly by saying that they all relate to issues that typically arise in the course of an action which has not been properly prepared. In every case in which we have a transcript or note of the judgment the judge addressed the issues he had to determine with great care and clarity. All his decisions fell well within the ambit of the wide discretion given him as the trial judge. In deference to Mr Perotti, however, I will refer to each of them in slightly more detail.

No 0552—22 October 2002

On the day before the trial started, Mr Perotti gave notice that he would be seeking an adjournment in order to enable him to seek legal representation. In a long judgment the judge carefully rehearsed the arguments on each side before dismissing the application. This decision fell well within the wide ambit of his discretion, and even if Mr Perotti thinks that the judge should have given more weight to the arguments he had been adducing, there are no grounds on which this court could interfere with the judge's decision.

No 0553—24 October 2002

The judge adjourned Mr Perotti's application to adjourn the trial so as to enable him to appeal to the Court of Appeal against order no 0552 on the basis that the transcript of his judgment on 22 October was not yet available for the Court of Appeal to consider. There are no possible grounds for challenging the reasonableness of this decision.

No 0554—25 October 2002

This was an order that Mr Perotti should take to the defendants' offices and disclose the pleadings, orders, witness statements, lists of documents and documents supplied in the course of inspection in what was described as the fourth action, together with the reamended statement of claim and the reamended defences in what was described as the first or main action. We have not been supplied with any transcript or note of any judgment the judge may have given. In the course of his judgment in relation to orders nos 0555 and 0556 four days later the judge explained that Mr Perotti had made no disclosure by list, and he had made order no 0554 when it seemed to him that some documents which were likely to be of real materiality in the action had not been disclosed. Mr Perotti complied with this order and given that he was in default in not serving a list of documents before the trial (when any claim he might have made for legal professional privilege could have been dealt with in an orderly way), there are no grounds at all for interfering retrospectively with this order.

No 0555—29 October 2002

Mr Perotti complained to the judge that legal professional privilege attached to some of the documents he had been ordered to hand over, and he wished to be able to go to the Court of Appeal to seek leave to appeal against order no 0554. The judge said that he had no doubt that he would be able to put out of his mind

any document which transpired to be truly the subject of legal professional privilege. He instanced in this context a note of a conference between Mr Perotti and other lawyers he was now suing which had been annexed to one of the pleadings he had disclosed. He made it clear that he would proceed with the trial on this basis and refused an adjournment. Again, this order fell within the wide ambit of the judge's discretion, and there would be no possible grounds for interfering with it now.

No 0556—29 October 2002

The principal ground on which the judge refused to permit Mr Perotti to amend his claim in order to allege negligence against the defendants arising out of his dealings with Mr Saner in September 1992 (see [10], above) was because there was no realistic prospect of Mr Perotti being able to prove a retainer in September 1992. The judge said that if he had not formed that view he would have been disposed to grant the amendment. The judge refused to allow an amendment to include a claim relating to Mr Saner's advice in December 1985 on a number of different grounds. It is unnecessary to recite these grounds, because the judge was clearly entitled, in the exercise of his discretion, to refuse to permit an amendment a week into the trial which would have opened up questions as to what had been said between Mr Saner and Mr Perotti all those years ago and what Mr Perotti did after taking Mr Saner's advice. Mr Perotti argued that the judge had misdirected himself in his approach to limitation issues because a cause of action in negligence is not complete until damage is suffered as a result of the negligence, but there were many other solid grounds on which the judge refused to permit these very late amendments, and there are no grounds at all for interfering with his decision.

No 0557—30 October 2002

The judge refused to allow Mr Perotti to issue summonses against Mr Marsh, Mr Saner and Miss Ayling because he did not wish to adopt what they had previously said but to challenge it. He considered that he had no jurisdiction to allow a witness summons to be issued for the purpose of cross-examination only. This approach was clearly right. This court adopted a similar approach in *McPhilemy v Times Newspapers Ltd (No 2)* [2001] EWCA Civ 933, [2001] 4 All ER 861, [2002] 1 WLR 934 when it refused to allow the claimant to put in evidence a witness statement served by the defendant for the sole purpose of inviting the jury to conclude that that statement was knowingly fabricated.

No 0558—31 October 2002

Mr Perotti was now seeking an adjournment of the trial in order to enable him to consult, without the intervention of a solicitor, a member of the Bar who had previously given Mr Perotti advice which he had respected in relation to a different matter. He wished to seek advice in order to ascertain whether or not he had a case. The judge was shown a letter which made it clear that Mr Perotti had been refused legal aid in connection with these proceedings in June 1999. He refused an adjournment on the basis that even if he had any power to give a direction requiring a member of the Bar to advise Mr Perotti without the intervention of a solicitor, taking this step would either lead to very substantial delay (if counsel considered that there might be some realistic prospect of success) or be of no practical advantage at all if counsel were able to advise quickly that there was no truly viable cause of action with some realistic prospect

of success. There are no possible grounds for challenging this decision, which fell well within the ambit of the judge's discretion.

No 0559—31 October 2002

We have not been furnished with any note or transcript of the judge's reasons for refusing to adjourn the trial in order to enable Mr Perotti to challenge order no 0558 in the Court of Appeal. This order was well within his discretion, and there are no possible grounds for interfering retrospectively with this decision.

No 0560 31—October 2002

Mr Perotti applied for the trial to be aborted and started again before some other judge on the sole ground that Lindsay J had now made a number of rulings favourable to the defendant. He asserted that Rimer J had taken such a course on a previous occasion. When Lindsay J inquired into that matter he ascertained that it related to a decision by Rimer J, who had conducted the long trial of the administration action in 1997 (see [21], [22], above) recusing himself at Mr Perotti's request at an earlier stage of the present action because he knew Mr Hinks, the second defendant, although he did not know him very well. Lindsay J considered that this recusal threw no light on the course he should adopt, and he found no reason whatsoever to recuse himself. This decision was clearly right, and there are no possible grounds for interfering with it.

No 0561—4 November 2002

On Monday 4 November Mr Perotti greeted the judge with a seven-page document which he described as a witness statement. I have already summarised (in [28], above) the effect of the judge's directions in response to this statement. They were all well within the judge's discretion to make, and there are no grounds for interfering with his decisions. No hearing of the action took place on 12 November or between 14 and 21 November on account of Mr Perotti's indisposition. The hearing resumed on 21 November and ended on 29 November, when the judge reserved judgment.

No 1608—21 November 2002

I have already summarised (in [28], above) the effect of the judge's directions on 21 November. Put briefly: (i) the judge refused to allow Mr Perotti to call an expert witness at this late stage of the trial because he had not identified the witness or indicated what he might say, and because case management directions had been made well in advance of the trial and the provision of such a witness had not been contemplated then; (ii) the judge refused to order Mr Watson to attend so that Mr Perotti could cross-examine him for the same reasons he had given for order no 0557; (iii) the judge refused to order a barrister to attend the trial to give evidence about the law because it would be inappropriate for a barrister to act in such a capacity; (iv) the judge refused to allow an expert to give evidence on Italian law, because the matter of the Italian will and loan was not adequately pleaded as part of Mr Perotti's case against Messrs Collyer-Bristow so that such evidence was not relevant; (v) no recorded reasons are given for the judge's refusal to require a tax inspector to attend the trial, but Mr Perotti has submitted no grounds for challenging this decision. All these orders were, in my judgment, well within the ambit of the judge's discretion, particularly at such a late stage of the trial, and there are no viable grounds for interfering with them.

No 1610—21 November 2002

At an earlier stage of the trial Mr Perotti had told the judge he did not wish to amend his case against Messrs Collyer-Bristow to include allegations of negligence concerning advice in relation to the Italian will and loan. Quite apart from the consideration that this amendment represented a new claim stemming from facts not substantially similar to the issues in the present action (see CPR 17.4(2)) the judge refused the amendment on the basis that the trial had been going on for a long time, the amendment was being sought extremely late, its introduction might well lead to prejudice to the defendants which could not be compensated in costs, and the amendment was being put on a substantially different footing from the case argued before Rimer J in the administration action. There is absolutely no prospect of a successful challenge to this obviously correct decision.

[36] Before I move on to consider Mr Perotti's challenge to the judge's substantive judgment, there are some observations I need to make about these 12 appeals. They are all totally devoid of merit. They were all made long after the hearing ended on 29 November 2002. Ten of them were filed on 14 March 2003 and the other two on 17 July 2003. No proper grounds of appeal were included in the relevant notices of appeal. Mr Perotti merely included in each notice of appeal a five-page statement exploring why he was unable to provide full and proper grounds of appeal until he was furnished with the assistance of lawyers and a copy of the original six-page statement which he had placed before Lindsay J in support of the application he made for an adjournment on the first day of the trial. On 6 October Chadwick LJ, in a judgment with which Carnwath LJ agreed ([2003] EWCA Civ 1521, [2004] 2 All ER 189), refused to direct that Mr Perotti should be provided with legal representation (on the grounds that the court had no power to make such a direction). He also said that there was nothing in any of Mr Perotti's applications which required the provision of legal representation in connection with the application for permission to appeal.

[37] Notwithstanding this order, Mr Perotti did not formulate any grounds of appeal in connection with any of the judge's directions during the trial until he attended the hearing before us, when he produced a number of written representations about certain of the matters of which he made complaint. Although there was therefore in almost every case a serious breach of para 3.2 of CPR PD 52 ('the grounds of appeal should set out clearly the reasons why [CPR] 52.11(3)(a) or (b) is said to apply'), the court has not been provided with the resources to police the activities of a litigant like Mr Perotti. This is the only reason why all these unmeritorious applications, which must have cost the taxpayer (or other fee-paying litigants) an enormous amount of money to process (Mr Perotti being exempt from any requirement to pay any court fees because of his impecuniosity) have come before a court of two judges and taken so long to hear and dispose of.

[38] I turn finally to the proposed appeal against the substantive judgment. There are 11 pages of grounds of appeal. The last six pages contain a copy of the written representations Mr Perotti made on the first day of the trial. The first three paragraphs and para 6 of the grounds are concerned with Mr Perotti's requests for an order that he be provided with legal representation and for the transcripts to which I referred in [33], above. I have held that there is no merit in his application for transcripts, and his application to be provided with legal representation was dismissed by this court on 6 October 2003 after a hearing in

which it received the assistance of an advocate to the court. In para [38] of his judgment, with which Carnwath LJ agreed, Chadwick LJ said he was concerned only with the need for legal representation in the context of his forthcoming applications for permission to appeal, not only in the matters now before us but on a number of other matters which were then pending.

[39] What Mr Perotti described as 'some basic grounds/reasons/etc why this appeal should be allowed, etc and inter alia' took up less than a page. He made ten complaints, all with the utmost generality. He referred to issues under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), to conflicting authorities, to contradictory findings, to points of practice and procedure of significant importance and so on, but he gave no details of any of these complaints, so that the reader was given no idea of how the judge was supposed to have gone wrong.

[40] CPR 52.2 prescribes that all parties to an appeal must comply with the relevant practice direction. Paragraph 3.2 of the practice direction states that the grounds of appeal should set out clearly the reasons why CPR 52.11(3)(a) or (b) is said to apply. The notice of appeal against the judge's substantive judgment does not set out clearly why the judge was wrong or why his decision was unjust because of a serious procedural or other irregularity in the proceedings. It does not refer to a single one of the judge's findings (and, as I have said in [30]–[32], above, he made findings on 16 different allegations of negligence) and is very seriously defective in this respect.

[41] On the hearing of the appeal Mr Perotti produced for the first time two documents which identified matters in the judgment which he sought to challenge. We decided it would be fair to hear him on these points, although they were being raised for the first time a year after the notice of appeal was filed. I will now refer to the main points he raised, and make my comments on them. I have considered all of them, even if I do not mention them all in this judgment.

[42] The first document, whose contents Mr Perotti developed in oral argument before us, was headed 'Hinks was not properly instructed'. It covers ground which the judge covered very thoroughly in the findings of fact he made in his judgment, without addressing the difficulty that any appeal court would face because the judge had plenty of opportunity to appraise both Mr Perotti and Miss Ayling before making his findings. Mr Perotti seeks to minimise the plight in which he found himself at the end of November 1992. Orders for costs had then been made against him in favour of three different defendants which would bite severely into any sums he might recover in the administration action, and Mr Kaye had made an 'unless' order against him, requiring him to serve a viable statement of claim by 9 December. While it is true that Mr Kaye left open the possibility of an application to a master for an extension of that period, such an application would have left Mr Perotti liable to pay still more by way of irrecoverable costs to the three defendants, and there was always a risk that his application might have been refused and the action brought to an end because no statement of claim had been served within the time allowed by Mr Kaye. There were no viable grounds for holding that the defendants were negligent in not seeking an extension of time or in not seeking to appeal Mr Kaye's order, which was fully within his discretion to make.

[43] I have read with care Mr Perotti's written submissions on this point and considered the points he made to us orally. He does not seem to realise that the judge was bound to make his findings on the evidence he received at the trial, and

that it is pointless to rely on comments made by other judges or masters or even by the Court of Appeal when they were considering less full evidence than the evidence before Lindsay J, or different evidence. In my judgment Lindsay J directed himself correctly on the law and the facts, and I consider that there is no real prospect of this court interfering with the findings he made in [48]–[62] or the succinct conclusions he reached in [162]–[168].

[44] There is an illuminating passage in para [62] of Lindsay J's judgment in which he correctly describes the nature of an administration action, and the way in which amendment and development of a beneficiary's complaints in the course of proceedings is more readily available than in other classes of litigation. This passage provides a complete answer to Mr Perotti's complaint that the lawyers he instructed on 26 November ought to have been able to think of and include every single possible argument against the administrator during the short time that was available to them to save his action from being struck out altogether. Mr Perotti does not address the judge's unassailable finding (at [62]) to the effect that Miss Ayling's remark that it would always be possible to amend the statement of claim later was in broad terms well justified.

[45] This takes me to the other matter on which we received detailed written submissions from Mr Perotti on the day of the hearing. The judge heard Miss Ayling and Mr Marsh give evidence and saw and heard a lot of Mr Perotti, although his evidence as such was formally withdrawn. In [137]–[145] the judge held that there were three reasons which justified the defendants terminating their retainer.

[46] The first was that Mr Perotti had made a formal complaint against the firm, and after Mr Perotti had referred to the contents of the senior partner's letter as 'indecipherable waffle' a conflict of interest had plainly emerged between solicitor and client such that the solicitor was drawn from doing his best for his client to protecting his own position. The judge was entitled, in my judgment, to hold (at [91]) that the firm reasonably read Mr Perotti's comment as signalling the parting of the ways, and to dismiss Mr Perotti's efforts to water down the effect of what he said.

[47] The second reason was that a serious breakdown in confidence between solicitor and client had occurred. The judge set out the evidence in summary form in [141]–[143], and said he accepted the evidence Mr Marsh and Miss Ayling had given to him. I need quote only one passage (at [141]):

> 'In oral evidence [Miss Ayling] spoke of matters being impossible when her advice, although understood by Mr Perotti, was persistently questioned. She gave her advice on costs as an example: Mr Perotti would not accept that costs already incurred by him by way of orders against him were irrecoverable and was vehement on that point. Even minor matters such as extensions of time to defendants for the time for their defences had become matters of heat or contention. It got to the stage, she said, that acting for Mr Perotti was just like being cross examined by him, by which Miss Ayling meant that it was, without cause for this on her part, a deeply unpleasant experience. I accept her evidence.'

[48] The judge found that either of these reasons, taken separately, would have justified Messrs Collyer-Bristow terminating their retainer. He also found that a natural break in the proceedings had occurred (in that Messrs Collyer-Bristow had by now saved the administration action), at which it was appropriate for them to withdraw.

[49] I have considered carefully the reasons Mr Perotti has given for challenging the judge's findings. He is faced with the insuperable difficulty, in my judgment, that he chose to withdraw his oral evidence and to decline to submit himself to cross-examination, and that the judge accepted the oral evidence of the defendants' two witnesses. It is therefore of no value to him to make assertions of fact to this court which he could have made in oral evidence to the court below. The judge was fully entitled, as a matter of law, to hold that the solicitors were entitled to terminate their retainer for good reason, and to hold on the facts that there were two very good reasons entitling them to do so. Mr Perotti took us through the January–April correspondence, which the judge had analysed with care, and in my judgment there is no prospect of the judge's findings being set aside on appeal.

[50] Mr Perotti also sought to persuade us that if stronger points had been included in the statement of claim during the short period when Messrs Collyer-Bristow were acting for him, Mr Watson would probably have capitulated so that the trial before Rimer J, and its financially disastrous outcome, would not have taken place. In this context he invited us to consider some 'without prejudice' correspondence and a notice of payment into court in the administration action. The insuperable difficulty which Mr Perotti faces in this regard is that this court has upheld Lloyd J's decision striking out his action against Mr Hinks and Lindsay J has dismissed on very solid grounds his allegations of negligence against Messrs Collyer-Bristow in connection with the events leading up to the service of the re-settled statement of claim.

[51] I derived no benefit from the citations Mr Perotti made to us from the Law Society's *Guide to the Professional Conduct of Solicitors* (8th edn, 1999). The judge determined with great care the issues of negligence it was his duty to try, and a case cannot be prolonged at the appeal stage by making additional complaints about what the solicitors might or might not have done.

[52] In addition to considering these points, I have read the judge's long judgment with great care, in order to see if there are any other grounds for reasonable complaint about any part of the judgment. I have come unhesitatingly to the conclusion that there were not. The judge was perfectly entitled to reach the conclusions he did on the material that was before him. This application for permission to appeal is totally devoid of merit. It is therefore dismissed.

[53] I would for these reasons dismiss all these applications. They are all totally devoid of merit.

[54] Today the court has dismissed 14 applications by Mr Perotti as being totally devoid of merit. On 26 February 2004 Chadwick LJ dismissed 11 further applications by Mr Perotti on the same grounds. It has been drawn to the court's attention that, putting on one side certain pending matters, since 1997 Mr Perotti has made 80 different applications to the court in different matters, of which two have been allowed, 75 refused, and three have been disposed of by different orders. Forty of these applications were made in 2002 and 2003. In relation to the 82 applications, Mr Perotti has paid the appropriate court fee seven times. On one occasion he received a remission of the fee, and on the other 74 occasions he was exempted from paying a fee, so that the entire cost of processing his applications has fallen on the taxpayer (or on other fee-paying litigants).

[55] It appears that on three occasions, in November 1997 and in March and July 1999, High Court judges made civil restraint orders (formerly known as *Grepe v Loam* orders (see *Grepe v Loam* (1887) 37 Ch D 168) against him. On

10 April 2003 Neuberger J made an extended civil restraint order (formerly known as an *Ebert* order (see *Ebert v Venvil, Ebert v Birch* [2000] Ch 484, [1999] 3 WLR 670)). On 26 February 2004 Chadwick LJ refused permission to appeal against Neuberger J's order. He set out passages from Neuberger J's judgment in his own judgment ([2004] EWCA Civ 269 at [15]–[17]) and I need not repeat them here. It is sufficient to say that Neuberger J considered that in his experience of litigants in person, which was not insignificant, Mr Perotti was second to none in terms of his persistence, and in terms of the aggressiveness, rudeness and unreasonableness with which he conducted his applications. He said that this was as plain a case for making an extended *Grepe v Loam* order as he had ever seen. Chadwick LJ said that there were ample grounds on which Neuberger J could have properly reached the conclusion that an extended restraint order was required in this case.

[56] At the end of his judgment given on 26 February Chadwick LJ expressed concern about the risk of a stream of applications by Mr Perotti coming to this court after a High Court judge had made an order refusing him permission to issue an application or to start an action under the powers given to him by the extended civil restraint order. He observed that it was plain that Mr Perotti's reaction to any decision which was made against him was automatically to serve a notice of appeal without, it seemed, giving any proper thought to the question whether the appeal had any proper basis in fact or in law. He said that the time had come, as it seemed to him, to consider whether the extended civil restraint order should be varied so as to provide that a decision of the judge of the High Court should be final and not subject to any further appeal unless the judge himself gave permission to appeal.

[57] In addition to this warning the Civil Appeals Office, at my direction, had notified Mr Perotti on 23 February that at this hearing the court might wish to consider whether to make any further order restraining his litigious activities in the Court of Appeal, and if so in what terms this order should be made.

[58] The outcome of the present applications has shown without any doubt that unless more effectively restrained Mr Perotti will continue to abuse the processes of this court and to waste its resources on applications that are totally without merit. It has confirmed Chadwick LJ's view that Mr Perotti files these applications without giving any proper thought to whether the appeal has any proper basis in fact or in law. The judgment of this court in *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113, [2004] 1 WLR 8 has illuminated the range of powers a superior court now possesses in order to protect its process from abuse, and the reasons why these powers are needed. During the course of his submissions to us Mr Perotti told us that he wanted his damages and compensation, and that it was 'no skin off his nose' who he got the damages from. He also told us that he wanted the decision to strike out his action against Mr Hinks reopened under the *Taylor v Lawrence* jurisdiction (see *Taylor v Lawrence* [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528). He has already filed with the Court of Appeal notices of appeal in other matters where lower courts have struck out other actions of his that relate to the same saga.

[59] When we hand this judgment down, we will permit Mr Perotti 30 minutes in which to make submissions to us as to why we should not give the following directions.

[60] First, a direction that the extended civil restraint order made by Neuberger J should be varied in two ways. It should now include this paragraph:

'If the claimant wishes to apply for such permission then such application for permission must be made without notice (save as provided at (3) above) in writing to Mr Justice Rimer or to such other judge of the High Court as may be nominated by the Vice-Chancellor from time to time, and will be disposed of on paper. That judge's decision will be final and will not be subject to any appeal unless the judge himself gives permission to appeal.'

A new para 8 to the order (following the guidance given by this court in *Bhamjee v Forsdick (No 2)*) should also be added in these terms: 'This order will be effective until ...th May 2006 and will then expire (unless renewed in the meantime).'

[61] Secondly, because the range of Mr Perotti's persistent and vexatious litigation now goes much wider than litigation against the persons protected by the extended civil restraint order (namely Mr Watson, his firm Mackrell Turner Garrett, and/or any partner, former partner, employee, or former employee of such firm or his, or their present or former legal representative), a direction that any other application to this court by Mr Perotti in any matter not embraced by the terms of the extended civil restraint order should, for the next two years, be considered only by a judge of this court on paper (unless that judge considers that an oral hearing would be appropriate). This decision on paper would be final and not subject to any reconsideration at a hearing, so that CPR 52.4(4) should not apply in Mr Perotti's case. This direction would embrace consideration of the remaining notices of appeal which are still awaiting a decision whether to grant permission to appeal. The reason for making such a direction would be that the nuisance posed by Mr Perotti's litigious activities is now so extreme that the court would be entitled to take this unusual step to protect its own processes and the interests of other litigants.

[62] Thirdly, a direction that the Civil Appeals Office should send all relevant papers to the Attorney General so that he may consider whether it is appropriate to seek an order against Mr Perotti under s 42 of the Supreme Court Act 1981.

[63] Finally, a direction that the stay on the sale of Mr Perotti's property at 43A Ridgemount Gardens, which was continued in effect by Chadwick LJ on 26 February 2004, should now be lifted.

[64] Because this judgment contains matters of general importance it is released from the normal prohibition on citation of judgments of this type.

MAURICE KAY LJ.

[65] I entirely agree.

Applications dismissed.

Dilys Tausz Barrister.

Note

Perotti v Collyer-Bristow (a firm) (No 2)

[2004] EWCA Civ 1019

COURT OF APPEAL, CIVIL DIVISION
BROOKE AND MAURICE KAY LJJ
29 JUNE, 27 JULY 2004

Judgment – Handed down judgments – Judgment in advance of hearing – Correction of minor errors.

Notes

For correction of errors in judgments and orders, see 37 *Halsbury's Laws* (4th edn reissue) para 1211.

Cases referred to in judgment

A-G v Ebert [2001] EWHC Admin 695, [2002] 2 All ER 789, DC.
Bhamjee v Forsdick (Practice Note) [2003] EWCA Civ 1113, [2004] 1 WLR 88.
Practice Statement (Royal Courts of Justice: judgments) [1998] 2 All ER 667, [1998] 1 WLR 825

Applications

Angelo Perotti applied for permission to appeal against (i) the judgment of Lindsay J on 21 January 2003 ([2003] EWHC 25 (Ch), [2003] All ER (D) 149 (Jan)) dismissing his claim for damages for professional negligence against Collyer-Bristow, a firm of solicitors; (ii) twelve rulings made by Lindsay J in the course of the trial between 22 October 2002 and 21 November 2002; and (iii) for reconsideration of the decision of Master Venne on 3 April 2003 refusing to direct that certain parts of the trial proceedings be prepared at public expense. The Court of Appeal (Brooke and Maurice Kay LJJ) sent its draft judgment to Mr Perotti, in which the court stated that Mr Perotti would be permitted, when the judgment was handed down, to make brief submissions as to why proposed directions should not be given. Mr Perotti did not visit his address for service until after the court handed down the judgment on 21 May 2004 ([2004] EWCA Civ 639, [2004] 4 All ER 53). The court therefore directed that the order should not be drawn up immediately so as to allow Mr Perotti the opportunity to be heard.

Mr Perotti appeared in person.
The defendants were not represented.

Cur adv vult

27 July 2004. The following judgment of the court was delivered.

BROOKE LJ.

[1] On 21 May 2004 we handed down our judgment in this case ([2004] EWCA Civ 639, [2004] 4 All ER 53). It was sent to Mr Perotti in draft and arrived at his address for service on 19 May, but he did not go there until after we had delivered

judgment. We therefore directed that our order should not be drawn up immediately in order to give Mr Perotti the opportunity to make submissions to us as to why we should not give the directions suggested in paras [60]–[63].

[2] In the event he sent us very full written submissions. We also allowed him ten minutes for oral submissions at the hearing on 29 June but he preferred to take up the whole of the time allotted that morning to his submissions in the appeal relating to his action against Iliffes Booth Bennett and others.

[3] As is Mr Perotti's custom, he sent us very extensive submissions. While we are willing to consider 'typing errors, wrong references and other minor corrections of that kind' (see *Practice Statement (Royal Courts of Justice: judgments)* [1998] 2 All ER 667 at 1021, [1998] 1 WLR 825 at 827) we are certainly not willing to consider renewed submissions on the merits. After considering Mr Perotti's points, we direct that the following changes be made to the text of Brooke LJ's approved judgment:[a]

Para [4] Lines 3–4
Substitute 'March 1992' for 'March 1991'.

Para [10] Lines 2–4
Delete second sentence and substitute:

> 'This achieved nothing because Mr Perotti was unable to reach agreement with Mr Saner on the terms on which Mr Saner and his firm would be willing to assist him.'

Para [17] Line 2
Delete second sentence and substitute:

'Mr and Mrs Abbate served their defence on 22 December 1992, Mr Watson on 12 February 1993 (his defence included a counterclaim for an order for the administration of the testator's estate, "if and in so far as it be necessary") and Mr Impanni on 30 April.'

Para [25] Lines 1–2
Delete first sentence and substitute:

> 'Mr Hinks, on the other hand, succeeded in his much later application for summary judgment to be entered in his favour, Master Moncaster having on 16 April 1999 refused to strike out the action against him as well.'

[4] We have now had the opportunity of considering Mr Perotti's submissions as to the orders we said we were minded to make (see paras [60]–[63] of Brooke LJ's earlier judgment). It is well established in Strasbourg jurisprudence that any court is entitled to protect its process from abuse, provided that the very essence of a litigant's right of access to the court is not impaired, and Mr Perotti is wrong when he suggests that he has an absolute right to an oral hearing in the Court of Appeal either under art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) or at common law or otherwise. See *Bhamjee v Forsdick (No 2)* [2003] EWCA Civ 1113 at [49], [50], [2004] 1 WLR 88 at [49], [50]; *A-G v Ebert* [2001] EWHC Admin 695 at [36], [2002] 2 All ER 789 at [36].

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a Editor's note: the changes set out in [3] have been incorporated in the text of Brooke LJ's judgment reported at [2004] 4 All ER 53.

[5] We postponed the delivery of this judgment until after we had had the opportunity of considering the merits of Mr Perotti's application for permission to appeal against the judgment of Peter Smith J in his action against Iliffes Booth Bennett and others. Now that we have determined that application, we see no reason why we should continue the stay on the sale of Mr Perotti's property. a

[6] We therefore direct that the order we made in Mr Perotti's absence on 21 May be now drawn up and sealed. That order covers the matters mentioned in paras [60]–[63] of the earlier judgment. b

[7] Since this judgment is ancillary to our earlier judgments in this matter it is also released from the normal prohibition on citation.

Order accordingly.

Dilys Tausz Barrister.

Director of Public Prosecutions v Meaden

[2003] EWHC 3005 (Admin)

DIVISIONAL COURT

ROSE LJ AND JACKSON J

1 DECEMBER 2003

Police – Assault on constable in execution of duty – Execution of duty – Execution of search warrant relating to property and persons therein – Police officers restricting movement of persons on premises while premises being searched – Whether police officers acting in execution of duty – Police and Criminal Evidence Act 1984, s 117.

Police officers executed a search warrant issued by magistrates under the Misuse of Drugs Act 1971 and the Police and Criminal Evidence Act 1984. The warrant authorised the search of specified premises and any persons found therein. The procedure used for searching the property was to search one room and when it had been ascertained that there was nothing of interest within it to those searching, to move the occupants into that 'sterile' room, and then search the other rooms. The defendant was searched and then entered the bathroom. He was detained in the bathroom while the first room was being searched. Once the sterile room was ready, he was asked to move into it. He repeatedly refused. The police officer attempted to guide the defendant. He resisted, holding out both arms to block the doorway, tensing his body and shouting abuse. He was eventually persuaded to go into the sterile room. Once within that room, another police officer was ordered to ensure that the defendant did not leave. The officer stood in the doorway. The defendant became abusive and ran at the officer with raised arms and clenched fists. The officer pushed him away. The defendant threw a cigarette lighter at the officer. He was then arrested for assaulting the officer in the execution of his duty and charged with that offence and, in relation to his actions in the bathroom, with wilfully obstructing a police officer in the execution of his duty. At trial the justices concluded that there was no case to answer as the police officers had stepped outside their duties by not allowing the defendant to move about the premises and that they had had no power to detain him. The prosecution appealed by way of case stated, submitting that the officers had been acting in the execution of their duties in using reasonable force to execute the search warrant, relying on s 117[a] of the 1984 Act, under which, where any power was conferred on a constable by the 1984 Act, and the conferring provision did not provide that the power could only be exercised with the consent of some person other than a police officer, the officer could use reasonable force, if necessary, in the exercise of the power. The defendant submitted, inter alia, that the primary focus of s 117 of the 1984 Act related to the circumstances in which officers executing a warrant entered premises.

Held – The power to use reasonable force under s 117 of the 1984 Act extended beyond the circumstances in which officers in executing a warrant entered premises to what went on once the premises had been entered and were being

a Section 117 is set out at [17], below

searched and also when the occupants of the premises were being searched. Whether the force used was reasonable depended on the facts and had to be gauged in the context of the purpose for which the force was being used. In the instant case the warrant had authorised a search of premises and persons for controlled drugs and documents connected with drugs offences and in order to be meaningful that authority had to enable the search to be effective. Although it was for the police to show that the use of force had been necessary and reasonable, it was entirely reasonable that the officers should have sought, by no more force than was necessary, to restrict the movement of those in occupation of the premises when those premises were being searched. Accordingly, the appeal would be allowed, and the matter remitted to the justices to continue the hearing (see [31]–[36], [38], [40], below).

Hepburn v Chief Constable of Thames Valley Police [2002] All ER (D) 214 distinguished.

Notes

For the power of a constable to use reasonable force, and for standard procedure in the conduct of searches, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 658, 681.

For the Police and Criminal Evidence Act 1984, s 117, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 807.

Cases referred to in judgments

Bentley v Brudzinski (1982) 75 Cr App R 217, DC.

Donnelly v Jackman [1970] 1 All ER 987, [1970] 1 WLR 562, DC.

Hepburn v Chief Constable of Thames Valley Police [2002] EWCA Civ 1841, [2002] All ER (D) 214, (2002) Times, 19 December.

Ludlow v Burgess (1982) 75 Cr App R 277, DC.

O'Loughlin v Chief Constable of Essex [1998] 1 WLR 374, CA.

R v Jones, R v Nelson (1999) Times, 21 April, CA.

R v Rahman (1985) 81 Cr App R 349, CA.

Cases referred to in skeleton arguments

C v DPP [2003] EWHC 2780 (Admin), DC.

R v McCay [1991] 1 All ER 232, [1990] 1 WLR 645, CA.

R v Quinn [1995] 1 Cr App R 480, CA.

Swales v Cox [1981] 1 All ER 1115, [1981] QB 849, [1981] 2 WLR 814, DC.

Case stated

The Director of Public Prosecutions appealed by way of case stated from the decision of the Sussex Justices for the Petty Sessional Division of Mid-Sussex sitting at Horsham that the defendant, Michael Meaden, had no case to answer in relation to informations preferred against him for assaulting PC Convery while in the execution of his duty, contrary to s 89(1) of the Police Act 1996, and wilfully obstructing PC Pinyoun in the execution of his duty, contrary to s 89(2) of the 1996 Act. The questions for the consideration of the court are set out at [11], below. The facts are set out in the judgment of Rose LJ.

Hugh Davies (instructed by the *Crown Prosecution Service*, Crawley) for the DPP.
Francis Fitzgibbon (instructed by *Hamnett Osborne Tisshaw*, Haywards Heath) for the defendant.

ROSE LJ.

[1] This is an appeal by way of case stated against a decision of the Sussex Justices for the Petty Sessional Division of Mid-Sussex who, sitting at Horsham, on 11 February 2003, concluded that there was in relation to the defendant (as I shall call him) no case for him to answer. Two questions were posed at the conclusion of the case stated to which, in due course, I shall come.

[2] The circumstances were that, on 3 October 2002, informations were preferred against the defendant for assaulting PC Convery while in the execution of his duty, contrary to s 89(1) of the Police Act 1996, and wilfully obstructing PC Pinyoun in the execution of his duty, contrary to s 89(2) of the same Act.

[3] The case stated identifies the facts found by the justices, and then rehearses the evidence given.

[4] In the present case, no difficulty arises from that because the recital of facts, helpfully set out by Mr Davis, for the appellant, the Director of Public Prosecutions, in his skeleton argument are accepted by Mr Fitzgibbon for the defence.

[5] The facts were these. On 3 October 2002 a number of police officers, between 7 and 14 of them, executed a search warrant issued by magistrates on 1 October 2002, under s 23 of the Misuse of Drugs Act 1971 and s 15 of the Police and Criminal Evidence Act 1984 (PACE). That warrant identified the premises to be searched as 68 Washington Road, Haywards Heath, and associated outbuildings and vehicles, on the basis of a suspicion that controlled drugs, or documents which might be connected with offences under the 1971 Act, might be found in those premises, or in the possession of persons at those premises. It is pertinent to note, particularly having regard to the terms of the warrant in the Court of Appeal's decision in *Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841, [2002] All ER (D) 214, (2002) Times, 19 December, to which the justices were referred, that the warrant extended not only to the premises but also to searching any persons found therein.

[6] The premises in question were on two floors. Constables Pinyoun and Convery were ordered to search and contain the upper floor. That was occupied by the defendant and two relations of his, Sheila Meaden and Christine Meaden. The defendant was immediately abusive to the officers. The procedure for searching the property was to search one room and, when it was ascertained that that was sterile in the sense that there was nothing of interest to those searching within it, the occupants of the premises were then, having themselves been searched, moved into that room, in order to enable the other rooms in the premises to be properly searched; thereby, of course, the disposal of drugs by any of the occupants, and the contamination of other rooms which had already been searched, could be avoided.

[7] The defendant, in accordance with that procedure, was searched and then went into the bathroom. There was no evidence as to whether the bathroom had been searched at that time, but a bedroom was searched. It was Mrs Meaden's bedroom. The defendant was detained in the bathroom while the bedroom was being searched. He asked to go downstairs to get himself a drink. Constable Pinyoun refused. The defendant said it was his house and he could do

whatever he liked. His language was robust, and he was warned about swearing. Once the bedroom had been searched, the defendant was asked to move into it. He repeatedly refused. He was warned that he might be arrested for obstructing a police officer, although, as will emerge, there are conspicuous limitations on the power of the police in that respect.

[8] Constable Pinyoun sought to guide the defendant. He resisted. He held out both his arms to block the doorway, and he tensed his body and shouted abuse towards the officer. Eventually, however, although still angry, he was persuaded to leave the bathroom and was guided to the searched bedroom. There was no question at that stage of him being under arrest. But that conduct was the basis of the first of the charges against him, namely wilfully obstructing Constable Pinyoun in the execution of his duty, contrary to s 89(2), of the 1996 Act, by resisting the officer's attempt to remove him from the bathroom and put him in the bedroom.

[9] Once he was in the bedroom, Constable Convery was ordered to keep an eye on the defendant to ensure he did not leave it. The officer stood in the doorway to achieve this. The defendant now swore at this officer. He asked if he could go downstairs. He was refused permission and he pushed the officer. He was told to stay in the bedroom. He became more abusive and ran at Constable Convery with arms raised and fists clenched. The officer pushed him away. The defendant threw a cigarette lighter at the officer. He was, thereupon, arrested for assaulting Constable Convery in the execution of his duty.

[10] The case stated indicates that the justices were referred to three authorities: *Donnelly v Jackman* [1970] 1 All ER 987, [1970] 1 WLR 562; *R v Rahman* (1985) 81 Cr App R 349; and *Hepburn v Chief Constable of Thames Valley Police* (as reported in (2002) Times, 19 December). They were also referred to certain passages in *Blackstone's Criminal Practice* (13th edn, 2003) pp 172–174 (paras B2.25–2.30), pp 184–186 (paras B2.57–2.62). Their conclusions are set out in the case stated:

> 'We were of the opinion that the police officers had stepped outside their duty by not allowing the defendant to move about the premises. The police had no express power to detain the defendant and he was therefore falsely imprisoned. When the defendant obstructed the search the officers' remedy was to arrest him in accordance with *Hepburn*'s case. The police on failing to arrest the defendant detained him unlawfully and therefore acted outside their duty. An essential element of both of the offences was missing and therefore there was no case to answer and the case was dismissed.'

[11] The case concludes by posing these questions for the consideration of this court:

> 'Are police officers that are executing a search warrant of a property acting within the execution of their duty if they ask individuals within the property to go into and remain in certain rooms whilst they are searching other rooms in the property? Further, are they entitled to prevent individuals from leaving the property altogether?'

It is to be noted that in posing those questions the justices refer to the search warrant in relation to the property. They do not refer to the material aspect of this search warrant, which related to persons within the premises as well as the premises. To those questions, in due course, I shall return.

[12] The submission which is made on behalf of the Director of Public Prosecutions, by Mr Davis, is that police officers are acting in the execution of their duty in requiring those within premises, the subject of a lawful search, to remain in sterile rooms within the premises during the search, or at least to refrain from visiting non-sterile areas of the premises subject to the search. It is further submitted that the present case is distinguishable from *Hepburn*'s case because the search warrants in *Hepburn*'s case simply authorised a search of the premises, rather than extending also to persons within them. Furthermore, whereas Mr Hepburn was seeking to leave the premises subject to search completely, the defendant was seeking to 'move freely' within the premises during the search. Mr Davies submits that the reasoning of *Hepburn*'s case should be reviewed because the judgment of Sedley LJ, with which the other members of the court agreed, appears to proceed on the basis that the offence of obstructing a police officer in the execution of his duty under s 89(2) of the 1996 Act is an arrestable offence.

[13] So far as that aspect of the matter is concerned, it is common ground that there is no express power of arrest for wilful obstruction of a police officer in the execution of his duty contrary to s 89(2) of the 1996 Act. It is an offence triable only summarily, and s 26 of PACE repealed, subject to express exemptions within Sch 2, any Act enabling a constable to arrest a person for an offence without warrant. Neither s 23(4) of the 1971 Act, nor s 89 of the 1996 Act is specified among the exceptions listed in Sch 2. By para 22 of Sch 1A, an offence under s 89(1) of the 1996 Act is specified but not an offence under s 89(2). And so, it is common ground, the only power of arrest that the officers carrying out this search would have had, in relation to obstruction of their conduct, would be if the criteria identified in s 25 of PACE, by way of general arrest conditions, were fulfilled. Those general arrest conditions, as identified in s 25(3), are for present purposes:

> '(d) that the constable has reasonable grounds for believing that arrest is necessary to prevent the relevant person—(i) causing physical injury to himself or any other person; (ii) suffering physical injury; (iii) causing loss of or damage to property ...'

Accordingly, submits Mr Davies, when the judgment of the Court of Appeal in *Hepburn*'s case [2002] All ER (D) 214 is considered in the full transcript (that full transcript not, as I have said, being before the justices at the time of their decision), para [14] of Sedley LJ's judgment is not, as it stands, a correct statement of the law. Sedley LJ said:

> 'If a person obstructs a police officer in the execution of his or her duty an offence is committed and a power of arrest arises. That, and not an implied power to detain or manhandle people who are doing nothing wrong, is how the law protects officers executing a search warrant from interference.'

[14] That passage, submits Mr Davies, has to be read in the light of the absence of any specific power of arrest, for the reasons which we have given, in relation to obstructing a police officer in the execution of his duty, and the need, before any power of arrest could arise in the circumstances of such a search as the one with which we are concerned, for the criteria set out in s 25 of PACE to be

fulfilled. That is to say, there is no general power of arrest merely because someone is obstructing a police officer in the execution of his duty.

[15] I return to the statutory provisions which gave rise to, and supported, the issuing of the search warrant in the present case. Section 23 of the 1971 Act, provides in material part:

> *'Powers to search and obtain evidence* ... (2) If a constable has reasonable grounds to suspect that any person is in possession of a controlled drug ... the constable may—(a) search that person, and detain him for the purpose of searching him ...
>
> (3) If a justice of the peace ... is satisfied by information on oath that there is reasonable ground for suspecting—(a) that any controlled drugs are, in contravention of this Act or of any regulations made thereunder, in the possession of a person on any premises; or (b) that a document directly or indirectly relating to, or connected with, a transaction or dealing which was, or an intended transaction or dealing which would if carried out be, an offence under this Act ...' A search warrant can be issued.

Section 23 continues: '(4) A person commits an offence if he—(a) intentionally obstructs a person in the exercise of his powers under this section ...'

[16] Section 15 of PACE was the other section under which a search warrant in the present case was issued. It identifies the safeguards in relation to the execution of search warrants, which impose a variety of duties and obligations upon a constable who is applying for the issue of such a warrant.

[17] Section 117 of PACE provides:

> *'Power of constable to use reasonable force.*—Where any provision of this Act—(a) confers a power on a constable; and (b) does not provide that the power may only be exercised with the consent of some person, other than a police officer, the officer may use reasonable force, if necessary, in the exercise of the power.'

[18] The Code of Practice issued under PACE has a status identified by ss 60, 66 and 67 of the Act, namely it is designed to regulate the conduct of persons charged with the duty of investigating offences. Non-observance of the code does not of itself give rise to any criminal or civil liability, but compliance therewith, or breach thereof, may be relevant to decisions about the admissibility of the evidence. *The Code of Practice for the Searching of Premises by Police Officers and the Seizure of Property found by Police Officers on Persons or Premises* (Code B) (4th edn, 1997) provides: '5.9 Premises may be searched only to the extent necessary to achieve the object of the search, having regard to the size and nature of whatever is sought.' And para 5.10 provides:

> 'Searches must be conducted with due consideration for the property and privacy of the occupier of the premises searched, and with no more disturbance than necessary. Reasonable force may be used only where this is necessary because the co-operation of the occupier cannot be obtained or is insufficient for the purpose.'

[19] In the light of those provisions, Mr Davies submits that the code provisions as to reasonable force echo the power to use reasonable force set out in s 117. It follows, he submits, that, in any particular case, a police officer will be

acting in the execution of his duty if he uses reasonable force to execute the search warrant; whether force is reasonable is obviously a matter of fact in each case.

[20] Mr Davies submits, and this is conceded by Mr Fitzgibbon on behalf of the defendant, that it is a legitimate and proportionate reading of any statutory power to search that reasonable steps may be taken by the police to ensure that the search is effective. The right of any individual to move freely around premises as they are searched, and thereby likely to compromise the search, must be balanced against the forensic requirements of the search in terms of evidence. There is an obvious public interest in the police being able to carry out thorough, effective, searches, and to secure the integrity of exhibits for evidential purposes.

[21] Mr Davies submits that, in the present case, the justices do not appear to have taken into account the s 117 powers to which I have referred. Had they done so, rather than directing themselves in accordance with the Times Law Report in *Hepburn*'s case they could, he submits, only rationally have concluded that the police officers in the present case were using reasonable force and thus acting in the execution of their duty. It would defeat the object of the search of premises and occupants of premises, if members of the public from outside, or occupants within the premises, were permitted to wander freely around the premises during the search. Accordingly, he submits, the defendant's detention was reasonable in the context of this search, and such force as was used was reasonable as being ancillary to the power to search. Had he been permitted to wander around the premises it might well have been necessary to search him again.

[22] On behalf of the defendant, Mr Fitzgibbon submits that the justices were entitled to find that Constable Convery was not acting in the execution of his duty when the defendant assaulted him. The defendant was not being lawfully detained, the police having no power to detain him at the time. In that the defendant was prevented from leaving first the bathroom and then the bedroom, he was being held in unlawful detention. Section 117, he submits, does no more than permit the police to use reasonable force when exercising the power conferred by other provisions of PACE. It confers no free-standing right to use force, much less to detain someone. The question which arises, in particular under Code B, para 5.10, is whether the defendant was being so unco-operative once the police had entered the premises that it was a necessary and proportionate response to detain him in the manner in which he was detained. The submission is that it was not so necessary and proportionate and, therefore, the justices were entitled to reach the conclusion they did.

[23] Mr Fitzgibbon referred to a number of authorities: *O'Loughlin v Chief Constable of Essex* [1998] 1 WLR 374 and, in particular, a passage in the judgment of Roch LJ in that case (at 383) where he referred to the 'severe burden which a constable has to discharge when trying to prove that the use of force was really necessary in order to justify his use of force'. That observation, for my part, I bear in mind.

[24] Mr Fitzgibbon also referred to *R v Jones, R v Nelson* (1999) Times, 21 April and to certain observations by Beldam LJ in relation to Code C, para 8.9, and Beldam LJ's view that the requirement that reasonable force may be used to secure conditions of detention does not authorise the use of force to bring about a confrontation. That observation, in a very different factual context, does not, to my mind, assist in the resolution of the present case.

[25] Mr Fitzgibbon submits, courageously, that it is immaterial that the justices relied on *Hepburn v Chief Constable of Thames Valley Police*. Mr Fitzgibbon

also referred to *Ludlow v Burgess* (1982) 75 Cr App R 277 and *Bentley v Brudzinski* (1982) 75 Cr App R 217. It is to be noted that the facts in those cases were very different and, in particular, neither of them related to the execution of a search warrant. For my part, I do not find them of assistance in the present case.

[26] Mr Fitzgibbon finally relied on arts 5 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). Article 5 asserts everyone's right to liberty and security. He submits that what occurred in the present case was not within 'a procedure prescribed by law' within (c), namely the lawful arrest or detention of a person for the purpose of bringing him before the competent legal authority. For my part, I am happy to accept that that is so. It may well be, as it seems to me, however, that the conduct here was within (b) of art 5(1). Be that as it may, it does not seem to me that art 5 adds anything to the common law principles which are, to my mind, determinative in the present case.

[27] As to art 8, the right to respect for private and family life. The provisions in relation to interference by a public authority, so far as is in accordance with the law and necessary in a democratic society for the prevention of disorder or crime, seem to me, again, not to add, in the circumstances of the present case, materially to the common law position.

[28] In essence, Mr Fitzgibbon's submission amounted to this. Absent any specific statutory power, this defendant ought to have been permitted, having himself been searched, to wander around the premises save those parts which were in the process of being searched. Any other conclusion, he submits, would be a step too far in conferring power upon the police in carrying out this search.

[29] As it seems to me, the justices' reliance on the Court of Appeal's decision in *Hepburn's* case was misplaced. They were plainly thereby led into error. The crucial distinction between *Hepburn's* case and the present case, although this is perhaps not as clear from the Times Law Report, to which the justices were referred, as it is from the full transcript which is before us, is that the search warrant in that case was limited to the premises, whereas here the warrant applied both to the premises and to any persons found there. It is not for this court to question the conclusion reached by the Court of Appeal on the particulars facts in *Hepburn's* case. But the reasoning of Sedley LJ at [14]), which I have rehearsed, may, on some future occasion, merit consideration. It may also be that, in *Hepburn's* case, the warrant was issued only under s 23(3) of the 1971 Act, for s 117 of PACE was not referred to in the judgment in that case. But, in any event, for the reasons which I have already sought to explain, contrary to the observation made by Sedley LJ, there is not any general power of arrest for obstructing a police officer in the execution of his duty.

[30] That said, those are not matters which affect the outcome of the present appeal because, as I have already indicated, *Hepburn's* case is plainly distinguishable from the present case. Furthermore, the warrant here was not only issued in relation to persons as well as premises, it was issued under both s 23 of the 1971 Act and s 15 of PACE, in relation to which there are the powers enshrined in s 117 of that Act. Section 23 conferred on the officers a power to detain people for the purpose of searching them, and s 117 conferred the power to use reasonable force for the purpose of executing the warrant.

[31] I accept Mr Fitzgibbon's submission that the primary focus of s 117 no doubt relates to the circumstances in which officers in executing a warrant enter premises, and it is not the entry of the premises which gives rise to the present difficulty. But it is also plain to my mind that s 117 also extends to what goes on

once the premises have been entered and are being searched and also when the occupants of the premises are being searched. Whether, in a particular case, the force used is reasonable, depends on the particular facts and, in my judgment, has to be gauged in the context of the purpose for which the force is being used.

[32] Here the warrant authorised a search of premises and persons for controlled drugs and documents connected with drugs offences. That authority, to be meaningful, had, as it seems to me, to enable the search to be effective. It could not be effective, particularly in premises on two floors, presently occupied by a number of people, if the occupiers were permitted to move about freely within the premises while the searches were going on. Although I accept it is for the police to show, and the burden upon them is a heavy one, that the use of force was necessary and reasonable, it seems to me to be entirely reasonable that officers should seek, by no more force than is necessary, to restrict the movement of those in occupation of premises while those premises are being searched.

[33] In the present case, it was reasonable to restrict the defendant initially in the bathroom while the bedroom was being searched and, subsequently, in the bedroom while the rest of the premises were being searched.

[34] Accordingly, returning to the questions posed by the justices at the end of the case, I would answer both of them in the affirmative, subject to the proviso that what is appropriate depends on the facts of the particular case. The justices were, in my view, wrong to accede to the submission that there was no case to answer.

[35] If Jackson J agrees, I would allow this appeal and remit the matter to the justices to continue the hearing.

JACKSON J.

[36] I agree. In *Hepburn v Chief Constable of Thames Valley Police* [2002] EWCA Civ 1841 at [14], [2002] All ER (D) 214 at [14], (2002) Times, 19 December, Sedley LJ said:

> 'It is a bedrock of our liberties that a citizen's freedom of person and of movement is inviolable except where the law unequivocally gives the state power to restrict it. If a person obstructs a police officer in the execution of his or her duty an offence is committed and a power of arrest arises. That, and not an implied power to detain or manhandle people who are doing nothing wrong, is how the law protects officers executing a search warrant from interference.'

[37] The latter part of that paragraph is open to question for the reasons stated by Rose LJ. However, the first sentence of that paragraph states an important principle of English law, which is not open to question. In the present case the warrant issued under s 23 of the Misuse of Drugs Act 1971 and under s 15 of the Police and Criminal Evidence Act 1984, expressly authorised police officers both to search the property and also to search any persons within the property, such as the defendant.

[38] In my judgment, that search warrant, in conjunction with the statutory provisions governing it, did unequivocally give to police officers the power to restrict the respondent to a sterile room during the currency of the search.

[39] Accordingly, the important principle of law stated by Sedley LJ was not infringed by restricting the respondent to the bedroom and the bathroom at the relevant time. a

[40] In those circumstances, the justices erred in law in concluding at the end of the prosecution evidence that there was no case to answer.

Appeal allowed. Case remitted to the justices to continue hearing. b

Dilys Tausz Barrister.

Mattis v Pollock (trading as Flamingos Nightclub)

[2003] EWCA Civ 887

COURT OF APPEAL, CIVIL DIVISION
JUDGE, DYSON LJJ AND PUMFREY J
14 MAY, 1 JULY 2003

Vicarious liability – Master and servant – Employer expecting employee to use violence while carrying out his duties – Employee involved in violent incident with employer's customers during employment – Employee leaving premises – Employee returning to vicinity and injuring customer – Whether employer vicariously liable.

The defendant employed a doorman at his nightclub. The doorman's behaviour was aggressive and intimidating. The defendant intended that the doorman should be prepared to use physical force to ensure compliance with the defendant's instructions to customers at the club. One of the claimant's friends, C, was ejected from the club on the defendant's instructions. A week later the claimant was at the club. C and others arrived later. The doorman told C that he was not allowed in the club. He hit C the face with a weapon and struck on the head a friend who protested. The claimant tried to pull the doorman away. The doorman's behaviour provoked a negative reaction and a number of the people in the club gathered round him; he was struck several times and a glass object was broken over his head. The doorman managed to escape to his flat, which was nearby, where he armed himself with a knife. The claimant and the others assembled outside the club and decided to make their respective ways home. The doorman returned to the vicinity of the club, intent on revenge for the injuries inflicted on him and what he perceived as the public humiliation of having been driven from the club. The group of customers, other than the claimant, split up and fled. The doorman stabbed the claimant, severing his spinal cord, and set off in brief pursuit of the others. The attack rendered the claimant a paraplegic. He brought a claim for damages against the defendant on the basis, inter alia, that he was vicariously liable for the injuries inflicted by the doorman. The judge concluded that, at the time of the knife attack on the claimant, the defendant had ceased to be under any continuing duty to him. The events which culminated in the stabbing were not to be treated as a single event, which had begun in the club while the doorman was working and therefore there was not a sufficiently close connection between the employment of the doorman by the defendant and the assault for it to be fair and just for the defendant to be vicariously liable to the claimant for the consequences of that attack. The claimant appealed.

Held – Where an employee was expected to use violence while carrying out his duties, the likelihood of establishing that an act of violence fell within the broad scope of his employment was greater than it would be if he were not. In the instant case the doorman had been encouraged and expected to perform his duties of keeping order and discipline at the nightclub in an aggressive and intimidatory manner. The attack on him inside the club had wholly undermined the doorman's reputation and status as the doorman the defendant expected him

to be and his return to the vicinity had been motivated by a need to revenge the physical injuries and public humiliation he had sustained. The stabbing of the claimant represented the culmination of the incident which had started within the club and could not fairly and justly be treated in isolation. Even allowing that the doorman's behaviour included an important element of personal revenge, approaching the matter broadly, at the moment when the claimant had been stabbed, the responsibility of the defendant for the actions of his aggressive employee had not been extinguished and he was therefore vicariously liable. The appeal would accordingly be allowed (see [19], [25], [30]–[32], below).

Lister v Hesley Hall Ltd [2001] 2 All ER 769 and *Dubai Aluminium Co Ltd v Salaam (Livingstone and ors, third parties)* [2003] 1 All ER 97 applied.

Notes

For the liability of employers for torts committed by an employee in the course of his employment, see 45(2) *Halsbury's Laws* (4th edn reissue) paras 304, 819–820.

Cases referred to in judgment

Cave v Ritchie Motors Ltd (1972) 34 DLR (3d) 141, BC SC.

Children's Foundation v Bazley [1999] 4 LRC 327, sub nom *Bazley v Curry* (1999) 174 DLR (4th) 45, Can SC.

Daniels v Whetstone Entertainments Ltd [1962] 2 Lloyd's Rep 1, CA.

Deatons Pty Ltd v Flew (1949) 79 CLR 370, Aus HC.

Dubai Aluminium Co Ltd v Salaam (Livingstone and ors, third parties) [2002] UKHL 48, [2003] 1 All ER 97, [2003] 2 AC 366, [2003] 3 WLR 1913.

Dyer v Munday [1895] 1 QB 742, [1895–9] All ER Rep 1022, CA.

Fontin v Katapodis (1962) 108 CLR 177, Aus HC.

Griggs v Southside Hotel Ltd [1947] 4 DLR 49, Ont CA.

Irving v Post Office [1987] IRLR 289, CA.

Keppel Bus Co Ltd v Sa'ad bin Ahmad [1974] 2 All ER 700, [1974] 1 WLR 1082, PC.

Lister v Hesley Hall Ltd [2001] UKHL 22, [2001] 2 All ER 769, [2002] 1 AC 215, [2001] 2 WLR 1311.

Vasey v Surrey Free Inns plc [1996] PIQR P373, CA.

Warren v Henlys Ltd [1948] 2 All ER 935.

Cases referred to in skeleton arguments

Balfron Trustees Ltd v Peterson [2001] IRLR 758.

Cercato-Gouveia v Kyprianou [2001] EWCA Civ 1887, [2001] All ER (D) 437 (Nov).

Hudson v Ridge Manufacturing Co Ltd [1957] 2 All ER 229, [1957] 2 QB 348, [1957] 2 WLR 948.

Jacobi v Griffiths [1999] 4 LRC 348, (1999) 174 DLR (4th) 71, Can SC.

South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group plc [1996] 3 All ER 365, [1997] AC 191, [1996] 3 WLR 87, HL.

Appeal

David Wilson Mattis appealed from the decision of Judge Richard Seymour QC sitting as a High Court judge on 24 October 2002 ([2002] EWHC 2177 (QB)) dismissing his claim against Gerrard Pollock, trading as Flamingos Nightclub, for damages for personal injury and consequent loss. The facts are set out in the judgment of the court.

Paul Rose QC and *Timothy Meakin* (instructed by *Leigh Day & Co*) for for Mr Mattis.
Benjamin Browne QC and *Roger Harris* (instructed by *Davies Lavery*, Maidstone) for Mr Pollock.

Cur adv vult

1 July 2003. The following judgment of the court was delivered.

JUDGE LJ.

[1] This is the judgment of the court.

[2] This is an appeal by David Mattis from the decision of Judge Richard Seymour QC, dated 24 October 2002 ([2002] EWHC 2177 (QB)), dismissing his claim against Gerard Pollock for damages for personal injury and consequent loss sustained on 1 August 1998.

[3] The essential facts are stark. At about 1.40 am on 1 August 1998, Mr Mattis, a self-employed carpenter, aged 40 years, was stabbed by a doorman employed at a nightclub called Flamingos, Stephen Cranston. His spinal cord was severed at T11 level, rendering him paraplegic and devastating his life. On 26 March 1999, Cranston was convicted at the Crown Court at Woolwich of causing Mr Mattis grievous bodily harm with intent, contrary to s 18 of the Offences Against the Person Act 1861. After a successful appeal against the sentence imposed at the Crown Court, he was ordered to serve eight years' imprisonment.

[4] The claim for damages was brought, not against Cranston personally, but rather against Mr Pollock. Until January 2000, Mr Pollock owned and operated Flamingos, on Wellington Street, Woolwich, London SE18. The essential foundation for his alleged liability for the consequences of Cranston's attack on Mr Mattis was that this incident occurred when Cranston was acting as a doorman at Flamingos. Accordingly, Mr Pollock was vicariously liable for the injuries inflicted by Cranston. Liability was also said to arise for breach of the duty of care owed by him personally to Mr Mattis. After resolving a series of complicated factual issues, the judge rejected both contentions: hence this appeal.

[5] Based on the judge's findings of fact, and when appropriate quoting his own words, the background, and the probable course of the incident itself, can be summarised shortly.

[6] Cranston started employment as a doorman, or 'door supervisor', at Flamingos on about 17 July 1998. He was so employed on the night of 31 July–1 August. Contrary to regulations then in force, he was not registered for this purpose by the licensing authority, the London Borough of Greenwich. On 26 August 1999, Mr Pollock was convicted at Woolwich Magistrates' Court of employing Mr Cranston on or about 31 July 1998 as an unlicensed door supervisor.

[7] Just after 2 am on the night of 18 July, a violent incident occurred at the club, when a man called Paul Fitzgerald was a customer. Because he failed to drink up with sufficient alacrity, Cranston seized hold of another customer, Steven Priestman, a friend of Mr Fitzgerald, and hurled him across the room. Mr Pollock gave Cranston instructions by which he meant, and Cranston understood him to mean—

> 'that an occasion should be created to impress upon Mr Fitzgerald that Mr Cranston was prepared to use physical force to ensure compliance with

any instructions which he might give to Mr Fitzgerald or any of his companions.' a

The incident involving Mr Priestman 'was provoked by Mr Cranston in compliance' with that instruction. Fortunately, this incident did not escalate into something much more serious, and Mr Priestman himself did not suffer 'any real injury'. However, the potential for injury, or for a scene of violent disorder, was real enough, and Mr Pollock connived at Cranston's display of violence. b

[8] Another, and potentially more significant incident, involving Mr Mattis and a friend of his named Dean Cook, occurred at about midnight on 24 July. On Mr Pollock's instructions that he should be barred, Mr Cook was ejected from the club by Cranston. No specific violence was used towards Mr Cook or Mr Mattis. In truth, none was needed. The intimidating atmosphere was captured in Mr Mattis's witness statement, amplifying what he had said to the police in the immediate aftermath of the incident, and his evidence at trial. In his witness statement, he said: c

'As I saw matters [Cranston] was acting on Pollock's orders to remove Dean from the club, and he made it clear that he would be violent in order to carry out these instructions, if necessary. All this time Pollock was present, and he knew precisely how Cranston was acting, and he did nothing to stop it or in any way discourage him. If anything, he was tacitly encouraging Cranston to act in this way, and it obviously gave a strong impression to persons in the club as to what action they could expect if Pollock chose to remove them.' d e

In his evidence at trial, as quoted by the judge in his judgment ([2002] EWHC 2177 (QB) at [20]), Mr Mattis said:

'Dean [Cook] was in no way aggressive or threatening. The black bouncer [Cranston], on the other hand, was very aggressive and intimidating. I got the impression that he wanted to start a fight.' f

[9] Mr Pollock was present throughout the majority of the incident involving Mr Cook, and observed how Cranston had treated him. His attitude to Cranston on this occasion, as described by Mr Mattis, was consistent with his general attitude to Cranston's behaviour with customers at the nightclub. This had attracted the attention of two of his fellow employees, to the extent that they were prepared to take it up with Mr Pollock. One warned Mr Pollock that Cranston could be 'dangerous', and pointed out that he was not licensed to act as a doorman. Another expressly described Cranston to Mr Pollock as 'a bully'. Mr Pollock's response indicated that he regarded Cranston's reputation as an attribute: 'He wished to employ someone as a doorman who could be relied upon to intimidate customers.' g h

[10] The incident on 24 July was the 'precursor' of the attack on Mr Mattis, which took place just over a week later. Mr Mattis arrived at the club at about 11.15 pm on 31 July, with other friends. They were all admitted without difficulty. At about 1 am, Mr Cook entered the club with another group of friends, including Paul Fitzgerald, and a man named John Loft. They were seen to enter by Mr Pollock, who raised no objection. As they moved through the door from the foyer, into the bar area, Cranston was leaning on the back of a seat in the passageway, and observed Mr Cook's arrival. j

[11] Cranston told Mr Cook that he was not allowed in the club. The start of the incident was not untypical. Cranston grabbed hold of Mr Cook round the neck and pulled his face close up to his own. Mr Loft was nearby and said: 'Leave him alone. He has not done anything.' Cranston then released Mr Cook, and turned his attention towards Mr Loft, who, with an instinct for self-preservation, made to disappear into the ladies' lavatory. Cranston pursued him, arming himself with something like a knuckleduster, or perhaps a cosh. He struck Mr Loft on the back of the head. Mr Loft fell to the ground. Cranston then returned his attention to Mr Cook, running towards him, and striking him in the face with the weapon he had used on Mr Loft. Mr Cook also fell to the ground.

[12] In the meantime, Mr Mattis, who had not seen the start of this incident, emerged from the men's lavatory just as Cranston was running towards Mr Cook. He saw the blow delivered by Cranston to Mr Cook, and grabbed Cranston round the waist for a few seconds to try, unsuccessfully, to pull him away. He then turned to help Mr Cook off the ground.

[13] Cranston's behaviour provoked a 'negative reaction among other persons present'. A number of them gathered around Cranston, and he was struck several times. Among other things, a glass object, probably a bottle, was broken over his head. However, he managed to escape, leaving the premises at about 1.21 am.

[14] Cranston was followed out of the club by Mr Cook and a number of others, four or five in number, but not including Mr Mattis himself. Mr Cook, and some of those who followed him out of the club, intended to continue the revenge or punishment attack on Cranston which had started in the premises themselves. However, Cranston disappeared to his own flat, something over 500 m away from the club. Those with Mr Cook gave the chase up fairly early and returned to the club, and eventually Mr Cook also gave it up and returned to join them near the club, meeting up on his return with Mr Mattis and other friend. They assembled close to a street corner some 100 m from the entrance to the club, discussing what to do next. It was now between 1.36 and 1.44 am. They decided to make their respective ways home.

[15] In the meantime, at his own flat, Cranston armed himself with a knife and returned to the vicinity of the club, intent on revenge for the injuries inflicted on him, and what he perceived as the public humiliation of having been driven from the club. He reappeared, running towards the group, carrying the knife in his hand. The entire group, except Mr Mattis, split up and fled. Mr Mattis remained more or less where he was, taking up a defensive position, anticipating a blow. Cranston grabbed hold of him, pulled him forward, and, plainly referring to Mr Mattis's intervention a little while earlier, in defence of Mr Cook, said something like, 'I'll teach you to fuck with me', and stabbed him in the upper left back. He set off in brief pursuit of others, including Mr Cook. He then ran away from the club, in the process slashing a young man, Mr Mahoney, who had had nothing whatever to do with the earlier incident, but who, on hearing something of what was happening, had, with considerable public spirit, followed Cranston, intending to assist in his apprehension.

[16] After considering the authorities, the judge concluded (at [77]) that, at the time of the knife attack on Mr Mattis, Mr Pollock had ceased to be under any continuing duty to him. The events which culminated in the stabbing of Mr Mattis should not be treated as a single incident, which had begun in the club while Cranston was working as a doorman. Rather, 'the initial incident came to an end when Mr Cranston left the club'. What he described as 'the entire episode'

would have ended, but for, first, the decision of Mr Cook and others to chase Cranston, and, second, after Cranston had made good his escape, and reached his home, his decision to arm himself, and return to the vicinity of the club:

> 'The lapse of time and the intervening events were, in my judgment, of such a nature that it would not be right to treat the event culminating in the stabbing of Mr Mattis as one incident commencing in the club ...'

He concluded (at [81]) that there—

> 'was not a sufficiently close connection between the employment of Mr Cranston by Mr Pollock and the assault on Mr Mattis for it to be fair and just for Mr Pollock to be vicariously liable to Mr Mattis for the consequences of that attack.'

[17] The judge also held that, even if it could be said that Mr Pollock owed a personal duty to his customers and other visitors to the club to take reasonable care about the character of those he employed as doormen, it did not extend to cover a knife attack which took place outside the course of the doorman's employment. The judge ended the relevant part of his judgment (at [93]):

> 'While the occasion of Mr Cranston's grievance arose while he was at work as a doorman for Mr Pollock, the injuries were caused by the decision of Mr Cranston to arm himself, to set out in search of someone upon whom to wreak his revenge, and, ultimately, when he found the group of which Mr Mattis was a member, to stab the first person within his reach. In reality it is only the last of these decisions which resulted in the injury to Mr Mattis.'

[18] During the course of the arguments, our attention was closely focused on two recent decisions in the House of Lords in which the principles relating to vicarious liability were analysed and authoritatively decided. These are *Lister v Hesley Hall Ltd* [2001] UKHL 22, [2001] 2 All ER 769, [2002] 1 AC 215 and *Dubai Aluminium Co Ltd v Salaam (Livingstone and ors, third parties)* [2002] UKHL 48, [2003] 1 All ER 97, [2003] 2 AC 366. *Lister*'s case was specifically concerned with sexual abuse of children committed to his care by a warden of a boarding house attached to a school owned and managed by the defendants. The *Dubai Aluminium* case was concerned with liability of a firm for the dishonesty of one of its partners. However, the principles relating to vicarious liability in such circumstances are indistinguishable from those which apply where an employer/employee relationship is under consideration. The opinions in the *Dubai Aluminium* case were delivered shortly after the judgment in the present case was handed down. If they had been available earlier, it would probably have been unnecessary for Judge Seymour to set out extended passages from the speeches in *Lister*'s case in his judgment. We do not find it necessary to repeat them.

[19] The essential principle we derive from the reasoning in *Lister* and *Dubai Aluminium* is that Mr Pollock's vicarious liability to Mr Mattis for Cranston's attack requires a deceptively simple question to be answered. Approaching the matter broadly, was the assault 'so closely connected' with what Mr Pollock authorised or expected of Cranston in the performance of his employment as doorman at his nightclub, that it would be fair and just to conclude that

Mr Pollock is vicariously liable for the damage Mr Mattis sustained when Crantson stabbed him.

[20] In answering this question, we have borne in mind the further clarification of several important features of the principles relating to vicarious liability, conveniently summarised by Lord Millett in the *Dubai Aluminium* case [2003] 1 All ER 97 at [121]. It is—

> 'no answer to a claim against the employer to say that the employee was guilty of intentional wrongdoing, or that his act was not merely tortious but criminal, or that he was acting exclusively for his own benefit, or that he was acting contrary to express instructions, or that his conduct was the very negation of his employer's duty ... vicarious liability is not necessarily defeated if the employee acted for his own benefit.'

Moreover, as Lord Millett explained, vicarious liability may arise even if the act of the employee is 'an independent act in itself', and (at [128]) he underlined that 'the mere fact that he was acting dishonestly or for his own benefit is seldom likely to be sufficient' to show that an employee was not acting in the course of his employment. *Lister*'s case itself demonstrated the heresy of the proposition that an employer cannot be vicariously liable for an independent act of 'self-indulgence or self-gratification' by his employee.

[21] Mr Paul Rose QC, for the appellant, drew attention to the decision of the Supreme Court of Canada in *Children's Foundation v Bazley* [1999] 4 LRC 327. When considering a claim against an employer based on a tort deliberately committed by an employee, a number of distinct factors may be relevant. These include (see [1999] 4 LRC 327 at 343):

> '(a) the opportunity that the enterprise afforded the employee to abuse his or her power;
>
> (b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);
>
> (c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;
>
> (d) the extent of the power conferred on the employee in relation to the victim;
>
> (e) the vulnerability of potential victims to wrongful exercise of the employee's power.'

While we acknowledge the value of this guidance, and in the present context, paras (b) and (c) in particular, the list is not, and is expressly stated not to be either complete or conclusive. Mr Benjamin Browne QC, for the respondent, formulated a different, forensically attractive list of considerations, which, if complete, and answered as he submitted they should be, would have led to the dismissal of the appeal. Again, however, although his list too was valuable, it was incomplete, and in any event we should not have agreed with all his suggested answers to the questions he had formulated. Mr Browne further relied on Mr Rose's concession before the judge that Mr Pollock would not have been vicariously liable to Mr Mahoney for the injury he sustained at Cranston's hands. Mr Rose withdrew that concession before us, and it would not be helpful to refer to that concession again, or to put ourselves in a position in which we had to

decide whether Mr Pollock would indeed have been liable to Mr Mahoney. We simply record that in our view it was not the concession, but the withdrawal of the concession that was right.

[22] Mr Browne forcefully reminded us that in the *Dubai Aluminium* case, Lord Nicholls of Birkenhead had emphasised the value of reflecting on previous reported decisions which, he suggested, provided the essential starting point when seeking to answer the question whether any specific act by an employee was sufficiently work-related to found vicarious liability. Lord Nicholls observed ([2003] 1 All ER 97 at [26]):

> 'The crucial feature or features, either producing or negativing vicarious liability, vary widely from one case or type of case to the next. Essentially the court makes an evaluative judgment in each case, having regard to all the circumstances and, importantly, having regard also to the assistance provided by previous court decisions. In this field the latter form of assistance is particularly valuable.'

[23] In deference to these observations, and the careful attention paid by counsel to them, we have felt it necessary to reflect on some of the decisions which preceded *Lister* and *Dubai Aluminium*. In doing so, however, we remind ourselves that Lord Nicholls did not say that any earlier decision where the facts were similar should authoritatively decide a case where the facts were not identical. Second, it does not follow that he was approving each earlier decision, or implying that the reasoning which led to it remained equally valid after *Lister* and *Dubai Aluminium* as it had been before. Third, in the ultimate analysis, Lord Nicholls was not suggesting that the court should do more or less than evaluate the specific features of the individual case, and having done so, decide whether, as a matter of law, vicarious liability was established.

[24] In reviewing some of the earlier authorities in which vicarious liability was said to arise from violent assaults committed by an employee, we do not intend to give the impression that such cases raise different issues of principle, distinct from cases where an employee's criminal behaviour takes a non-violent form. Nevertheless, this group of cases itself serves to demonstrate the fact-specific nature of the inquiry. Thus, even where an employee behaves violently towards a fellow employee, while at work, that is, at his employer's premises and during working hours, the claim against the employer for vicarious liability may nevertheless fail (see the *Children's Foundation* case). Equally, such liability may nevertheless be established for an assault committed outside the employer's premises by an individual whose duties are normally expected to be performed within the premises (see *Vasey v Surrey Free Inns plc* [1996] PIQR P373), or indeed, when the assault takes place in the victim's own home (see *Dyer v Munday* [1895] 1 QB 742, [1895–9] All ER Rep 1022, a decision of the Court of Appeal which has perhaps attracted rather less attention than it merited). These examples underline the importance of focusing on the individual circumstances of the case under consideration.

[25] In an article entitled 'Liability for an Employee's Assaults' (FD Rose, (1977) 40 MLR 420), after considering all the relevant authorities, the writer suggested:

> 'Courts within the British Commonwealth have demonstrated a persistent reluctance to hold that an employee's assault has been committed within the

course of his employment so as to make his employer vicariously liable for the tort.'

Mr Rose identified a number of different circumstances in which an employer escaped liability to the victim for an assault by his employee. These were summarised as, and Mr Browne would seek to rely on (pp 420–421):

> '... a quarrelsome drunk threatened with ejection from a bar (*Griggs v Southside Hotel Ltd* [1947] 4 DLR 49): see also (*Deatons Pty Ltd v Flew* (1949) 79 CLR 370); a customer threatening to report a garage-man's conduct in the performance of his duties to his employers (*Warren v Henlys Ltd* [1948] 2 All ER 935); an aggrieved customer whom he had wrongly accused of not paying his bill (*Fontin v Katapodis* (1962) 108 CLR 177); a patron whom he had ejected from a dance hall in the course of his employment and whom he wrongly suspected of assaulting him during the ejection (*Daniels v Whetstone Entertainments Ltd* [1962] 2 Lloyd's Rep 1); a customer who became aggressive subsequently to the employee's attempt to defraud her during a car sale (*Cave v Ritchie Motors Ltd* (1972) 34 DLR (3d) 141); and a passenger complaining of his manner during the performance of his duties as a bus conductor [*Keppel Bus Co Ltd v Sa'ad bin Ahmad* [1974] 2 All ER 700, [1974] 1 WLR 1082].'

The writer's avowed intention was (pp 432–433)—

> 'to call for a more liberal approach in applying the traditional tests of vicarious liability and a greater readiness to hold the employer liable for assaults arising out of circumstances connected with his servant's employment, especially where the trouble arises out of the latter's conduct in the performance of his duties.'

From the authorities Mr Rose drew a distinction between assaults committed by employees who were authorised to use violence in the course of their employment, and those who were not. He pointed out (p 433) that the duties of some employees might involve the risk 'of an assault being committed during the discharge of his duties', adding in a footnote that in such a case 'the character of the employee will be important'. We acknowledge the validity of the distinction at the time when it was drawn, and, following the decisions in *Lister* and *Dubai Aluminium*, it is clear that where an employee is expected to use violence while carrying out his duties, the likelihood of establishing that an act of violence fell within the broad scope of his employment is greater than it would be if he were not.

[26] This article was considered in *Lister*'s case itself. Lord Steyn commented ([2001] 2 All ER 769 at [24]) that '[i]f such [non-sexual] assaults arise directly out of circumstances connected with the employment, vicarious liability may arise', and suggested that the focus of concentration should be 'the relative closeness of the connection between the nature of the employment and the particular tort'. These observations seem entirely consistent with the principle we have derived from *Lister* and *Dubai Aluminium*, and summarised in [18], above. In the context of *Deatons Pty Ltd v Flew* (1949) 79 CLR 370 and *Irving v Post Office* [1987] IRLR 289, Lord Clyde noted ([2001] 2 All ER 769 at [44]) that assaults resulting from 'passion and resentment' or 'personal spite' may fall outside vicarious liability. He did not suggest that assaults committed in such circumstances would inevitably do so.

[27] In *Lister*'s case Lord Millett, too, analysed a number of the previous decisions in which it was sought to establish vicarious liability on the basis of assaults by an employee. He emphasised (at [81]) that in the *Deatons* case (1949) 79 CLR 370 at 381–382 the assault by the barmaid who threw a glass of beer into the customer's face was not 'incident to or in consequence of anything the barmaid was employed to do'. He suggested that if she had been—

> 'in charge of the bar and authorised to maintain order, the result might well have been different. It would not, in my opinion, have been enough in itself to exclude the employer's liability that she had been paying off a private score of her own.'

He pointed out (at [80]) that liability was established in *Dyer*'s case, a clear example where vicarious liability was established against an employer who had placed his employee in a situation 'where he may be expected on occasions to have to resort to personal violence'. He noted criticism of the decision in *Warren v Henlys Ltd* [1948] 2 All ER 935, where a petrol pump attendant's employer escaped liability, although a customer was assaulted as a result of a dispute over payment, and he indicated that the better view of the decision was that the employer 'was not liable because it was no part of the duties of the pump attendant to keep order'. The critical feature was to concentrate attention 'on the closeness of the connection between the act of the employee and the duties he is engaged to perform broadly defined'. Again, our approach to the underlying principle in [18], above is consistent with this observation.

[28] Mr Browne attached considerable importance to the decision in *Daniels v Whetstone Entertainments Ltd* [1962] 2 Lloyd's Rep 1. The close analogy with this case is that Allender, who perpetrated the act of violence which led to the plaintiff's injuries, was an employee in Cranston's position. However, his violent action came after he had 'contumaciously' repudiated his employer's unequivocal instructions that he should return back inside the premises. Instead, he indulged in an act of private retaliation. Vicarious liability was not established. In the present case, however, no such instructions were given: rather, Mr Pollock actively welcomed Cranston's aggressive attitude to his customers. We need not analyse whether the decision in *Daniels*'s case would survive the clarification of principle in the *Dubai Aluminium* case, that vicarious liability could be established even when an employee was 'acting contrary to express instructions'.

[29] In the result, neither Mr Browne nor Mr Rose suggested that any previous authority was decisive. We agree, and see no advantage in analysis of any further authorities which did not specifically attract any observations in *Lister*'s case. The cases to which reference has been made do, however, helpfully highlight a number of factors of relevance to the present appeal, to which we must return.

[30] Cranston was indeed employed by Mr Pollock to keep order and discipline at the nightclub. That is what bouncers are employed to do. Moreover, however, he was encouraged and expected to perform his duties in an aggressive and intimidatory manner, which included physical manhandling of customers. In our judgment this aspect of the evidence was not sufficiently addressed by Judge Seymour. He suggested that the evidence went no further than a single incident of inappropriate violence (on 18 July) which would not have justified immediate dismissal. Whether, taking Cranston's behaviour as a whole, it would have been appropriate to dismiss him, is a moot point. The reality was that Mr Pollock should not have been employing Cranston at all, and

certainly should not have been encouraging him to perform his duties as he did. It was not perhaps anticipated that Cranston's behaviour would be counter-productive, and that by way of self-defence, and indeed revenge, his behaviour would provoke a violent response. That is because the customers with whom he tangled were supposed to be intimidated, and to go quietly. The whole point of any physical confrontation with Mr Pollock's customers in the nightclub, whether engineered by Cranston or not, was that he should win it.

[31] Judge Seymour accurately noted that the incident might have ended at a number of different stages before Mr Mattis was stabbed. Nevertheless, that did not, of itself, provide the definitive answer to the question whether Mr Pollock should be held vicariously liable for the stabbing. On the night in question Cranston and Mr Pollock both anticipated an untroubled clash with Mr Cook. The 'negative reaction' from the customers meant that Cranston, rather than Mr Cook, had to flee the premises. True, there was ample time for calm reflection. True, too, Cranston's return to the scene, armed with a knife, would have ended differently if Mr Cook, Mr Mattis and the rest had already departed. In itself, however, Mr Mattis's absence from the place where the stabbing took place would not necessarily have provided any guarantee of a peaceful outcome. Cranston was still in his working hours, and if he had not found an immediate target on whom to vent his anger outside the club, it seems probable that he would have returned inside the club to ascertain whether any of his attackers were still there. If so, on the facts found here, we have little doubt that he would have been violent within the premises, as he was outside them. In any event, his return to the immediate vicinity was motivated by a need to revenge the physical injuries and public humiliation he had sustained inside the club. The incident had wholly undermined his reputation and status as the doorman Mr Pollock expected him to be. And the words he used as he stabbed Mr Mattis demonstrated that he had Mr Mattis's intervention in defence of Mr Cook in the forefront of his mind, and that his actions were directly linked to the incident which had taken place earlier in the club.

[32] This incident certainly developed in stages, at each of which it might have petered out. However, in our judgment, Judge Seymour approached the question for decision too narrowly. The stabbing of Mr Mattis represented the unfortunate, and virtual culmination of the unpleasant incident which had started within the club, and could not fairly and justly be treated in isolation from earlier events, or as a separate and distinct incident. Even allowing that Cranston's behaviour included an important element of personal revenge, approaching the matter broadly, at the moment when Mr Mattis was stabbed, the responsibility of Mr Pollock for the actions of his aggressive doorman was not extinguished. Vicarious liability was therefore established. Accordingly the appeal on this ground must succeed.

[33] The issue of Mr Pollock's personal, as opposed to vicarious liability, was not closely canvassed in argument. Judge Seymour's robust approach to this aspect of his decision derived from his conclusion that personal liability would not survive the reasoning which had led him to conclude that the claim based on vicarious liability must fail. In the circumstances of this case, we accept the validity of this approach, adding, however, that personal liability would not necessarily and always follow the establishment of vicarious liability. In the present case, however, it does. Mr Pollock chose to employ Cranston, knowing and approving of his aggressive tendencies, which he encouraged rather than curbed, and the assault on Mr Mattis represented the culmination of an incident

which began in Mr Pollock's premises and involved his customers, in which his employee behaved in the violent and aggressive manner which Mr Pollock expected of him. a

[34] Given the particular circumstances in which we have found that vicarious liability is established, if we had to decide the point, Mr Pollock's personal liability would also follow.

Appeal allowed. b

Dilys Tausz Barrister.

Meikle v Nottinghamshire County Council

[2004] EWCA Civ 859

COURT OF APPEAL, CIVIL DIVISION
THORPE, KEENE LJJ AND BENNETT J
28, 29 APRIL, 8 JULY 2004

Employment – Disability – Discrimination – Constructive dismissal – Whether constructive dismissal discriminatory act – Disability Discrimination Act 1995, s 4(2).

Employment – Disability – Discrimination – Reduction in sickness pay – Benefit payable in money or money's worth under a scheme or arrangement for the benefit of employees – Whether sickness pay benefit payable under a scheme or arrangement for the benefit of employees – Disability Discrimination Act 1995, ss 5, 6(11).

The defendant employer employed the claimant employee as a teacher. In 1993 the employee began to suffer from a deteriorating visual condition, losing the sight in one eye, and with deteriorating eyesight in the other. Not all the steps which could have been taken by the employer to assist her were made. In June 1999 she began a period of absence from work because of eyestrain, and in July 1999 she presented the first of two originating applications to an employment tribunal, alleging discrimination under the Disability Discrimination Act 1995. Under s 5(1)[a] of the 1995 Act an employer discriminated against a disabled person if for a reason which related to the disabled person's disability, he treated him less favourably than he treated or would treat others to whom that reason did not or would not apply and he could not show that the treatment in question was justified. Section 5(5) provided that if in a case falling within s 5(1) the employer was under a duty under s 6[b] of the 1995 Act in relation to the disabled person but failed without justification to comply with that duty, his treatment of that person could not be justified under s 5 unless it would have been justified even if he had complied with the s 6 duty. The duty under s 6 was to take such steps as it was reasonable, in all the circumstances of the case, for the employer to have to take in order to prevent any arrangements made by him placing the disabled person concerned at a substantial disadvantage in comparison with persons who were not disabled. Section 6(11) provided that s 6 did not apply in relation to any benefit, inter alia, payable in money or money's worth under a scheme or arrangement for the benefit of employees, in respect of, inter alia, accident, injury, sickness or invalidity. The employee was put on half-pay from December 1999, in accordance with a policy of the employer whereby an absence of more than 100 days resulted in a reduction in sick pay. There were negotiations between the parties, the employee requesting certain adjustments to her working conditions. The employer failed to agree to those adjustments, and in May 2000, the employee resigned, stating that she was treating the employer's actions as both a breach of the implied contractual term of mutual trust and confidence, and unlawful disability discrimination. In July 2000, the employee presented her second originating application, claiming disability discrimination and

a Section 5, so far as material, is set out at [54], below
b Section 6, so far as material, is set out at [54], below

constructive dismissal. By s 4(2)(d)[c] of the 1995 Act it was unlawful for an employer to discriminate against a disabled person whom he employed 'by dismissing him, or subjecting him to any other detriment'. The tribunal held, inter alia, (i) that constructive dismissal did not amount to a 'dismissal' for the purposes of s 4(2)(d); (ii) that the reduction in the employee's sick pay fell within the terms of s 6(11) of the 1995 Act; and (iii) that although the reduction in pay amounted to less favourable treatment for a disability related reason within s 5(1), it reflected the employer's policy toward those who were absent from work for over 100 days because of sickness, and was therefore justified. On appeal, the Employment Appeal Tribunal reversed those decisions, and the employer appealed.

Held – (1) A constructive dismissal fell within the scope of the word 'dismissal' in s 4(2)(d) of the 1995 Act and was therefore, in itself, a discriminatory act. In the instant case the appeal tribunal had been correct in so regarding the constructive dismissal of the employee (see [52], [53], [70], [71], below); *Derby Specialist Fabrication Ltd v Burton* [2001] 2 All ER 840 and *Catherall v Michelin Tyres plc* [2003] IRLR 61 approved; *Metropolitan Police Comr v Harley* [2001] IRLR 263 disapproved.

(2) The words 'scheme or arrangement for the benefit of employees' in s 6(11) of the 1995 Act did not include the payment of sick pay by an employer to an employee under a contract of employment. The wording of the subsection was inappropriate to cover payments made directly by an employer to an employee. Accordingly, the appeal tribunal in the instant case had been correct in holding that the tribunal had fallen into error in ruling that s 6(11) excluded the s 6 duty on the employer to make a reasonable adjustment to overcome the disadvantage of the employee being on half pay (see [60], [62], [70], [71], below); *London Clubs Management Ltd v Hood* [2001] IRLR 719 approved.

(3) In applying s 5(5) of the 1995 Act a tribunal had to consider what the position would have been if the employer had complied with his s 6 duty. In the instant case the proper approach would have been to ask whether the employer had shown that, if all the reasonable adjustments required by s 6 to the employee's working conditions had been made, the employee would have been absent for over 100 days and thereby liable to the reduction in sick pay. The tribunal had not expressly applied its mind to that question and the appeal tribunal had been correct to conclude that, if it had done so, it could not have avoided making a finding of unlawful discrimination under s 5(1) in respect of the decision to put the employee on half-pay. The appeal would therefore be dismissed (see [66]–[71], below); *Collins v Royal National Theatre Board Ltd* [2004] 2 All ER 851 applied.

Per curiam. While an employee complaining of disability discrimination by constructive dismissal could formulate his complaint by relying on the employer's repudiatory act or conduct as 'any other detriment' in s 4(2)(d) of the 1995 Act it could be disadvantageous to him in terms of the running of time. Given the relatively short limitation periods operating in discrimination law there could be great significance attaching to whether the act is the dismissal, with time running from the termination of employment by resignation, or the employer's earlier discriminatory act (see [49]–[53], [70], [71], below).

c Section 4, so far as material, is set out at [40], below

Notes

For discrimination against applicants and employees, and for the duty of the employer to make adjustments, see 13 *Halsbury's Laws* (4th edn reissue) paras 488, 489.

For the Disability Discrimination Act 1995, ss 4, 5, 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 295, 296, 298.

Cases referred to in judgments

Bliss v South East Thames Regional Health Authority [1985] IRLR 308, [1987] ICR 700, CA.

Bracebridge Engineering Ltd v Darby [1990] IRLR 3, EAT.

Cast v Croydon College [1998] IRLR 318, [1998] ICR 500, CA.

Catherall v Michelin Tyres plc [2003] IRLR 61, [2003] ICR 28, EAT.

Collins v Royal National Theatre Board Ltd [2004] EWCA Civ 144, [2004] 2 All ER 851.

Derby Specialist Fabrication Ltd v Burton [2001] 2 All ER 840, [2001] ICR 833, EAT.

Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493, EAT.

Lewis v Motorworld Garages Ltd [1985] IRLR 465, [1986] ICR 157, CA.

London Clubs Management Ltd v Hood [2001] IRLR 719, EAT.

Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq) [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.

Marshall v Southampton and South West Hampshire Area Health Authority (Teaching) Case 152/84 [1986] 2 All ER 584, [1986] QB 401, [1986] 2 WLR 780, ECJ.

Metropolitan Police Comr v Harley [2001] IRLR 263, [2001] ICR 927, EAT.

Sutcliffe v Hawker Siddeley Aviation Ltd [1973] IRLR 304, [1973] ICR 560, NIRC.

Western Excavating (ECC) Ltd v Sharp [1978] 1 All ER 713, [1978] QB 761, [1978] 2 WLR 344, CA.

Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347, [1981] ICR 666, EAT; *affd* [1982] IRLR 413, [1982] ICR 693, CA.

Appeal

The employer, Nottinghamshire County Council (NCC) appealed from the decision of the Employment Appeal Tribunal (Judge Ansell, J Drake and BV Fitzgerald) on 26 September 2003 allowing the appeal of the employee, Gaynor Meikle from the decision of the employment tribunal dismissing certain of Mrs Meikle's complaints of unlawful discrimination under the Disability Discrimination Act 1995. The facts are set out in the judgment of Keene LJ.

John Cavanagh QC and *Séan Jones* (instructed by *Elizabeth Bennett*, Nottingham) for NCC.

Brian Langstaff QC and *David Massarella* (instructed by the *Disability Rights Commission*, Manchester) for Mrs Meikle.

Cur adv vult

8 July 2004. The following judgments were delivered.

KEENE LJ (giving the first judgment at the invitation of Thorpe LJ).

INTRODUCTION

[1] This appeal raises a number of issues involving employment and discrimination law. These can be summarised as whether the respondent

established that she had been constructively dismissed by her employer, the appellant; whether constructive dismissal amounts to a 'dismissal' within the meaning of the Disability Discrimination Act 1995; and whether the reduction in the respondent's sick pay by 50% after 100 days absence from work could amount to and did amount to discrimination under the 1995 Act.

[2] On each of these issues the employment tribunal (the tribunal) found for the employer, but was reversed by the Employment Appeal Tribunal (the EAT) ([2003] All ER (D) 06 (Oct). The employer, Nottingham County Council (NCC), now appeals from that decision. As I shall describe, the employee, Mrs Gaynor Meikle, was successful before the tribunal on a large number of complaints which she brought against NCC of unlawful discrimination under the 1995 Act, and those were not the subject of an appeal to the EAT.

THE MAIN FACTS

[3] Mrs Meikle began working for NCC in 1982 as a part-time teacher, becoming full-time in 1990. Since 1985 she worked at Gedling School. In about January 1993 she began to suffer from a deteriorating visual condition, and as a result she lost the sight of one eye and her eyesight in the other eye deteriorated. That meant that reading made her feel tired, but she found it easier to read if the printed word was enlarged..

[4] She found that she had a particular problem at the school with a document produced each morning showing which teachers were required to cover other teachers' classes. This daily cover timetable was printed in very small print. From about May 1993 she explained to the head teacher, Mr Lamb, that she needed an enlarged copy of this daily timetable but no arrangements were ever successfully made over following years for her to be provided with an enlarged copy.

[5] Some other steps were taken to assist her, but because of noise and other problems it was suggested in March 1998 that her textile teaching (one of four subjects she taught) should be moved to a room designated as DT6. That was located at the other end of the school from another classroom where she regularly taught. She asked that her timetable be adjusted so as to allow for the problems created by this physical separation, but no adjustments were made even though, as the tribunal found, 'it would have been practicable to do so'.

[6] The tribunal also found as a fact that NCC did not consider her needs when drawing up the 1998–99 timetable. One of the adjustments she sought to her working arrangements was an increase in what were called 'non-contact' periods, essentially periods when the teaching of pupils did not take place, so that she could do more of the necessary preparation and other work during daylight hours rather than after dark. The tribunal found that she was given fewer such non-contact periods than could have been achieved.

[7] Because of her eyestrain, Mrs Meikle had a number of absences from work. In particular she started a period of absence on 13 June 1999. In a report to NCC in August 1999, a consultant occupational health physician, Dr Thompson, referred to her distress 'as a result of continuing delays and difficulties in implementing the advice given to facilitate her continuing duties' and added that—

> 'the main problem in the past has been her visual impairment but in view of the factors noted above, the effects the situation has had on her general health now appears to be a significant concern.'

By now Mrs Meikle had instructed solicitors to act on her behalf, and on 23 July 1999 she presented the first of her two originating applications, alleging disability discrimination.

[8] On 10 September 1999 Mrs Meikle was told by an officer of NCC that she was suspended because of her absence. This was done under the terms of a Department for Education circular which had in fact been superseded in May of that year. The new circular in force at the time of the suspension provided that such a step should only be carried out on the advice of an appropriately qualified medical adviser. In due course the tribunal found that this suspension was irrational and unjustified.

[9] Mrs Meikle was put onto half-pay as from 17 December 1999. This was the result of a policy of NCC whereby an absence from work for more than 100 days resulted in a reduction of sickness benefit. She did not apply for NCC to exercise its discretion against making such a reduction.

[10] Various negotiations then took place during the early months of 2000. A further consultant occupational health physician, Dr Platts, reported on 29 February 2000 that Mrs Meikle had quite good distance vision, so that she would have no great difficulty in seeing pupils in her classes, but that it took her much longer than her colleagues to carry out routine reading, preparation of coursework and marking pupils' work.

[11] On receipt of that report, her solicitors wrote on 8 March 2000 to NCC, setting out 'the main reasonable adjustments requested by our client'. There were eight adjustments requested, including '1. enlargement of all written materials, especially the daily cover timetable and notices for departmental meetings', and: '9. [sic] additional non-contact time to allow our client to mark work during daylight hours at school and to do less marking at home in the evenings.' In its response NCC commented that it would be difficult to reduce her contact time further but that the enlargement of written materials was 'not a difficult issue'. Mrs Meikle's solicitors replied to this by letter dated 15 May 2000, in which they went through each of the eight items in detail, dealing with the comments made by NCC in its response. On the issue of non-contact time, it was said by her solicitors that there was another member of staff, not disabled, who had more non-contact time than she did, and they did not agree that more non-contact time could not be made available if NCC wished.

[12] By a second letter of the same date to the same officer of NCC, her solicitors referred to a meeting which had taken place to assess what reasonable adjustments were required to enable Mrs Meikle to return to work. The letter continued:

> 'For the sake of clarity we confirm that the reasonable adjustments our client is seeking are as set out in our letter to the County Council dated the 8th March 2000 (copy enclosed). If our client is able to return to teaching textiles in the old Textiles Room, only the reasonable adjustments numbered 1 and 9 in our letter dated the 8th March 2000 will need to be made.'

[13] The letter then stated that Mrs Meikle had been suffering from disability discrimination since 1993 and had been asking for 'the other reasonable adjustments outlined above' since 1996. It then went on as follows:

> 'If the reasonable adjustments she has been seeking are made, she will be fit to return to work immediately. Because of the vast length of time over

which our client has been discriminated against, and the loss of income she has suffered and will continue to suffer as a result (since her pay was cut to half pay from the 17th December 1999) our client will require the County Council's agreement to the following conditions before she returns to work:-

1 That she is allowed to return to work on a part time basis for a term (to allow her to adjust to returning to work after being absent since the 17th June 1999) before resuming her full time duties;

2 That she is compensated for her loss of pay since the 18th December 1999 when she went on to half pay. This will need to include compensation for loss of pay as a result of our client returning to work on a part time basis;

3 That she is compensated for her injury to feelings (an amount will need to be agreed before our client returns to work).

4 That Malcolm Lamb and Jenny Coleman are sent on a course to learn about disability discrimination in the workplace and how to treat disabled people fairly. This is particularly important to our client as she considers that at present neither Malcolm Lamb nor Jenny Coleman understand what their legal obligations are and she does not feel that she can return to work until they have this understanding.

Our client is also concerned that this matter should not drag on indefinitely. For this reason, she requires the Council's agreement to the above terms in principle within 2 weeks with the compensation figures and details of the course Malcolm Lamb and Jenny Coleman will attend, being finalised within 4 weeks thereafter. If agreement in this matter cannot be reached within the time scale proposed, our client will have no alternative but to conclude that there has been a complete breakdown of mutual trust and confidence between her and her employer, leaving her with no alternative but to resign from her position with immediate effect.'

[14] The solicitor for NCC replied on 22 May to both letters. He made some observations on points 1 to 4 in the second letter of 15 May and then did the same in respect of the items referred to in the first letter of that date. On point 1 in that letter, the enlargement of written materials, he commented that using existing staff at the school to do this had some difficulties but raised the possibility of a support technician doing this.

[15] Before any further correspondence was received by her solicitors, Mrs Meikle resigned by a letter both posted and faxed to the head teacher, Mr Lamb, on 30 May 2000. The letter stated:

'Please accept this letter as written confirmation that I am treating your actions as both a breach of the implied contractual term of mutual trust and confidence and unlawful disability discrimination in response to which I am tendering my resignation with immediate effect.'

[16] The following day her solicitors wrote and sent by fax a letter to the NCC solicitor. This stated:

'In our letter dated 15th May 2000 we indicated that if our client is able to return to teaching Textiles in the old Textiles Room, only the reasonable adjustments numbered 1 and 9 in our letter dated the 8th March 2000 will need to be made. As you are aware, our client cannot return to teaching in the old Textiles Room unless reasonable adjustments are made to this room first. The purpose of the meeting on the 11th May 2000 was to assess what reasonable adjustments are required to enable Mrs Meikle to return to work

> in this room. In our letter of the 15th May 2000, we also indicated that our client will require the County Council's agreement to the following conditions before she returns to work:'

The letter then set out the four additional conditions contained in the second letter of 15 May 2000 and commented on NCC's response or lack of response to each of them. It then mentioned:

> 'In short, the Council have not agreed to the reasonable terms laid down by our client for her return to work. Under the circumstances, our client has no alternative but to conclude that there has been a complete breakdown of mutual trust and confidence between her and her employer, leaving her with no alternative but to resign from her position with immediate effect.'

I have set this final correspondence out in some detail, because one of the issues in this appeal is whether Mrs Meikle resigned in response to a fundamental breach of contract by NCC.

[17] On 4 July 2000 she presented her second originating application, claiming disability discrimination and constructive dismissal.

THE EMPLOYMENT TRIBUNAL'S FINDINGS AND CONCLUSIONS

[18] As indicated earlier, the tribunal found that Mrs Meikle had been unlawfully discriminated against in a number of respects in breach of the 1995 Act. Eleven of her complaints of such discrimination were upheld. For example, the tribunal found that she was placed at a substantial disadvantage with regard to the arrangements about the cover timetable, it requiring no great effort to make a suitably enlarged copy for her. By 1 October 1998 NCC was aware that she needed to have all documents enlarged but this was never done. The tribunal found that the provision of an enlarged timetable and other documents were reasonable adjustments within the meaning of s 6 of the 1995 Act.

[19] It concluded also that she had been placed at a substantial disadvantage because of the distance between her relocated classroom DT6 and her other classes, that a reasonable adjustment would have been to amend the timetable so as to reduce the number of such journeys she had to make and that NCC could have taken this step but failed to consider her needs. The tribunal also held in her favour on the complaint about 'non-contact' time, finding that NCC had not given any proper consideration to this matter. On another complaint, it found that between October 1998 and June 1999 she worked under lighting conditions in DT6 which (from 1 February 1999) were substantially less than those required at law for a sighted person. It commented:

> 'The tribunal was at a loss to understand how the first respondent [NCC] could comply with its duty without an informed understanding of what were the applicant's needs. No consideration was given to what level was required for the applicant' (see para 43).

[20] Of some importance, the tribunal also found that she had been discriminated against between the date of her first originating application in July 1999 and her resignation in May 2000, because NCC had *continued* to send her documents which were not enlarged and because she was still not assigned any more non-contact time. In dealing with the correspondence in late May 2000, it stated that: 'The applicant was right to conclude that on her return there would be little, if any, difference, in the arrangements for cover' needed to provide more free time (see para 71).

[21] There is no need to set out details of other complaints held to be well-founded, but I do note that the tribunal concluded that the suspension of Mrs Meikle from duty in September 1999 was less favourable treatment which was unjustified and irrational.

[22] However, the tribunal also found that some of Mrs Meikle's complaints were not well-founded. It concluded that she had not been constructively dismissed within the meaning of s 95(1)(c) of the Employment Rights Act 1996, the provision which defines 'dismissal' for the purpose of the unfair dismissal part of that Act as including the situation where—

> 'the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.'

Not only was there therefore no unfair dismissal but, since there was no dismissal, the claim for wrongful dismissal was also rejected. The tribunal also concluded that a constructive dismissal was not a dismissal for the purpose of s 4(2)(d) of the 1995 Act. Section 4(2) makes it unlawful for an employer to discriminate against a disabled person whom he employs '(d) by dismissing him, or subjecting him to any other detriment'.

[23] Finally, amongst the discrimination claims under the 1995 Act dismissed by the tribunal was one which complained that the putting of Mrs Meikle on half-pay was less favourable treatment for a disability-related reason. This was conceded by NCC but their defence of justification was upheld by the tribunal. It is these three matters which were the subject of Mrs Meikle's successful appeal to the EAT. It is convenient to take each of them separately and to deal with the reasoning of the tribunal and the EAT under each separate heading.

CONSTRUCTIVE DISMISSAL

[24] The tribunal's reasoning on this issue requires to be set out in full. The first two of the three crucial paragraphs in the extended reasons summarise counsels' submissions, with para 100 setting out the tribunal's conclusions:

> '98. [Counsel for the applicant] submitted that there was a course of conduct amounting to a fundamental breach of contract. He relied in particular on the decision to suspend the applicant, and the failure to address her concerns. The failure to respond adequately and/or positively to the letters from her representatives dated 8 and 31 March and 15 May 2000 and the first respondent's actions amounted to the "last straw".
>
> 99. [Counsel for NCC] submitted that the applicant did not maintain that she had lost trust and confidence in the first respondent. In any event there was no breach.
>
> 100. The tribunal found that the applicant resigned because of the first respondent's failure to agree to terms which her solicitors stated had to be met before she would return to work. These were set out in their letter dated 15 May 2000. That failure did not constitute a breach of contract. Even when it considered the course of events from 1993 the tribunal did not decide that the first respondent's actions were such that the applicant was entitled to resign from her employment without notice. In reaching that conclusion the tribunal rejected [her counsel's] submission that the implied term may be broken even if subjectively the employee's trust and confidence was not undermined in fact. Almost immediately after her resignation the applicant successfully applied to re-enter the first respondent's employment.

> In her originating application she asked for re-engagement. These matters demonstrated that the relationship of trust and confidence still subsisted. It was her relationship with the second respondent [the head teacher] which had broken down. He was not her employer. She did not resign as a result of the first respondent's conduct. It could not, therefore, be said that she had been constructively dismissed under the provisions of s 95(1)(c) of the 1996 Act. Accordingly, the tribunal decided to dismiss the complaint.'

[25] The EAT accepted a number of criticisms of para 100 advanced on behalf of Mrs Meikle. They concluded, following the House of Lords decision in *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20, that the test in such cases is not whether the employee has subjectively lost confidence in the employer but whether, objectively speaking, the employer's conduct is likely to destroy or seriously damage the trust and confidence which an employee is entitled to have in his employer. Thus the tribunal had been wrong to apply a subjective test. On the issue of whether Mrs Meikle had resigned in response to the employer's breach, the EAT noted that, while her solicitors were imposing certain additional conditions, such as the payment of compensation, they 'were still requiring confirmation that appropriate adjustments would be made to deal with the issues of enlargement of materials and additional non-contract time'. In this connection the EAT drew attention to para 71 of the tribunal's decision, where there is the finding that Mrs Meikle was right to conclude that on her return to work there would be little, if any, difference in the arrangements for cover.

[26] The EAT also took the view that, in the light of the finding that Mrs Meikle's relationship with the headteacher, Mr Lamb, had broken down, the tribunal should have found that NCC had breached the implied term of trust and confidence because of those breaches by the headteacher. The EAT concluded that, if Mrs Meikle resigned in response to his conduct, she was as a matter of law resigning in response to NCC's conduct. This conclusion was influenced by the fact that, early on in the proceedings, the claims against Mr Lamb, who had been the second respondent to the originating applications, were withdrawn because NCC accepted that they were vicariously liable for him. That acceptance was expressly recorded in correspondence. The EAT recognised that an employer would not always or automatically be in breach of the implied term of trust and confidence as a result of the actions of a manager or senior employee, but they concluded that in this case that must be seen as the consequence.

[27] In any event, the EAT held, NCC had itself been in fundamental breach because of the accumulation of acts by it, a series of actions over a period of time. They placed particular emphasis on the unjustified suspension of Mrs Meikle, as well as NCC's continuing failure to deal with the two outstanding areas of discrimination. The latter, said the EAT, were sufficient to amount to the 'last straw' and to find otherwise was perverse. Consequently the EAT concluded that Mrs Meikle had been constructively dismissed, and therefore wrongfully dismissed as well.

[28] That analysis is now challenged by NCC. On its behalf, Mr Cavanagh QC, puts at the forefront of his case the submission that the EAT misconstrued para 100 of the tribunal's decision. It is argued that the tribunal found that the reason for Mrs Meikle's resignation was NCC's failure to agree to the four new requirements added in the second letter dated 15 May 2000 from her

solicitors. That was a finding of fact, and a finding which was not perverse. The tribunal was entitled to conclude that that failure to accept those four requirements was not a breach of the implied duty of trust and confidence. Yet it is well established that, in order for there to be a constructive dismissal, the employee must leave *in response to* the fundamental breach of contract by the employer (see *Western Excavating (ECC) Ltd v Sharp* [1978] 1 All ER 713, [1978] QB 761). Consequently Mrs Meikle did not leave her employment in response to any breach of that term.

[29] Mr Cavanagh emphasises that this is an argument about causation. It is not enough that the employer is in breach of the implied term of trust and confidence and that the employee resigns: the two events must be causally linked. It is accepted by NCC that, in the latter part of para 100, the tribunal went on to apply the wrong test when asking whether that implied term had been broken. Mr Cavanagh acknowledges that the test is an objective one, as appears from the House of Lords decision in *Malik*'s case, and that the tribunal went wrong in saying that the term cannot be broken unless the employee's trust and confidence has in fact been undermined. But it is contended that that does not matter, if the tribunal was right in the opening part of that paragraph to find that Mrs Meikle resigned in response to something which was not a breach of contract. That crucial paragraph should be seen as having two parts to it and the first is not vitiated by the error in the second part.

[30] I entirely accept that it is a question of fact why Mrs Meikle resigned. Moreover, it is not in issue that, for a constructive dismissal to arise, the employee must resign in response to a fundamental breach of contract. That is demonstrated not only by the *Western Excavating* case but also by *Lewis v Motorworld Garages Ltd* [1985] IRLR 465, [1986] ICR 157, where Glidewell LJ spoke of the employee having to show that he left 'as the result of a breach of contract by his employer' (see [1985] IRLR 465 at 469, [1986] ICR 157 at 169).

[31] Where I part company from Mr Cavanagh on his main submission is over his interpretation of the tribunal's finding. The tribunal in those opening sentences of para 100 does not find that Mrs Meikle resigned because of NCC's failure to agree to the four numbered items in the second letter of 15 May 2000. It found that she resigned because of NCC's failure 'to agree to terms which her solicitors stated had to be met before she would return to work. These were set out in their letter dated 15 May 2000'. When one turns to that letter, which is presumably the second letter of that date, one finds that her solicitors were setting out a number of matters which would have to be dealt with before she could return to work. Those certainly included the four numbered matters to which NCC's argument relates, but they also included several of the longer-standing reasonable adjustments she had been seeking. The letter expressly makes her return to work conditional on those reasonable adjustments: 'If [those] reasonable adjustments she has been seeking are made she will be fit to return to work immediately.' That is a reference to the earlier passage in the letter where the solicitors identified those adjustments as being the ones set out in their letter dated 8 March 2000, of which they enclosed a further copy. They also made the point that, of those, only those numbered 1 and 9, the enlargement of written materials and the additional non-contact time, would be required if she could revert to using the old textiles room. Those were clearly still terms which the solicitors were setting out in the letter of 15 May 2000 which had to be met before she would return to work. They were not met at the date of Mrs Meikle's

resignation. I can see no justification for so interpreting the tribunal's reference to 'terms' as to exclude those items.

[32] Moreover, like the EAT, I find support for this interpretation of the tribunal's finding in their earlier findings in para 71 about whether arrangements were, *at the end of May 2000*, going to be made to assure her of more free time. The tribunal was critical of an offer made by NCC in a letter dated 25 May 2000 and it found that 'the applicant was right to conclude that on her return there would be little, if any, difference, in the arrangements for cover'. What is significant about this finding is not merely that in fact there would be little if any difference, but that Mrs Meikle *concluded* that that would be so. In other words, at this critical time around the date of her resignation, she had been applying her mind to that particular 'reasonable adjustment' and had concluded that it would not be made. In those circumstances it would be remarkable if the tribunal intended to confine her reason for resignation solely to the additional four terms set out later in the letter of 15 May 2000. Nor does her own letter of resignation provide any justification for such a restricted interpretation: she indicates no such limitation. The later letter from her solicitors likewise imports no such limit. It seems to me, therefore, that the EAT was right to emphasise that the terms she wanted to be met embraced those reasonable adjustments as well.

[33] It has been held by the EAT in *Jones v F Sirl & Son (Furnishers) Ltd* [1997] IRLR 493 that in constructive dismissal cases the repudiatory breach by the employer need not be the sole cause of the employee's resignation. The EAT there pointed out that there may well be concurrent causes operating on the mind of an employee whose employer has committed fundamental breaches of contract and that the employee may leave because of both those breaches and another factor, such as the availability of another job. It suggested that the test to be applied was whether the breach or breaches were the 'effective cause' of the resignation. I see the attractions of that approach, but there are dangers in getting drawn too far into questions about the employee's motives. It must be remembered that we are dealing here with a contractual relationship, and constructive dismissal is a form of termination of contract by a repudiation by one party which is accepted by the other (see the *Western Excavating* case). The proper approach, therefore, once a repudiation of the contract by the employer has been established, is to ask whether the employee has accepted that repudiation by treating the contract of employment as at an end. It must be in response to the repudiation, but the fact that the employee also objected to the other actions or inactions of the employer, not amounting to a breach of contract, would not vitiate the acceptance of the repudiation. It follows that, in the present case, it was enough that the employee resigned in response, at least in part, to fundamental breaches of contract by NCC.

[34] It was not really argued before us that the persistent failure of NCC to carry out those reasonable adjustments did not amount to a fundamental breach. The tribunal found that they amounted to unlawful discrimination and, given the duration of them and the finding that, even at the time of her resignation, there would have been little improvement in cover if Mrs Meikle had returned to work, it seems to me to be clear that NCC was in breach of its obligation to maintain the trust and confidence of its employee. There are many cases where similar or lesser failures in respect of discrimination have been held to breach that implied term, such as *Bracebridge Engineering Ltd v Darby* [1990] IRLR 3, where the EAT held that the failure by an employer to treat an allegation of sexual

harassment seriously was a breach of that implied term, which entitled the employee to treat the contract as having been repudiated.

[35] Consequently the tribunal erred in law in concluding that NCC's failure to agree to the conditions set out by Mrs Meikle's solicitors did not constitute a breach of contract. Their failure was not merely a breach but sufficiently fundamental as to amount to repudiation of the contract. Moreover, the tribunal found that the relationship between Mrs Meikle and the headteacher, Mr Lamb, had broken down and implicitly that she had resigned, in part, because of that. I accept that not every piece of adverse conduct on the part of one employee towards another will cause a breach of the implied term of trust and confidence between employer and the second of those employees. But Mr Lamb was the headteacher at the school in which Mrs Meikle had taught since 1985. She had been experiencing problems about the enlargement of materials at the school since 1993, and neither Mr Lamb nor NCC had dealt adequately with those problems, any more than they had dealt with the problem of free time and cover. It would be remarkable indeed if Mr Lamb's failure did not amount to a breach by NCC of its duty of maintaining trust and confidence on Mrs Meikle's part.

[36] But even if the tribunal had been right that the matters which led to her resignation were not in themselves a breach of contract, that would not have been the end of the story. Such a finding would not have necessarily produced the conclusion that there was no constructive dismissal. In cases where a course of conduct or a series of events leads to a breach of the implied term, the final event which brings about the employee's resignation need not itself amount to a breach of contract. That was so held in *Woods v WM Car Services (Peterborough) Ltd* [1981] IRLR 347, [1981] ICR 666, a decision which was approved by this court in the *Motorworld Garages* case, where Glidewell LJ said ([1985] IRLR 465 at 469, [1986] ICR 157 at 169):

> '(c) The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term? [see *Woods v W M Car Services (Peterborough) Ltd* [1981] IRLR 347, [1981] ICR 666.] This is the "last straw" situation.'

This is the very reason why the tribunal here went on to consider whether the course of events from 1993 onwards amounted to such a breach. In the light of its earlier view that the trigger for the resignation was not a breach of contract, it had to consider that issue.

[37] However, it patently erred when it did so. It rejected the 'last straw' argument because it applied the subjective test of asking whether the employee's trust and confidence had in fact been undermined. Even if that had been the appropriate approach, the conclusion that Mrs Meikle's trust and confidence remained despite her relationship with the head teacher having broken down is an unsustainable one. But the test itself is wrong in law. As Lord Nicholls of Birkenhead said in *Malik*'s case [1997] 3 All ER 1 at 6, [1998] AC 20 at 35: 'Proof of a subjective loss of confidence in the employer is not an essential element of the breach ...' As I have already noted, the appellant does not now seek to argue to the contrary. It follows that the tribunal fell into error when it considered, as it had to, the 'last straw' argument, and the EAT was right in so concluding.

[38] It is contended by the appellant that, having reached that conclusion, the EAT should have remitted the case to the tribunal below for it to reconsider the issue of constructive dismissal and wrongful dismissal. Mr Cavanagh argues that the situation in which Mrs Meikle found herself was improving by May 2000. It cannot be said that the only conclusion which could be reached on the primary facts was that she had been dismissed rather than that she had resigned.

[39] I disagree. Once it is clear that NCC was in fundamental breach, as it patently was, the only question is whether Mrs Meikle resigned in response to the conduct which constituted that breach. I have concluded already that that was the finding of the tribunal. In those circumstances there could be only one outcome, namely that she had been constructively dismissed. The EAT was entitled therefore to substitute such a finding.

THE MEANING OF 'DISMISSAL' IN S 4(2)(D) OF THE 1995 ACT

[40] The issue here is whether a constructive dismissal amounts to a 'dismissal' within the meaning of s 4(2)(d) of the 1995 Act. Section 4(2) provides as follows:

> '(2) It is unlawful for an employer to discriminate against a disabled person whom he employs—(a) in the terms of employment which he affords him; (b) in the opportunities which he affords him for promotion, a transfer, training or receiving any other benefit; (c) by refusing to afford him, or deliberately not affording him, any such opportunity; or (d) by dismissing him, or subjecting him to any other detriment.'

[41] The tribunal, following the EAT decision in *Metropolitan Police Comr v Harley* [2001] IRLR 263, [2001] ICR 927, held that a constructive dismissal did not fall within the scope of the word 'dismissal' in s 4(2)(d), and was therefore not in itself a discriminatory act. It dismissed her complaint brought under the 1995 Act. By the time the case got to the EAT, there was a further decision of the EAT available, *Catherall v Michelin Tyres plc* [2003] IRLR 61, [2003] ICR 28, in which *Harley*'s case had not been followed, the EAT preferring the reasoning in an earlier EAT decision, *Derby Specialist Fabrication Ltd v Burton* [2001] 2 All ER 840, [2001] ICR 833. The EAT in the present case gave lengthy consideration to this conflict of authorities and to the issue arising, and it concluded that *Catherall*'s case was to be preferred. It therefore reversed the decision of the tribunal and made a finding that the constructive dismissal of Mrs Meikle was a discriminatory act within the meaning of the 1995 Act.

[42] The appellant contends that the EAT went wrong in so deciding. Mr Cavanagh, like the EAT in *Harley*'s case, relies upon the legislative history of the provisions in the various statutes dealing with employment and discrimination. He points out that, although the Sex Discrimination Act 1975, like the 1995 Act, did not contain any definition of 'dismissal', it was amended by Parliament in 1986 by the Sex Discrimination Act of that year so as to include constructive dismissal within the meaning of the word. Yet when the 1995 Act was passed, no extended definition of 'dismissal' was included. That must be seen as indicating that the term was not intended to include a constructive dismissal in the 1995 Act, any more than in the Race Relations Act 1976.

[43] Attention is also drawn by the appellant to the wording of para 3(1) of Sch 3 to the 1995 Act, which states:

'An employment tribunal shall not consider a complaint under section 8 unless it is presented before the end of the period of three months beginning when the act complained of was done.' a

Mr Cavanagh submits that that concept of an act complained of is difficult to reconcile with constructive dismissal, if treated as happening when the contract of employment is terminated by the employee's acceptance of the employer's repudiation of the conduct. Dismissal in ordinary language is an act by an employer. b

[44] This submission is linked to Mr Cavanagh's other main argument on this topic, namely that a purposive construction of s 4(2)(d) is unnecessary, because the repudiatory act or acts of the employer are already covered by the reference in that provision to 'subjecting him to any other detriment'. Consequently the employee can in any event bring a complaint about the employer's discriminatory conduct. It is said that this has no effect on the date from which the three months for bringing a complaint would run: even if constructive dismissal were to be regarded as within the meaning of 'dismissal', time would still run from the date of the repudiatory act or acts, and not from the termination of employment. For this proposition, Mr Cavanagh relies on a passage from the judgment of Auld LJ in *Cast v Croydon College* [1998] IRLR 318 at 324, [1998] ICR 500 at 515. Therefore it makes no difference whether or not the 'dismissal' is interpreted in the way adopted by the EAT in the present case. c d

[45] I am conscious that I presided over the EAT which made the decision in the *Derby* case that the similar provision in the 1976 Act did include a constructive dismissal. I have therefore sought to consider this matter afresh, particularly as there have been the subsequent EAT decisions in *Harley* and in *Catherall*. It was regrettable that the *Derby* case was not cited to the EAT in *Harley*'s case. None the less, the reasoning in that latter decision, largely adopted by the present appellant, deserves careful consideration. Both *Harley* and *Catherall* were Disability Discrimination Act cases, but it is not suggested that any distinction is to be drawn for this purpose between the 1995 Act and the 1976 Act, with which the *Derby* case was dealing. In *Catherall*'s case, the EAT, presided over by Nelson J, relied on the reasoning in the *Derby* case as the basis for not following the decision in *Harley*. e f

[46] I remain unpersuaded by the argument based on the legislative history of the various statutes. The amendment to the 1975 Act was made apparently in response to the decision of the European Court of Justice in *Marshall v Southampton and South West Hampshire Area Health Authority (Teaching)* Case 152/84 [1986] 2 All ER 584, [1986] QB 401, where the court had said the word 'dismissed' in the 1975 Act should be given a 'wide meaning' (see [1986] 2 All ER 584 at 598, [1986] QB 401 at 419 (para 34)). It is right that Parliament did not then or since amend the 1976 Act to make the same express inclusion of constructive dismissal, nor did it include any definition of 'dismissal' in the 1995 Act, wide or narrow. But that omission on Parliament's part in those two latter cases cannot be regarded as imposing a narrow meaning on the word when used in those two statutes: the amendment to the 1975 Act may well have been made out of an abundance of caution to demonstrate clear compliance with Community law. g h j

[47] Other statutes affecting the area of employment law have been interpreted as including a constructive dismissal within the concept of a dismissal without any express wording to that effect. The most obvious example is the Industrial Relations Act 1971, which when dealing with unfair dismissal made no

reference to constructive dismissal. Yet in *Sutcliffe v Hawker Siddeley Aviation Ltd* [1973] IRLR 304, [1973] ICR 560 the National Industrial Relations Court, presided over by Sir John Donaldson, held that none the less there could be an unfair dismissal deriving from a constructive dismissal. An argument that the converse interpretation should be adopted because earlier legislation in the shape of the Redundancy Payments Act 1965 had in s 3(1)(c) defined dismissal expressly so as to include constructive dismissal was roundly rejected (see [1973] IRLR 304 at 306, [1973] ICR 560 at 564 (para 13)):

> 'That comparison points, it is said, to Parliament having intended that there should be no room for an "unfair constructive dismissal." We entirely reject that contention. We consider that the omission arose solely because the draughtsman thought it unnecessary to include the subsection. We have no doubt that there can be constructive unfair dismissals and that any amendment of the 1971 Act to include a subsection (c) equivalent to that contained in the 1965 Act would have no effect other than to dispose of a misconstruction of the Act.'

Thus by 1973 the concept of a dismissal in employment law was being given this meaning, despite the fact that constructive dismissal had been expressly included within the concept in another statute.

[48] As Mr Langstaff QC submitted on behalf of Mrs Meikle, the courts should avoid attaching too much significance to form instead of substance. Whether there is a dismissal cannot depend on whether an employer says to an employee 'get out' or alternatively drives him out. In the *Derby* case, after dealing with the arguments based on the history of the various statutes, the EAT said ([2001] 2 All ER 840 at 845, [2001] ICR 833 at 840):

> 'Whether the employer deliberately dismisses the employee on racial grounds or he so acts as to repudiate the contract by racially discriminatory conduct, which repudiation the employee accepts, the end result is the same, namely the loss of employment by the employee. Why should Parliament be taken to have distinguished between these two situations?'

[49] The argument about para 3(1) of Sch 3 to the 1995 Act is bound up with Mr Cavanagh's submission that the employee's position is no worse if he cannot treat his constructive dismissal as a dismissal but has to rely on the employer's repudiatory act or conduct as 'any other detriment' in s 4(2)(d). I can see that the employee could formulate his complaint in that way, but it could be disadvantageous to him in terms of the running of time. Certainly, that was the way in which the EAT approached the matter in *Harley*'s case: the very reason it dealt with this issue of whether constructive dismissal was a dismissal was because the complaint was out of time if it was not, but it was in time if the constructive dismissal was itself an act of discrimination. There are relatively short limitation periods operating in discrimination law, normally three months from the act complained of, and on the face of it there could be great significance attaching to whether the act is the dismissal, with time running from the termination of employment by resignation, or the employer's earlier discriminatory act.

[50] The appellant's response to this is to say that, in any event, time would run from the employer's repudiatory act, even if dismissal were construed as covering a constructive dismissal. For this proposition reliance is placed on a passage in *Cast*'s case. The passage appears at [1998] IRLR 318 at 324, [1998] ICR

500 at 515, and was clearly obiter, since the employee's appeal had already been allowed on other grounds (see [1998] IRLR 318 at 324, [1998] ICR 500 at 515). It is right that in the passage in question, Auld LJ does appear to suggest that in a sex discrimination case, where there has been constructive dismissal, time runs from the employer's breach and not from the date of the employee's resignation.

[51] I regret to say that I do not find the reasoning in that passage persuasive. It is important to observe that it was a case brought under the sex discrimination legislation, with the result that there was no doubt that a constructive dismissal amounted to a dismissal. Section 82(1A) of the 1975 Act, as amended by the 1986 Act, provided that that was so: that subsection states that dismissal includes—

> 'the termination of that person's employment ... by any act of his (including the giving of notice) in circumstances such that he is entitled to terminate it without notice by reason of the conduct of the employer ...'

By s 6(2) of the 1975 Act:

> 'It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her ... (b) by dismissing her, or subjecting her to any other detriment.'

The three-months' time limit on bringing a complaint runs from 'when the act complained of was done' (s 76).

[52] When those provisions are read as a whole it seems clear to me that 'the act complained of' in such a case of constructive dismissal is the unlawful dismissal (s 6(2)(b)), which is constituted by the termination of the employee's employment by her act in circumstances where she was entitled to terminate it (s 82(1A)). In other words, the act complained of is the constructive dismissal which takes place when she accepts the repudiation by her employer. That is scarcely a surprising result: what would have been the point in deliberately and clearly including constructive dismissal within the definition of dismissal, which is the act of discrimination complained of, if that were not the outcome? The employee could have been left to rely on treating the repudiatory conduct as 'any other detriment'. While an employee faced with repudiatory conduct by his or her employer must act in sufficient time to avoid a finding that the breach has been waived, there may none the less be some interval between breach and acceptance, as in *Bliss v South East Thames Regional Health Authority* [1985] IRLR 308 at 315, [1987] ICR 700 at 715. To hold that time runs from the breach rather than the termination of the contract of employment could negate the clear inclusion of constructive dismissal within 'dismissal' in sex discrimination cases.

[53] I therefore find myself unable to agree with the view expressed obiter by Auld LJ in *Cast's* case. It follows that it can make a significant difference whether or not 'dismissal' includes constructive dismissal in these discrimination cases, including those brought under the 1995 Act. When one arrives at that position, an interpretation which acknowledges that not merely has the employer acted in a discriminatory way but also that this has led to the employee's loss of his or her job is appropriate. For all these reasons I conclude that the EAT was right to regard the constructive dismissal of Mrs Meikle as being in itself a discriminatory act under the 1995 Act.

THE SICK PAY ISSUE

[54] In dealing with this issue, it is necessary to begin by setting out the relevant parts of ss 5 and 6 of the 1995 Act, because discrimination under the 1995

Act can take two forms. Section 5 provides, in so far as material for present purposes:

> '(1) For the purposes of this Part, an employer discriminates against a disabled person if—(a) for a reason which relates to the disabled person's disability, he treats him less favourably than he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified.
>
> (2) For the purposes of this Part, an employer also discriminates against a disabled person if—(a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and (b) he cannot show that his failure to comply with that duty is justified ...
>
> (5) If, in a case falling within subsection (1), the employer is under a section 6 duty in relation to the disabled person but fails without justification to comply with that duty, his treatment of that person cannot be justified under subsection (3) unless it would have been justified even if he had complied with the section 6 duty.'

Section 6 then provides:

> '(1) Where—(a) any arrangements made by or on behalf of an employer, or (b) any physical feature of premises occupied by the employer, place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect.
>
> (2) Subsection (1)(a) applies only in relation to—(a) arrangements for determining to whom employment should be offered; (b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.
>
> (3) The following are examples of steps which an employer may have to take in relation to a disabled person in order to comply with subsection (1)—(a) making adjustments to premises; (b) allocating some of the disabled person's duties to another person; (c) transferring him to fill an existing vacancy; (d) altering his working hours; (e) assigning him to a different place of work; (f) allowing him to be absent during working hours for rehabilitation, assessment or treatment; (g) giving him, or arranging for him to be given, training; (h) acquiring or modifying equipment; (i) modifying instructions or reference manuals; (j) modifying procedures for testing or assessment; (k) providing a reader or interpreter; (l) providing supervision ...
>
> (11) This section does not apply in relation to any benefit under an occupational pension scheme or any other benefit payable in money or money's worth under a scheme or arrangement for the benefit of employees in respect of—(a) termination of service; (b) retirement, old age or death; (c) accident, injury, sickness or invalidity; or (d) any other prescribed matter ...'

Thus it can be seen that unlawful discrimination under the 1995 Act can take the form of less favourable treatment for a reason related to disability, if it is not shown that the treatment is justified (s 5(1) discrimination); or it can take the form of an unjustified failure to comply with a s 6 duty to make reasonable adjustments to prevent the disabled person being at a substantial disadvantage compared to those who are not disabled (s 5(2) discrimination).

[55] In the present case Mrs Meikle claimed that the reduction in sickness benefit to half-pay because of her absence from work amounted to both forms of disability discrimination. The cause of her absence from work was NCC's failure to make reasonable adjustments and the placing of her on half-pay put her at a substantial disadvantage. A reasonable adjustment then would have been to retain her on full pay, by way of sickness benefit, but NCC failed to comply with its s 6 duty and made no such adjustments. That was unjustified and so there was s 5(2)-type discrimination. In addition, there was 'direct' s 5(1) discrimination, in that putting her on half-pay was less favourable treatment for a disability-related reason, and this was unjustified.

[56] The tribunal rejected both these arguments. On the first of them, it accepted NCC's submission that there was no s 6 duty to pay Mrs Meikle full-pay sickness benefit, because such a payment fell within the terms of s 6(11) and was therefore excluded from the duty. As for the complaint of 'direct' s 5(1) discrimination, it was conceded by NCC that putting her on half-pay was less favourable treatment for a disability-related reason, but a submission that this was justified under s 5(1)(b) was upheld by the tribunal. It took the view that the decision to put her on half-pay reflected NCC's policy towards those who were absent from work for over 100 days because of sickness.

[57] The EAT reversed both those decisions. Relying on the earlier EAT decision in *London Clubs Management Ltd v Hood* [2001] IRLR 719, it held that s 6(11) did not apply. The sickness payments were made under the terms of the contract of employment between employer and employee, and were paid directly to her, rather than 'under a scheme or arrangement for the benefit of employees'. The EAT said that—

> '[w]hen one combines s 6(11) with ss 17 and 18 the purpose was clearly to exclude occupational pension schemes and benefits provided under third party insurance services from the employer's duty to make adjustments under s 6 and to replace them with obligations imposed under ss 17 and 18, but not to exclude contractual payment of sick pay by employers.'

Contractual sick pay was to be distinguished from third party insurance arrangements. The EAT was satisfied that NCC had failed to make reasonable adjustments and had not shown that that failure was justified.

[58] As for the s 5(1) claim, the EAT concluded that the tribunal had failed to apply s 5(5) properly or at all. The employer had failed without justification to comply with its s 6 duty, as they had found, which meant that the less favourable treatment of Mrs Meikle could not be justified under s 5.

[59] I shall take each of these two aspects of the sick pay issue in turn. On the s 5(2) claim, the main issue concerns the interpretation of s 6(11) of the 1995 Act, the exclusion section set out in [54] of this judgment. Mr Cavanagh argues that the *London Clubs* case was wrongly decided and that, on the ordinary meaning of the words, sick pay paid by an employer to an employee comes within the words 'any other benefit payable ... under a scheme or arrangement for the benefit of employees'. He points to the fact that s 6 clearly includes terms of the employment contract within the meaning of 'arrangements' in s 6(1), and arrangements for direct payments by the employer to employee can be described as being 'for the benefit of' the employee. No injustice is caused by excluding sick pay arrangements from the s 6 duty, because an employee can in appropriate circumstances rely on s 5(1) if he or she has been less favourably treated by the employer.

[60] In the *London Clubs* case, the EAT, presided over by Miss Recorder Slade QC, held that s 6 applied to monetary benefits, for otherwise there would have been no need for s 6(11). As to the meaning of that subsection itself, the EAT said this ([2001] IRLR 719 at 723 (para 28)):

> 'In our judgment, the natural meaning of "scheme or arrangement for the benefit of employees" does not include payment of sick pay by an employer to an employee under a contract of employment. Such payments are made by the employer to rather than "for the benefit" of the employee. Further, they are made pursuant to the contract of employment, an expression used in s. 4(3), rather than "under an arrangement" the expression used in s. 6(11).'

In my view, that construction is supported by the presence in the 1995 Act of ss 17 and 18, relied on by the EAT in the present case. Section 17 inserts a statutory 'non-discrimination rule' into occupational pension schemes, and requires trustees or managers of such a scheme to refrain from any act or omission which, if done by an employer, would amount to unlawful discrimination under the 1995 Act. Section 18 deals with insurance services, which are defined as services for the provision of benefits in respect of '(a) termination of service; (b) retirement, old age or death; (c) accident, injury, sickness or invalidity; or (d) any other prescribed matter'. It will be observed that these matters, which may give rise to the payment of benefits, are identical to those which appear in s 6(11). Section 18 then imposes certain liabilities on the insurer providing these insurance services to employees under arrangements with their employer, if the insurer discriminates.

[61] It seems to me that ss 17 and 18 are to be seen as the counterpart of s 6(11). The duty on an employer as to making reasonable arrangements to avoid placing a disabled employee at a substantial disadvantage in respect of occupational pension schemes or insurance services can be disapplied by s 6(11) because the employee is protected by ss 17 and 18. That makes practical sense since, as Mr Langstaff submitted, the employer will often not be in a position to make adjustments to an employees' pension scheme and insurance schemes. Such duties as there need to be fall more appropriately on those administering the schemes. But no such reason could exist for excluding direct payment of sick pay by an employer to an employee, in respect of which the employer does have control. No equivalent to s 17 or 18 exists in such a situation, nor does it need to.

[62] Moreover, I find the point made by the EAT in the *London Clubs* case persuasive. The wording of s 6(11) needs to be read as a whole and not by extracting individual words and phrases like 'arrangement' and 'for the benefit of'. When the subsection is read as a whole, the wording seems inappropriate to cover payments made directly by an employer to an employee. If that had been intended by Parliament, one would have expected to see it spelled out more clearly. Consequently I agree with the EAT that the tribunal fell into error in ruling that s 6(11) excluded the s 6 duty on NCC to make a reasonable adjustment to overcome the disadvantage of being on half-pay. Mr Cavanagh had a fall-back position in that event, namely that the EAT should have remitted the matter for the tribunal to reconsider it. Because of the conclusion I have reached on the other issue about the sick pay claim, no purpose would have been served by such a remission.

[63] I turn to that issue, which concerns the claim under s 5(1). It will be remembered that NCC conceded that the reduction in Mrs Meikle's sick pay to a

half-rate amounted to less favourable treatment for a reason relating to her disability. The dispute was over whether this was justified. The flaw identified by the EAT in the tribunal's reasoning was that it had failed to apply s 5(5) of the 1995 Act, which operates in s 5(1) cases where the employer is also under a s 6 duty but has unjustifiably failed to comply with that duty.

[64] Mr Cavanagh points out that the omission of any reference to s 5(5) in the tribunal's reasoning on this issue does not mean that it was unaware of it, because reference is made in those crucial paragraphs of the extended reasons to para 4.8 of the Code of Practice for the elimination of discrimination in the field of employment against disabled persons or persons who have had a disability (1996) issued by the Secretary of State under s 53 of the 1995 Act, and para 4.8 does refer to s 5(5). That is undoubtedly right. On the other hand, that still leaves open the question of whether the tribunal actually *applied* s 5(5).

[65] The EAT is criticised by NCC for having regarded s 5(5) as requiring the tribunal to consider what the position would have been if the reasonable adjustments had been made. That, Mr Cavanagh submits, is wrong: the subsection requires the tribunal to consider whether the employer would have been justified in reducing the employee's pay if she had been absent because of sickness where her absence had nothing to do with a failure to make reasonable adjustments. In the present case any employee absent through sickness for more than 100 days would have had their sick pay reduced as Mrs Meikle did. Consequently NCC could make out a case of justification.

[66] For my part, I cannot accept this line of argument. As this court said in *Collins v Royal National Theatre Board Ltd* [2004] EWCA Civ 144 at [24], [2004] 2 All ER 851 at [24]:

> 'The clear purpose of s 5(5) is to deny to an employer who has treated a disabled employee less favourably than others any defence of justification which depends directly or indirectly on a breach by the employer of his s 6 duty to make adjustments.'

A tribunal does have to consider what the position would have been if the employer had complied with his s 6 duty. That is what the final part of the subsection indicates by the words 'even if he had complied with the section 6 duty'. In the present case, it is clear from the findings of the tribunal that NCC had failed in a number of respects to comply with that duty, in particular (though not solely) in regard to enlargement of written materials and the provision of more non-contact time for Mrs Meikle. The proper approach was to ask whether NCC had shown that, if all the reasonable adjustments required by s 6 to her working conditions had been made, Mrs Meikle would have been absent for over 100 days and thereby liable to the reduction in sickness payment.

[67] The tribunal did not expressly apply its mind to that question. The EAT concluded that, had it done so, it could not have reached the conclusion that justification could have been shown. I agree. The burden was on NCC to establish such justification, but it made no submission to the tribunal that it met the test described at the end of the previous paragraph of this judgment. Moreover, the medical evidence referred to in [7] above strongly suggests that, even if NCC had raised the argument in the appropriate terms, it would have failed. That evidence pointed towards her lengthy absence being the consequence of the prolonged failure of NCC to take appropriate steps to cope with her disability. There is, on the evidence, no reason to believe that she would have been absent from work, certainly for more than 100 days, if the requisite

adjustments had been made. The EAT was entitled to decline to remit the matter. Its conclusion that NCC could not have met the applicable legal test under s 5(5) was an appropriate one.

[68] The EAT was, therefore, correct in its decision on this aspect of the case. The tribunal had failed to apply s 5(5) as it should have done. Had it done so, it could not have avoided making a finding of unlawful discrimination under s 5(1) in respect of the decision to put Mrs Meikle on half-pay.

CONCLUSION

[69] I conclude that the EAT reached the right conclusion on each of the issues raised. I would therefore dismiss this appeal.

BENNETT J.

[70] I agree.

THORPE LJ.

[71] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Sadek v Medical Protection Society and others

[2004] EWCA Civ 865

COURT OF APPEAL, CIVIL DIVISION

DAME ELIZABETH BUTLER-SLOSS P, LATHAM AND MAURICE KAY LJ

9 JUNE, 9 JULY 2004

Race relations – Unlawful discrimination – Statutory provision rendering it unlawful for organisation of workers to discriminate against member – Society providing advice and assistance to member medical professionals – Whether society an organisation of workers – Race Relations Act 1976, ss 11, 78(1).

Membership of the defendant society was open to medical practitioners, dental practitioners and others connected with the medical and dental professions. It provided advice and representation to individual members who had professional problems. The claimant was a doctor and a member of the society. He fell into dispute with the NHS trust which employed him and the society provided him with advice and representation in relation to the ensuing disciplinary proceedings. Those proceedings were resolved adversely to the claimant, and he sought and received further advice from the society which funded a consultation with leading counsel. Eventually, the society decided to stop advising the claimant and declined to fund further independent legal advice. The claimant then commenced proceedings against the society in an employment tribunal, claiming unlawful discrimination under s 11[a] of the Race Relations Act 1976 by an organisation against a member of the organisation. By sub-s (1), that section applied to three categories: (i) 'an organisation of workers'; (ii) 'an organisation of employers'; and (iii) 'any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists'. Section 78[b] of the 1976 Act defined 'profession' as including any vocation or occupation and 'employment' as extending to employment under a contract personally to execute any work or labour. As a preliminary issue, the tribunal considered whether it had jurisdiction under s 11 of the 1976 Act, concluding that it had, on the basis that the society fell within both the first and third categories in s 11(1). The society's appeal was dismissed by the Employment Appeal Tribunal. It appealed to the Court of Appeal, submitting, inter alia, that an organisation could only fall within the first category if its members or at least the majority of them were 'workers', but that most of the members of the society could not properly be described as 'workers' because they practised professions.

Held – The language of 1976 Act did not draw a distinction between 'workers' and 'professionals'. The width of the definition of 'profession' in s 78(1) was inconsistent with such a distinction. Medical and dental practitioners engaged under contracts of employment in the NHS or as independent contractors in the private sector were workers carrying out employment within the meaning of s 78(1). Accordingly, the tribunal had been correct to conclude that the society

a Section 11 is set out at [1], below

b Section 78, so far as material, is set out at [10], [11], below

was an 'organisation of workers' within the first category of s 11(1). The appeal would therefore be dismissed (see [8], [11], [12], [14], [20]–[22], below).

Notes

For discrimination by trade unions and employer's associations, see 13 *Halsbury's Laws* (4th edn reissue) para 410.

For the Race Relations Act 1976, ss 11, 78, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 145, 214.

Appeal

The Medical Protection Society (MPS), a company limited by guarantee, and Stephanie Bown and John Hickey, employees of the MPS, appealed from the decision of the Employment Appeal Tribunal (Keith J, M Clancy, SM Wilson CBE) on 4 November 2003 dismissing their appeal from the decision of an employment tribunal on the preliminary issue set out at [1], below, arising in proceedings brought by Saher Sadek against the appellants claiming unlawful racial discrimination and victimisation. The facts are set out in the judgment of Maurice Kay LJ.

David Pannick QC, who did not appear below (instructed by *RadcliffesLeBrasseur*) for the MPS, Dr Bown and Dr Hickey.

Dr Sadek appeared in person.

Cur adv vult

9 July 2004. The following judgments were delivered.

MAURICE KAY LJ (giving the first judgment at the invitation of Dame Elizabeth Butler-Sloss P).

[1] Dr Saher Sadek is a member of the Medical Protection Society (MPS). He was employed by Birmingham Heartlands and Solihull NHS Trust (the trust). He fell into dispute with the trust and became the subject of disciplinary proceedings. The MPS provided him with advice and representation in relation to the disciplinary proceedings. Both at first instance and on appeal the disciplinary proceedings were resolved adversely to Dr Sadek. He then sought advice from the MPS about possible employment tribunal proceedings against the trust. The MPS provided such advice and funded a consultation with leading counsel. Eventually the MPS decided to stop advising and assisting Dr Sadek in relation to his proposed claim against the trust and declined to fund further independent legal advice and assistance. Dr Sadek then commenced proceedings against the MPS in the employment tribunal. He claimed to be the subject of race discrimination and victimisation arising out of the way in which the MPS had advised and assisted him. On 19 December 2002 the employment tribunal directed a preliminary hearing of certain issues relating to its jurisdiction. One of the preliminary issues was formulated in this way:

> 'Whether the tribunal has jurisdiction to hear a complaint under s 11(1)(3) of the Race Relations Act 1976 or otherwise …'

Section 11 falls within Pt II of the 1976 Act. Part II is headed 'Discrimination in the Employment Field'. Sections 4–9 come under the sub-heading 'Discrimination by employers' and ss 10–15 fall under the sub-heading 'Discrimination by other

bodies'. Section 11 (the marginal note to which refers to 'Trade Unions etc') provides as follows:

> '(1) This section applies to an organisation of workers, an organisation of employers, or any other organisation whose members carry on a particular profession or trade for the purposes of which the organisation exists.
>
> (2) It is unlawful for an organisation to which this section applies, in the case of a person who is not a member of the organisation, to discriminate against him—(a) in the terms on which it is prepared to admit him to membership; or (b) by refusing, or deliberately omitting to accept, his application for membership.
>
> (3) It is unlawful for an organisation to which this section applies, in the case of a person who is a member of the organisation, to discriminate against him—(a) in the way it affords him access to any benefits, facilities or services, or by refusing or deliberately omitting to afford him access to them; or (b) by depriving him of membership, or varying the terms on which he is member; or (c) by subjecting him to any other detriment.'

By an amendment effective from 19 July 2003, s 11(4) now provides that harassment of a member or proposed member is unlawful.

[2] This appeal is concerned solely with whether the MPS is an organisation falling into any of the three categories set out in s 11(1). The employment tribunal decided that the MPS is both 'an organisation of workers' and 'any other organisation whose members carry on a particular profession ... for the purposes of which the organisation exists'. I shall refer to the former type of organisation as 'the first category' and the latter form as 'the third category'.

[3] The MPS appealed to the Employment Appeal Tribunal (EAT) but its appeal was dismissed. The EAT expressed no view on whether the MPS falls into the first category but was satisfied that it falls within the third category.

[4] Before addressing the legal issues which arise on this appeal it is appropriate to say a little more about the factual background. The MPS is a company limited by guarantee not having a share capital. It was founded in 1892. Dr Stephanie Bown and Dr John Hickey are employees of the MPS.

[5] The 2001 edition of the *Member's Handbook* published by the MPS refers to the MPS as 'the largest mutual medical protection organisation in the world'. The memorandum of association of the MPS sets outs its objects in terms which include the following:

> '3(A) To protect support and safeguard the character and interests of medical or dental practitioners who in the exercise of some qualification or entitlement ... are or have been practising their profession and of natural persons who are teaching or studying medicine or dentistry in any of their branches and of persons ... or who are engaged in any science or art allied or ancillary to dentistry or calculated or intended to be of use in connection therewith;
>
> 3(B) To advise and assist members ... with regard to any matter effecting in any way whether directly or indirectly their professional character or interests ...
>
> 3(C) To advise and assist and provide services for, and to procure the provision of advice and assistance and service for members ... (whether for reward or not) with regard to any matter effecting in any way whether directly or indirectly their business interests or affairs ...

> 3(E) To grant indemnities, (complete or partial ...) to persons (including without limitation any body corporate) and (in the case of any natural person) to their personal representatives ... as the [MPS] may in accordance with its regulation determine ...'

Against that constitutional background and with the benefit of evidence from Dr Hickey the employment tribunal described the services provided by the MPS as follows:

> 'The main purpose of the MPS is to provide advice and representation to individual members who have professional problems with which he, or she, requires assistance. The principal assistance which the MPS provides is advice in connection with a difficulty arising out of professional practice and a right to apply for an indemnity in respect of civil claims for damages made against the member. Among its subsidiary purposes, the MPS makes representations on changes to the regulatory regime which affects its members, if the MPS is of the opinion that it would in the interests of members or future members, and the more efficient process of regulation could be expected to lead to a more economical use of members' subscriptions. If the MPS foresees legislation which would have an adverse effect on members' interests so far as the indemnity, and the cost of providing the indemnity, is concerned, then it may consider making representations with regard to the prospective legislation to protect the funds of the MPS for the benefit of members and future members.'

[6] The MPS has more than 200,000 members in over 40 countries. Membership is open to natural persons who are medical practitioners, dental practitioners, students of medicine or dentistry, physiotherapists, pharmacists, operating departments assistants, dieticians, practice nurses, the managers of general medical practices, dental technicians, dental hygienists and the like. In addition there are some corporate members. Within the United Kingdom there are two other medical defence organisations similar to the MPS, namely the Medical Defence Union and the Medical and Dental Defence Union of Scotland. The decision of the employment tribunal records that a proprietary insurer was involved in the market for some time but has now withdrawn from it. The British Medical Association is a professional association of medical practitioners. It is an independent trade union which represents the interests of the medical profession in contacts with government, the media and others. The British Dental Association performs similar functions for the dental profession. The case for the MPS is that whereas the British Medical Association and the British Dental Association fall comfortably within s 11 of the 1976 Act, the MPS is beyond its catchment.

[7] On behalf of the MPS Mr Pannick QC submits that the MPS does not fall within either the first category or the third category of s 11(1). It is now common ground that it does not fall within the second category, namely 'an organisation of employers'. The employment tribunal was asked to consider but rejected the second category and, understandably, there has been no cross-appeal in relation to that. Although Mr Pannick's submissions proceeded directly to deal with the first category and the third category as separate headings, there is a logically prior point which requires to be addressed.

[8] As I have related, the employment tribunal was satisfied as to both the first category and the third category, whereas the EAT, being satisfied as to the third

category, found it unnecessary to reach a conclusion about the first category. This raises an important issue about the relationship between the first category and the third category. The third category comprises 'any other organisation'. In my judgment it follows from the words I have emphasised that to fall within the third category an organisation cannot be within the first or second category. To this extent the approaches of both the employment tribunal and the EAT were erroneous. The former erred by concluding that the MPS fell within both categories, whereas the latter erred by finding that it falls within the third category without having excluded it from the first category. With this in mind it is necessary to begin by considering the first category.

THE FIRST CATEGORY

[9] Before this court Mr Pannick has abandoned some of the submissions that were made (by different counsel) to the employment tribunal and the EAT to support the contention that the MPS is not an 'organisation of workers'. In particular, and wisely, he has abandoned the submission that the existence of a number of corporate members takes the MPS out of the catchment of an organisation 'of workers'. The submission which he seeks to advance is attractively simple. It is that an organisation can only fall within the first category if its members or at least the majority of its members are 'workers' but most of the members of the MPS are not properly described as 'workers' because they practise professions.

[10] Perhaps surprisingly, there is no definition of 'worker' in the 1976 Act. 'Employment'—the concern of Pt II of the Act—is defined in s 78. The definition extends beyond contracts of service and apprenticeship to 'a contract personally to execute any work or labour'. The submission on behalf of the MPS is that those who practice professions are a breed apart and that this is born out by their inclusion in the third category. It is further suggested that this is supported by the definition of 'worker' in other legislation. For example, by s 296(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, 'worker' means, among other things, an individual who works under a contract whereby he undertakes to do or perform personally any work or services for another party to the contract 'who is not a professional client of his'. Similarly, by s 230(3) of the Employment Rights Act 1996 the definition extends to a person who undertakes to do or perform personally any work or services for another party 'whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual'.

[11] In my judgment, these submissions on behalf of the MPS are unsustainable. They invest the concept of profession with an aura and exclusivity which, notwithstanding its historical validity, is inconsistent with the language of the 1976 Act. 'Profession' is defined in s 78(1) as including 'any vocation or occupation'. In such circumstances, it simply cannot be said that one cannot be a member of a profession and a worker.

[12] Although there is no specific evidence about their arrangements, it is well known that medical and dental practitioners work under a variety of contractual arrangements in the National Health Service and the private sector. In the former, they are engaged under contracts of employment. In the latter, they are usually independent contractors. In both cases they are workers carrying out employment within the meaning of s 78(1). I consider that this is confirmed rather than refuted by the references to the 1992 Act and the 1996 Act. The 1976 Act contains no equivalent provision excluding the professional/client

relationship from the catchment in the way that those Acts do. Moreover, it is not simply a case of the absence of an exclusion. The width of the definition of 'profession' in s 78(1) is inconsistent with the distinction between 'workers' and 'professionals' which Mr Pannick seeks to establish.

[13] In this context it is pertinent to observe that the British Medical Association and the British Dental Association are registered as independent trade unions. As such they have been accepted by the certification officer as organisations consisting 'wholly or mainly of workers ... and whose principal purposes include the regulation of relations between workers ... and employers ...': see s 1(a) of the 1992 Act. I refer to this not to suggest that the MPS is bound by the certification of other organisations but to illustrate the modern reality referable to practitioners of professions.

[14] It follows from what I have said that I have come to the same conclusion as did the employment tribunal about the first category, namely that the MPS is an 'organisation of workers'. The employment tribunal expressed itself as follows:

> 'Today those engaged in many occupations are described as professionals and the word "profession" no longer has a precise meaning. To exclude professionals from the first limb of s 11(1) of the 1976 Act would place an unexpected and serious restriction on it. It would also be extremely difficult to decide who fell within or without that limb of the definition.'

I respectfully agree. In view of that conclusion, and having regard to what I have already said about the relationship between the first and the third category, it is not strictly necessary to proceed to a consideration of the third category. However, in deference to the submissions we have heard and because this is the first occasion on which the matter has been considered in the Court of Appeal, it is appropriate to deal with the third category in this judgment.

THE THIRD CATEGORY

[15] Mr Pannick makes two submissions, either of which would, if correct, take the MPS outside the third category, assuming for this purpose that it is not within the first category. The first submission is that the MPS is not an organisation 'whose members carry on a particular profession'. This is because the membership extends beyond medical practitioners to dental practitioners and the various other professions to which I have referred. The second submission is that the MPS does not exist for the purpose of the professions practised by its members but for the purposes of the members themselves. It is therefore not an organisation 'whose members carry on a particular profession ... for the purposes of which the organisation exists'.

[16] As to the first submission, it is clearly correct that the MPS has members who practise in more than one profession. However, I do not accept that the words 'a particular profession' limit the third category to organisations whose members are confined to a single profession. There would be no logic in that. To include within the third category an organisation all of whose members are doctors but to exclude an organisation half of whose members are doctors and the other half dentists would be absurd. Similarly, it would be absurd if an organisation with a single profession as its catchment were to be removed from the third category upon a subsequent amalgamation or reorganisation which brought in a second profession. Furthermore, to confine the third category to organisations representing a single profession would inevitably encourage

disputes about the categorisation and sub-categorisation of professions. For all these reasons I reject this submission. *a*

[17] So far as the alternative submission is concerned, I accept that, as the employment tribunal found, the MPS regards itself as performing services for its individual members rather than for the medical profession as a whole. However, that self-perception is not conclusive. In referring to 'for the purposes of which the organisation exists', the draftsman was clearly intending to confine the third *b* category to the purposes of the profession. Accordingly, it was no doubt intended to exclude organisations whose members may come from a particular profession but whose purpose is, say, sporting or cultural. In the course of submissions there was a debate along a spectrum stretching from the Law Society to a golfing society which exists solely for the benefit of the members of a particular *c* profession. Clearly the former falls within the third category but the latter does not. Equally clearly, the MPS falls somewhere between those two extremes. I refer again to its purposes as found by the employment tribunal in the passage quoted at [5], above. The provision of advice and representation is not limited to the defence of compensation claims and the provision of an indemnity. It often includes advice and representations in relation to professional disciplinary *d* matters.

[18] When the EAT considered this submission it concluded:

> 'In our opinion, the focus of the language is not so much on whether the organisation exists for the purpose of the profession of its members but *e* rather on whether the organisation exists for the purpose of enabling or assisting its members to carry on their profession. We can think of no rational reasons why Parliament would want to extend the statutory protection from discrimination in s 11 to members of only those professional bodies which seek to advance the interests of the profession as a whole and *f* not to members of professional bodies which enable or assist its members to carry on their profession.'

I find myself in broad agreement with this approach. Indeed, it is a useful tool in considering where on the spectrum a particular organisation lies. I agree with the employment tribunal and the EAT that, assuming the MPS not to be within the *g* first category, it would be an organisation 'whose members carry on a particular profession ... for the purposes of which the organisation exists'. This is apparent from the findings of the employment tribunal as to what the MPS does and the analytical approach of the EAT.

[19] A point made by Mr Pannick in relation to s 11(1) as a whole is that we *h* should not be concerned if, on a proper construction, the MPS does not come within the section at all because, even if it does not, there is still the potential of liability under Pt III of the 1976 Act, which is headed 'Discrimination in Other Fields'. Section 25 renders it unlawful for associations not within s 11 to discriminate against members and prospective members. The remedy lies not in *j* the employment tribunals but in designated county courts: see s 57. It is suggested that in the present context this mitigates the general policy of construing anti-discrimination legislation inclusively wherever possible. I am unmoved by this submission, partly because to divert a claimant to the county court may have serious cost implications but mainly because, in my judgment, there is no ambiguity in s 11 in any event.

CONCLUSION

a [20] It follows from what I have said that I consider that the employment tribunal was correct to hold that the MPS falls within the first category—'an organisation of workers'. In the circumstances, the third category does not arise although, if it did, the MPS would fall within it. I would dismiss the appeal.

b **LATHAM LJ.**

[21] I agree.

DAME ELIZABETH BUTLER-SLOSS P.

[22] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

R (on the application of Camacho) v Law Society

[2004] EWHC 1675 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COURT)
THOMAS LJ, SILBER AND GOLDRING JJ
19 MAY, 12 JULY 2004

Solicitor – Disciplinary proceedings – Solicitors Disciplinary Tribunal – Power of tribunal to impose conditions on practice – Whether tribunal should exercise power – Solicitors' Act 1974, s 47.

A solicitor appealed against a decision of the Solicitors Disciplinary Tribunal by which he had been suspended indefinitely. The court allowed the appeal and reduced the period of suspension to a fixed period. It also considered that certain conditions should be imposed upon him in relation to his practice. The court was told that it was the practice of the tribunal to suspend either for a fixed or indefinite period, but that it did not impose conditions; it made recommendations to the Law Society as to the conditions it thought appropriate and left it to the Society to implement those recommendations by imposing conditions on practising certificates. The court subsequently heard further representations on the imposition of practising conditions. It was accepted that the terms of s 47[a] of the Solicitors' Act 1974, under which the tribunal had the power to make such orders as it thought fit, were sufficiently wide to give the tribunal itself power to impose conditions under which a solicitor might practice. It was submitted, however, (i) that for reasons of subsequent policing and enforcement; and (ii) in order to allow the Law Society to exercise its discretion over the issue of practising certificates on the basis of the facts available at the time of application for a new certificate, that a tribunal ought not to exercise its power to impose practising conditions, but should continue its existing practice. It was further submitted that if the period for which terms would be imposed were an indefinite one, with permission to apply to the court or to the tribunal to vary conditions, that the tribunal should never exercise its power to vary because of resource implications for the Law Society in keeping files open for an indefinite period. The solicitor submitted the conditions should be imposed for a finite period.

Held – (1) It was the duty of the tribunal in each case where it considered that restrictions were required to consider imposing those restrictions itself. If a tribunal considered that a period of complete suspension followed by a period of restricted practice was the appropriate sanction to protect the public then it was the tribunal which should impose that penalty. The jurisdiction of the Law Society to impose conditions on practising certificates was derived from its regulatory powers under the 1974 Act which were quite distinct from the disciplinary powers. The Law Society in the exercise of its regulatory powers could not bind itself to accept a recommendation from the tribunal exercising its disciplinary functions. Neither the court nor the tribunal had any means of being certain that the penalty that was determined to be in the public interest would be

a Section 47, so far as material, is set out at [12], below

imposed. Accordingly, in each case the tribunal should address the question as to whether the public interest was best served by imposing a condition which it could be certain would be put into effect or by leaving the matter entirely to the Law Society. Unless there were exceptional reasons the tribunal should itself impose the conditions it considered appropriate. In the instant case, the public interest demanded that the conditions which the court considered necessary to protect the public had the necessary certainty of imposition and it would have been an abdication of the court's responsibility not to have imposed them (see [16], below).

(2) There was no impediment to the tribunal, if it thought fit, imposing conditions for an indefinite period with permission to apply to it, so that it could reconsider the conditions and vary them. There was no evidence that any significant resource would be required. However, in the instant case, conditions would be imposed for a fixed period (see [19], [20], below).

Per curiam. The court trusts that the Law Society will ensure that orders of the tribunal will be vigilantly policed by the Society and any breach made the subject of disciplinary proceedings (see [16], below).

Notes

For the jurisdiction of the Solicitors Disciplinary Tribunal, its penalties, orders and findings, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 421, 442, 458.

For the Solicitors' Act 1974, s 47, see 41 *Halsbury's Statutes* (4th edn) (2004 reissue) 77.

Cases referred to in judgment

Solicitor No 6 of 1993, Re a (23 July 1993, unreported).
Solicitor No 5 of 1999, Re a (2 July 1999, unreported).
Solicitor No 9 of 1993, Re a (9 December 1993, unreported).

Appeal

Ronald Anthony Camacho, a solicitor, appealed from the decision of the Solicitors Disciplinary Tribunal made on 10 April 2003 by which he was suspended indefinitely. On 1 April the court reduced the period of suspension to 18 months and recommended certain practising conditions should be imposed on the appellant by the Law Society (see [2004] EWHC 1042 (Admin)). The Law Society and the tribunal wished to make further representations to the court in relation to the power to impose conditions and the matter was relisted for hearing. The facts are set out in the judgment of the court.

Jeremy Hyam (instructed by *Shah Solicitors*, Harrow) for the appellant.
Geoffrey Williams QC and *George Marriott* (solicitor advocate) (instructed by *Gorvins Solicitors*, Stockport) for the Law Society.
Andrew Hopper QC (solicitor advocate) (instructed by the *Solicitors Disciplinary Tribunal*) for the tribunal.

Cur adv vult

12 July 2004. The following judgment was delivered.

THOMAS LJ.

[1] This is the judgment of the court.

[2] On 1 April 2004, we heard an appeal by Mr Ronald Anthony Camacho, a solicitor, (the appellant) against a decision of the Solicitors Disciplinary Tribunal (the tribunal) made on 10 April 2003 by which he was suspended indefinitely. We allowed the appeal and reduced the period of suspension to one of 18 months: [2004] EWHC 1042 (Admin).

[3] For the reasons set out at [32]–[35] of the judgment of Silber J, we considered that certain conditions should be imposed upon him in relation to his practice.

[4] We also set out in our judgments various observations in relation to: (i) the need for the Law Society to consider revised procedures for its disciplinary hearings, including the introduction of case management (see [4]–[5] and [42]–[49]); (ii) the scope of the powers of the tribunal to impose conditions (see [34]–[36] and [50]–[53]); (iii) the scope of the powers on costs (see [54]–[57]).[b]

[5] We were told at that hearing that it was uncertain whether the tribunal had power to impose conditions in relation to the suspension of a solicitor; the practice had been for the tribunal to suspend either for a finite or indefinite period, but it did not impose conditions; it made recommendations to the Law Society as to the conditions it thought appropriate and left it to them to impose the conditions. As we considered that conditions were appropriate, we proposed that the Law Society should agree to impose the five conditions that we considered should be imposed on the applicant and gave the Law Society until 22 April to agree to impose those conditions.

[6] We were told that the Law Society wished to make further representations to the court in relation to our judgments and the order we had imposed.

THE PROCEDURES OF THE TRIBUNAL AND THE SCOPE OF THE POWERS ON COSTS.

[7] The first matter on which the advocates instructed by the tribunal and the Law Society wished to address us were our observations in relation to the procedures of the tribunal and the scope of the powers in relation to costs. We were told that the observations we had made in relation to the procedures of the tribunal and in particular the need for the tribunal to adopt a system of case management had been carefully considered by those responsible for the rules and procedures of the tribunal; they had considered that the failures in the proceedings of the tribunal in this matter were very much 'one-off' and due entirely to the conduct of those then representing the appellant. Case management would not assist, as the tribunal would never prevent a defendant from putting his case as he chose, within reasonable bounds, even if this represented a substantial departure from a previously adopted position; the extremely grave consequences for solicitors found guilty of serious misconduct required a more flexible, if not a generous approach. As the tribunal lacked any power to compel compliance with its procedural directions, it had necessarily to a degree to regulate by consensus. Moreover it was said that the procedures of the tribunal had been in existence in their current form for many decades and were well tested, worked well and did not need a case management approach. We were invited to withdraw our observations.

[8] As we made clear in our judgments on 1 April 2004, our observations were made to assist the tribunal. We made it clear in the argument before us in the further hearing, that as the tribunal had considered our observations and they did

b Editor's note: [2004] EWHC 1042 (Admin) [4], [5], [32]–[36] and [42]–[57] are reproduced as an appendix to this judgment

not wish to make any changes, that was, as matters presently stand, entirely a matter for them. We also made clear, despite the arguments presented attractively to us on behalf of the tribunal and Law Society, that we saw no reason whatsoever to doubt or alter the views we had expressed about the current procedures and the real need for a proper system of case management, but there was no more we could, or would, say about the matter.

[9] We were also asked to re-visit the issue we had recorded as being raised in relation to the question as to whether the tribunal was obliged to take into account the means of a defendant to disciplinary proceedings when making an award of costs against the defendant. We made it clear during the course of argument that we saw no reason to answer the questions raised by the appellant's argument, as it had been unnecessary for us to decide them on the facts of this appeal. It was far better to leave the important issue for argument on an occasion, either before the tribunal or in this court, when the ability of the defendant to disciplinary proceedings to pay the costs claimed by the Law Society was directly in issue.

THE POWER TO IMPOSE CONDITIONS

[10] We therefore turn to the only issue that it is apposite for us to decide—the power to impose conditions.

[11] Although, as we have said, there had been some uncertainty at the hearing on 1 April 2004 as to whether the tribunal had power to impose conditions in relation to the way in which a solicitor might practice, it was accepted by all those represented before us that the terms of s 47 of the Solicitors Act 1974 were sufficiently wide to give the tribunal itself power to impose conditions under which a solicitor might practice.

[12] We are sure that all the parties were right in their view. Section 47 is in very wide terms:

> '(2) Subject to subsection (3) and to section 54, on the hearing of any application or complaint made to the Tribunal under this Act, other than an application under section 43, the Tribunal shall have power to make such order as it may think fit, and any such order may include provision for any of the following matters ... (b) the suspension of that solicitor from practice indefinitely or for a specified period ... (d) in the circumstances referred to in subsection (2A) the exclusion of that solicitor from legal aid work (either permanently or for a specified period) ... (e) the termination of that solicitor's unspecified period of suspension from practice ... (g) in the case of a former solicitor whose name has been removed from the roll, a direction prohibiting the restoration of his name to the roll except by order of the Tribunal ...'

[13] As can be seen from the width of the statutory provisions, the tribunal has a broad discretion to make such orders as it thinks fit; indeed it is its duty to make orders that are seen to preserve the trust that the public is entitled to place in solicitors.

[14] It was submitted, however, that a tribunal ought not to exercise such power and the practice of making a recommendation to the Law Society as to the conditions on which a person should be permitted to practice should continue so that the Law Society could implement the recommendations by imposing conditions on practising certificates. In exercising those powers, the Law Society acted in accordance with the guidance given by successive Masters of the Rolls.

For example, in *Re a Solicitor No 6 of 1993* (23 July 1993, unreported), the then Master of the Rolls (Bingham MR) stated:

> 'The purpose of a condition on a practising certificate is not punitive, but is intended to ensure that a solicitor who has run into trouble in a professional capacity is subject to a degree of oversight in the conduct of his professional life at least until he has demonstrated over a period that he is not in need of any such supervision to protect the public.'

The powers to impose conditions were exercised by the Law Society following disciplinary hearings (see *Re a Solicitor No 9 of 1993* (9 December 1993, unreported) and *Re a Solicitor No 5 of 1999* (2 July 1999, unreported).

[15] There were two principal reasons, it was submitted, why the tribunal should not exercise its power to impose terms. (i) **Reasons of subsequent policing and enforcement**. It was submitted that the tribunal had no power to act on its own motion or to enforce its orders. Orders for suspension and striking off were policed by the Law Society, primarily through the power to intervene in practices. The only means of enforcement would otherwise be through separate disciplinary proceedings or for injunctive relief; the responsibility for these would fall on the Law Society. (ii) **Role of practising certificates.** It was submitted that the better practice was for the tribunal to confine itself to a recommendation as to the terms on which a solicitor might practice after a period of suspension. The order for suspension made by the tribunal would suspend the defendant's practising certificate and he would have to give notice of his intention to apply for a new certificate (s 12 of the 1974 Act). When that application was made, the Law Society would exercise its discretion on the basis of the facts available at that time; the decision would be made by an adjudicator (to whom the Law Society had delegated its powers) who would not be bound to follow the recommendations. None the less, it was virtually inevitable, after a period of suspension, that the Law Society would impose conditions on the practising certificate as to the terms on which the solicitor could resume practice. Recommendations by the tribunal were (and would be) accorded the utmost respect by the Law Society, as those of the court would be in this case. The imposition of conditions was an onerous responsibility that the Law Society was experienced in exercising; currently about 600 solicitors were subject to Conditional Practising Certificates.

[16] We cannot accept these arguments. (i) If a tribunal considers that a period of complete suspension followed by a period of restricted practice is the appropriate sanction to protect the public, then as it is accepted that the tribunal has power to impose such conditions or restrictions, then it is the tribunal which should impose that penalty and not leave it to others. A body entrusted by Parliament to exercise disciplinary powers and protect the public should not, unless there are compelling reasons, delegate part of that task to others; there are no compelling reasons which apply to the jurisdiction of the tribunal. It is well able to decide the appropriate terms and it should impose those terms as part of the penalty in the public interest. (ii) It was urged upon us, and we accept, that the Law Society in the exercise of its regulatory powers cannot bind itself to accept a recommendation from the tribunal, exercising disciplinary functions, to impose a condition on a practising certificate. The jurisdiction of the Law Society to impose conditions on practising certificates is derived from its regulatory powers under ss 9–18 of the 1974 Act which are quite distinct from the disciplinary powers under ss 46–54. The Law Society has to consider the application for a practising certificate on the materials available to it when the application is made.

a There is also a separate appeal procedure in respect of the imposition of terms—first to an adjudication panel and then to the Master of the Rolls. (iii) Thus, although we accept that the Law Society will accord our views or those of a tribunal the utmost respect, the Law Society does not have to follow any recommendation made by us or the tribunal. Neither we nor the tribunal has any means of being certain that the penalty that is determined to be in the public b interest will be imposed. As the tribunal is an independent body, separate and apart from the Law Society (with its combined duties of regulation and representation of the profession), we consider that in each case the tribunal must address the question as to whether the public interest is best served by it imposing a condition which it can be certain will be put into effect or leaving the matter c entirely to the Law Society. Unless there are exceptional reasons, we consider that the tribunal should impose itself the conditions it considers appropriate, as that is part of the decision it has made; if the defendant considers the conditions too harsh or wrong in principle, then as the imposition of the conditions is part of the penalty, the route of appeal should be that route that has been provided in respect of the penalty and not that provided in respect of the regulatory powers. d (iv) In this case, we have no doubt that the public interest demands that the conditions which we consider are necessary to protect the public must have the necessary certainty of imposition; we were of the view that the penalty of indefinite suspension was far too harsh and the justice of the case and the protection of the public would be met by a period of complete suspension e followed by a return to practice on conditions. As we considered that the just penalty, it would have been an abdication of our responsibility not to have imposed that penalty, as it is now accepted we had power to do so. (v) We see no reason whatsoever why the Law Society cannot police orders made by the tribunal; it may entail some cost, but that is the cost of self regulation that the Law Society must bear. We trust therefore that the Law Society will ensure that f the orders of the tribunal will be vigilantly policed by the Law Society and any breach made the subject of disciplinary proceedings. Any breach of an order of the tribunal restricting the terms on which a solicitor can practice would be a disciplinary offence which would generally merit a separate penalty and not merely intervention in a practice; that penalty would be required because the g solicitor would have breached an order of the tribunal which it had imposed as a penalty; there is no reason why a solicitor should be treated any differently or more leniently that any other person who breaches the terms of an order imposed by a court or disciplinary tribunal and which has been imposed as part of the penalty to protect the public. For these principal reasons, we reject the h contentions advanced by the Law Society and the tribunal and make it clear that it is duty of the tribunal in each case where it considers that restrictions are required to consider imposing those restrictions itself.

THE POWER OF THE TRIBUNAL TO VARY THE CONDITIONS

j [17] The question then arose as to whether the period for which terms would be imposed should be for a certain period or whether it should be for an indefinite period with permission to apply to the court or to the tribunal to vary the conditions. It was submitted on behalf of the appellant that the period should be a finite one as that would be appropriate in the circumstances; it was submitted on behalf of the tribunal that if the period was to be an indefinite one, then, although the tribunal had power to vary that at any time in the future on the

application of the defendant, it should never do so because of resource implications for the Law Society in keeping files open for an indefinite period.

[18] The position is in our view clear. The powers conferred by s 47 are very wide, as we have stated. The tribunal has, for example, power to defer sentence. It is clear to us that if the order of the tribunal imposed conditions for an indefinite period, but gave the defendant permission to apply to vary the conditions either at any time or after the elapse of a defined period, then that was an order which the tribunal had power to make. It would then be open to the defendant to apply to the tribunal in accordance with the terms of the order to vary the conditions.

[19] There is therefore, in our view, no impediment to the tribunal, if it thinks fit, imposing conditions for an indefinite period with permission to apply to it, so that it can re-consider the conditions and vary them. We do not consider the resource implications can be material. In the first place there was no evidence that any significant resource would be required and we cannot believe that any would be. Secondly, and of greater importance, if justice and the public interest require conditions to be imposed for an indefinite period, with the opportunity to review the matter at any time in the future, then the Law Society must find the resources necessary to keep open the relevant files.

CONCLUSION

[20] On the facts of this case, we considered that a finite period for the duration of the conditions would be apposite; we therefore imposed the conditions to run for a period of one year at the expiry of the period of suspension of 18 months.

Appeal allowed to the extent indicated.

James Wilson Barrister (NZ).

APPENDIX

Extract from *R (on the application of Camacho) v Law Society* [2004] EWHC 1042 (Admin)

'SILBER J.

[4] The appeal to the Solicitors Disciplinary Tribunal (the tribunal) has had an unhappy history. The initial approach of the appellant was that all allegations that had been made against him were admitted and that therefore the only issue for the tribunal was whether the appellant was dishonest as had been alleged. As the case developed in the tribunal proceedings, it became clear that other factual issues were in dispute. It is most surprising and disturbing that there is no procedure in place in the tribunal which requires a complainant to formulate a pleading alleging wrongdoing and which is then responded to by the defendant in writing. If such a procedure was in place the tribunal could then and would exercise important case management powers which would enable the parties and the tribunal to focus on the important issues in the proceedings.

[5] Another advantage of such a form of procedure would mean that the parties could and would then be able to give an accurate time estimate. In this case the original time estimate was two hours and the hearing of this case in front of the tribunal had then to be adjourned on the first day and it then came on for a second hearing almost two months later ...

[32] In my view it is unlikely that this appellant is likely to re-offend, but it is important to indicate the seriousness with which the profession and the courts regard these matters. So the appellant must suffer a period of suspension.

[33] For my part I do not think that it is necessary or appropriate in this case for that period to be unlimited. In reaching that conclusion I have borne in mind not only the four factors to which I have just referred [First, the appellant was not found to have acted dishonestly, but only recklessly. Second, in the period from his admission as a solicitor in 1990 until the commission of the present offences there is no finding recorded against the [appellant] ... Third, the amount involved ... is under £9,000. Fourth, no loss to any client has been shown and there is no evidence of any complaint having been made by any client], but also that this appellant has, we have been told, recently taken a course in solicitor's accounts which would have reminded him of his duties.

[34] Mr Hyam said that the appellant wished to resume practice, but he is prepared to have conditions imposed upon him. We consider that the appropriate course in this case would be to impose conditions so that anybody dealing with him would know first that he did not handle clients' money, second that he worked under supervision and third that he would not be responsible for training anybody working under him.

[35] In my view the appropriate order in this case would be to reduce the period of suspension imposed on the appellant to one of 18 months as from 10 April 2003. I would also propose and recommend that the Law Society should impose the same conditions as were imposed upon the appellant between the time of the conclusion of the investigation and before the decision of the tribunal. Those conditions were (1) that he could only act as a solicitor in employment or partnership which had firstly been approved by the Office for the Supervision of Solicitors in connection with the imposing of the conditions; (2) that he could not be an office holder or shareholder of an incorporated solicitors practice; (3) that he could not act as a training principal or might not be responsible for the supervision of a training solicitor; (4) that he did not handle clients' money or did not become a signatory to any office or client accounts cheque; and (5) that any prospective employer or partner of the appellant be informed of those conditions.

[36] Mr Marriott told us that he would wish to take some instructions on whether or not those conditions should be imposed and whether it is appropriate for this court to make such a recommendation. Although he has made some preliminary inquiries, he did not have adequate opportunity to do so. So I propose that the Law Society be given an opportunity until 22 April 2004 to agree to those recommendations. If they do not do so, the matter can then be listed again in front of us so that I can decide whether we have the power to and whether we should make an order to that effect ...

THOMAS LJ.

(1) THE NEED FOR CONSIDERATION OF REVISED PROCEDURES

[42] The first of my observations relates to the pre-disciplinary hearing procedures of the Solicitors Disciplinary Tribunal (the tribunal). If I may say so the r 4.2 statement formulated under the Solicitors Disciplinary Tribunal's Rules was formulated clearly and with a considerable degree of specificity in relation to the facts alleged against the claimant. Under the rules, as we have been told, there is no requirement that a detailed response be made, though as happens, and

happened in this case, the respondent is entitled to make a response which may or may not deal with the specific matters alleged. In this case it did not. *a*

[43] There is, therefore, as Silber J has made clear, in place no clear procedure for determining what is in issue at the hearing. In that respect the rules do not provide for what in most jurisdictions, whether disciplinary or those of the court, are recognised to be important provisions of a modern system of justice, namely proper case management powers. Silber J has already set out the consequences of that position. *b*

[44] In this particular case, which was a matter that should have been completed within the time estimate of two hours, difficulties arose and they can be illustrated by what happened in relation to the eighth charge, as Silber J has said. [45] In the r 4.2 statement it was pleaded clearly: 'The file demonstrated: There is no evidence on the file that HD [the client] were notified of the right to have the costs taxed.' There was no specific response to that. *c*

[46] At the commencement of the hearing the advocate then appearing for the appellant (and I should make it clear that he was not the advocate who appeared before us today) told the advocate for the Law Society that the allegations that were made were admitted. The advocate for the Law Society, who has appeared before us today, and if I may say so has been of most considerable assistance to us and has answered every question we have asked him with a great deal of assistance to the court, told the chairman of the tribunal: *d*

> 'But I have been told today, sir, that all the allegations that are made, that is 1 to 12, are admitted. The only issue therefore between the parties is whether he is dishonest.' *e*

[47] The chairman said nothing. He did not seek any clarification whatsoever from the advocate for the appellant. The matter proceeded in that way. It is hardly surprising, therefore, with no firm decision having been made or required by the chairman of the tribunal as to precisely what was admitted that the issues were not clear (because, no doubt, there is no guidance for him which advises him what he should do). *f*

[48] During the course of the appellant's evidence he produced a letter which had never been seen before by the advocate for the tribunal. This showed that the facts particularised in the r 4 statement were not correct. There was indeed a letter to the client. Unfortunately, and this was one of a number of instances where matters that were apparently not in issue became in issue, the matter became more complicated. It is, therefore, not surprising that the tribunal when it came to the end of the case was placed in quite a difficult position. However, that arose because, as it seems to me, there was not in place for the procedures of this tribunal a system for identifying factual matters in dispute. *g* *h*

[49] I very much hope, therefore, particularly to enable matters to be resolved with due proportionality and in the interests of justice, that the Law Society and the tribunal will give urgent considering to what has happened in this case and to the observations made by Silber J and by me in relation to the desirability of giving consideration to a more modern form of procedure. It would seem that if there had been proper modern procedures in place for this case, I have no doubt that the matter could have been disposed of in two hours at great saving of cost. There would have been no need for an adjournment because it would have been clear how long the matter was going to last. The tribunal, in fairness to its members, would have been able to concentrate on what had been agreed as the *j*

issues prior to the hearing taking place. There would not have arisen the unfortunate events that did.

(2) THE SCOPE OF THE POWER TO IMPOSE CONDITIONS

[50] The second matter of which I would make a brief observation relates to the issues that have arisen in relation to penalties. It was submitted on behalf of the appellant, as Silber J has said, that he should be entitled to work as a solicitor, subject to certain conditions. And it was submitted on his behalf that the very broad powers under s 47(2) of the Solicitors Act 1974 gave the tribunal power to impose a suspension on certain conditions.

[51] We were told very helpfully by Mr Marriott, that the tribunal's practice was to take the view it could either suspend totally either for an indefinite period or for a specific period, or make no order of suspension; it could not suspend on conditions. What it did, if it thought it apposite, was to make a recommendation to the Law Society in respect of any restriction or condition it thought should be imposed, but did not believe it had power to impose such a condition.

[52] As this point arose before us we raised with Mr Marriott the practice of the tribunal. At first sight and having only had the benefit of a brief submission from Mr Hyam, who has appeared on behalf of the appellant, it would appear to us that the statute may be susceptible of a broad construction, particularly, as Mr Hyam urged, in the light of the Human Rights Act 1998. Moreover there are considerations of the public interest from which it would seem that the power to impose a penalty should rest entirely with the tribunal and not be confined to making a recommendation to the Law Society. However this is an important point of principle and it seems to us that as no real notice of this had been given to Mr Marriott we should not hear full argument on it today, in particular in the light of the way in which Silber J has said this matter can be dealt with.

[53] No doubt the Law Society and the tribunal in particular will consider this practice and give urgent consideration to whether the public interest does not demand that where a penalty is to be imposed, it is for the independent tribunal and not the Law Society to be the final and ultimate arbiter of the scope of that penalty. There is an important question of public perception and, as Silber J has observed by his citation from the judgment of Bingham MR (*Bolton v Law Society* [1994] 2 All ER 486 at 491–492, [1994] 1 WLR 512 at 518), public confidence is at the core of disciplinary procedure.

(3) THE SCOPE OF THE POWERS ON COSTS

[54] The third matter that arises relates to costs. My Lord has already set out the quantum of the costs in this case; the costs were substantial. In evidence put before us today the appellant stated that he is on jobseeker's allowance and has child tax credit. He has a substantial mortgage on his home. We inquired whether it was the practice of the tribunal to take into account the means of a person against whom an order for costs was to be made. We were told that it is the practice of the tribunal that they do not take into account means at all when imposing an order as to costs. They make the award and leave it to the Law Society to decide as to whether it should be enforced and, if so, to what extent.

[55] Again a very important question arises in relation to the public interest. Is it in the public interest and is it fair to the appellant that the question as to the extent of what is a significant financial liability should not properly be considered by the independent tribunal but should rather rest with the Law Society? We were told, and I, for my part, accept entirely, that the Law Society acts in an

entirely responsible and reasonable way in deciding whether to enforce such orders, but that is not the point. The point is what is properly in the public interest and what properly is in the interests of justice for a respondent to disciplinary tribunals? a

[56] Again no notice of this particular point which arose on the appellant's argument was given to Mr Marriott. Again this is an important question and again we have only heard briefly one side of the argument. b

[57] We consider, in the circumstances, that we ought not to reach any decision on the matter because the order which is set out in Silber J's judgment deals with the matter without us needing to decide this particular, though important, point of practice. Again we trust that both the Law Society and the tribunal will give careful consideration to this third area of practice which has arisen in this appeal.' c

R v Cort

[2003] EWCA Crim 2149

COURT OF APPEAL, CRIMINAL DIVISION
BUXTON LJ, MITTING J AND JUDGE PAGET QC
7 JULY 2003

Criminal law – Kidnapping – Taking away by fraud – Relevance of consent.

The defendant frequently stopped his car at bus stops, falsely alleging to those waiting there that the bus had broken down, and offering to give women on their own a lift. Mostly those offers were rejected, twice they were accepted. One woman changed her mind, and the defendant complied with her request to let her out. The other he took to her destination. On the basis of those events he was charged with two counts of kidnapping and ten counts of attempted kidnapping. He denied that he had had any sinister motive and had simply wished to enjoy the company of the persons he approached. He contended that an element of the offence of kidnapping was absent in that he had taken the women in his car with their consent; they had freely got into the car in order to go to, and only to go to, the place where they did in fact arrive. The judge ruled that he had no defence at law and he pleaded guilty. Subsequently he appealed against conviction. It was not disputed that, in the case of the two women who went with the defendant in his car, they had been carried away from the bus stop by fraud, in the sense that they would not have got into the defendant's car unless he had told them the lie that the bus had broken down.

Held – The offence of kidnapping consisted of (i) the taking or carrying away of one person by another; (ii) by force or fraud; (iii) without the consent of the person so taken or carried away; and (iv) without lawful excuse, but where the offence was taking away by fraud issues of consent were unlikely or impossible to arise. In the instant case the victim had not consented to being taken away by fraud and it was difficult to see how one could ever consent to that once fraud was established. All that she had consented to was a ride in the car, which in itself was irrelevant to the offence and a different thing from that with which the defendant had been charged. The appeal would therefore be dismissed (see [19]–[22], [26], below).

R v D [1984] 2 All ER 449 applied.

Notes

For kidnapping, see 11(1) *Halsbury's Laws* (4th edn reissue) para 493.

Cases referred to in judgment

R v Clarence (Charles James) (1888) 22 QBD 23, [1886–90] All ER Rep 133, CCR.
R v D [1984] 2 All ER 449, [1984] AC 778, [1984] 3 WLR 186, HL.
R v Linekar [1995] 3 All ER 69, [1995] QB 250, [1995] 2 WLR 237, CA.
R v R (Rape: marital exemption) [1991] 4 All ER 481, [1992] 1 AC 599, [1991] 3 WLR 767, HL.
R v Richardson (Diane) [1999] QB 444, [1998] 3 WLR 1292, CA.
R v Williams (Owen Richard) [1923] 1 KB 340, [1922] All ER Rep 433, CCA.

Cases also cited or referred to in skeleton arguments
R v Tabassum [2000] 2 Cr App R 328, CA.
R v Wellard [1978] 3 All ER 161, [1978] 1 WLR 921, CA.

Appeal
Peter Laurence Cort appealed against his conviction in the Leicester Crown Court by Judge Pollard on 3 May 2002 on two counts of kidnapping and ten of attempted kidnapping following his plea of guilty made after the judge ruled that the matters adduced by him afforded no defence at law. The facts are set out in the judgment of the court.

Philip Gibbs (assigned by the *Registrar of Criminal Appeals*) for the defendant.
William Everard (instructed by the *Crown Prosecution Service*) for the Crown.

BUXTON LJ.

[1] Mr Peter Laurence Cort appeals against conviction on two counts of kidnapping and ten of attempted kidnapping recorded in the Crown Court at Leicester before Judge Pollard in May of last year. The learned judge sentenced him to a community rehabilitation order concurrent on each count. A large number of other counts of the same offences were ordered to remain on the file.

[2] It will already be clear from the penalty imposed by the learned judge that this was unlike the normal run of kidnapping cases. The conviction was recorded after a ruling by the judge that the matters that Mr Cort adduced afforded him no defence in law. He is of course entitled, having pleaded guilty after that ruling, to challenge the ruling in this court.

[3] The facts, as we have said, were unusual. On a number of dates in the year 2001 (from the number of offences we have already indicated a very large number of dates) Mr Cort would stop his motor car, almost always at bus stops, falsely alleging to persons waiting in the queue that the relevant bus they were waiting for had broken down, and he would ask various ladies, always ladies who were on their own, if they wanted a lift with him. On almost every occasion, perhaps not surprisingly, that offer was rejected. Those events were the basis of the counts of attempted kidnapping, it not having been suggested before us that the requisite elements of an attempt were not present, granted that the underlying offence could in fact be committed. On two occasions ladies said that they would go with Mr Cort. Those were the counts of kidnapping. One of the two persons changed her mind and asked to be let out of the car and Mr Cort complied. The other was taken to her destination. There was no dispute but that the appellant's invitation was a ruse to the ladies to get them to his motor car.

[4] Mr Cort pleaded guilty on the basis that:

> 'The defendant denies that there was a sinister motivation behind his actions. The defendant simply wished to enjoy the company of the persons he approached. The defence case is that the items recovered from the defendant's car, the handcuffs, Durex string, Stanley knife and tape, were there for innocent purposes. There is no connection between them and the defendant's conduct in these matters.'

That was the basis of plea. There is no reason to suggest that that basis of plea was anything other than truthful and accurate.

[5] Kidnapping, with which Mr Cort was charged, is a common law offence. It is defined authoritatively by Lord Brandon of Oakbrook speaking for a unanimous House of Lords in the case of *R v D* [1984] 2 All ER 449 at 453, [1984] AC 778 at 800 where Lord Brandon said this as to the elements of the offence:

> 'First, the nature of the offence is an attack on, and infringement of, the personal liberty of an individual. Second, the offence contains four ingredients as follows: (1) the taking or carrying away of one person by another, (2) by force or by fraud, (3) without the consent of the person so taken or carried away and (4) without lawful excuse.'

Lord Brandon went on to point out that kidnapping was regarded as a serious offence.

[6] It is important to bear in mind, for reasons that will become apparent later in this judgment, what the issue was in the case of *R v D*. The issue before the House in that case was whether it could be an offence of kidnapping if a parent took away his own child. The issue as to consent that was debated was whether the absence of consent of the person having custody, or care and control, of the child was material to the issue of whether the taking was or was without the consent of the child. That is to say, consent was regarded as an important issue in that case, because the question was whose consent was the court concerned with.

[7] That to some extent may explain what otherwise appears to be a difficulty or inconsistency in the general definition as set out by Lord Brandon. The taking in this case, under limb (2) of Lord Brandon's definition, was a taking or carrying away by fraud. There is no doubt, and it is not disputed, that in the case of the two ladies that went with Mr Cort in his motor car they were indeed carried away from where they originally were and wanted to be, that is to say at the bus stop, and they were carried away by fraud, in the sense that they would not have got into Mr Cort's car unless he had told them the lie that he did about the bus having broken down.

[8] It is none the less argued in this case, and was argued below, and has been helpfully argued before us by Mr Gibbs who appears for Mr Cort, that none the less the taking was with the consent of the victims, so that para (3) of Lord Brandon's requirements of the elements of kidnapping was not fulfilled. That contention is based on the argument that to outward appearances the victims freely got into the car in order to go to, and only to go to, the place where they did in fact want to arrive, albeit that they did so under a mistake induced by Mr Cort as to the circumstances.

[9] There is authority in cases of assault and of rape that the only mistakes that in law can vitiate an otherwise apparent consent are either a mistake as to the identify of the person with whom the victim is dealing, or a mistake as to the nature of the act in which she was engaging. In the present case the first limitation does not arise. Mr Cort's identity was no doubt a matter of indifference: in contrast, for instance, to cases where a man has intercourse with a woman pretending to be her husband. On the second limb, however, it is argued that the act that the victim was under no mistake in relation to was the riding in the car to an intended destination. That was the nature of the act in which she was engaged, she was not mistaken as to it, so Mr Cort was wrongly convicted.

[10] As we have already pointed to out, the application of that line of authority to the case of kidnapping produces a surprising outcome. The definition of the

offence inculpates the defendant in cases of fraud, but then exculpates him unless the fraud is as to a very unusual and limited matter not in fact likely to arise in most kidnapping cases. To understand the issues and why, in our judgment, that argument does not prevail in a case of kidnapping it is necessary briefly to explore the authority on which the asserted law as to consent is based.

[11] In relation to an assault and rape the limited rule that Mr Gibbs relies on as to consent has long stood in the books, based on the judgments in the Court of Crown Cases Reserved in the case of *R v Clarence (Charles James)* (1888) 22 QBD 23, [1886–90] All ER Rep 133. It was not, as far as we can see, however, confirmed by English authority until the case of *R v Linekar* [1995] 3 All ER 69, [1995] QB 250. The latter was a case where a prostitute agreed to have intercourse with a man for the sum of £25. After that intercourse had taken place he made off without paying. The judge directed the jury that if consent to sexual intercourse had been obtained because the appellant believed he would pay her the agreed sum, but he never intended to do so, then that fraud vitiated her consent to the act of intercourse and the appellant would be guilty of rape.

[12] This court on appeal said that an essential ingredient of rape was proof that the woman did not consent to the act of intercourse with the man who penetrated her. The only types of fraud which could vitiate consent in a case of rape were frauds as to the nature of the act itself, or as to the identity of the agent, but it was the absence of consent to the sexual intercourse, rather than fraud, which constituted the offence of rape.

[13] That ruling was drawn, as we have said, from *R v Clarence*. Two points were extracted by this court in *R v Linekar* from the judgment in *R v Clarence*. First, the court quoted ([1995] 3 All ER 69 at 76, [1995] QB 250 at 258) the observation of Wills J in that report:

> 'That consent obtained by fraud is no consent at all is not true as a general proposition either in fact or in law. If a man meets a woman in the street and knowingly gives her bad money in order to procure her consent to intercourse with him, he obtains her consent by fraud, but it would be childish to say that she did not consent. In respect of a contract, fraud does not destroy the consent. It only makes it revocable.' (See (1888) 22 QBD 23 at 27, [1886–90] All ER Rep 133 at 135.)

[14] The court cited ([1995] 3 All ER 69 at 76, [1995] QB 250 at 258) a well-known passage from the judgment of Stephen J in *R v Clarence* (1888) 22 QBD 23 at 43–44, [1886–90] All ER Rep 133 at 144, which held that fraud as to the nature of the act done would vitiate content. His Lordship was less ready to confirm that fraud as to the identity of a person would vitiate consent, but that is, as we have said, not a matter in issue in this court.

[15] We would venture to observe in passing, though only in passing because the matter is now decided by *R v Linekar*, that neither of the propositions drawn from the case of *R v Clarence* by commentators had the support of all of the 13 judges who sat in the Court of Crown Cases Reserved. Wills J's judgment was concurred in only by Pollock B and by Lord Coleridge CJ. As far as we can determine Stephen J's judgment, including the statement that we have just set out, was concurred in by a bare majority of seven of the 13 judges. There were however other reasons in that case for the acquittal. Those included, in particular, that a man could only in very particular circumstances assault his wife by having intercourse with her because of a general consent to intercourse given at the time of marriage. That is a view of the implications of the marriage

contract that is no longer the law of this country, as the House of Lords held in the case of *R v R (Rape: marital exemption)* [1991] 4 All ER 481, [1992] 1 AC 599. Or, alternatively, the causing of disease (which was the offence in *R v Clarence*, that the man had concealed that he had venereal disease) albeit by direct physical contact, did not amount to 'inflicting' injury under the terms of s 20 of the Offences Against the Person Act 1861 under which Mr Clarence was charged.

[16] We would only venture to comment that the fact that judges of the standing of those who sat in *R v Clarence* could experience that degree of difficulty with what was even at that date the antique language of the 1861 Act adds further force to the need for radical reform of that provision, proposals for which remain unimplemented 115 years after *R v Clarence* was decided. However that, it may be said, does not directly assist us in this case.

[17] For the moment, at any rate, the formulation adopted from *R v Clarence* in *R v Linekar* is the law so far as rape and assault is concerned. Must it be extended to the case of kidnapping? We turn to what was said to be the natural meaning of 'consent' as stated by Wills J in *R v Clarence*.

[18] We should say that we have severe reservations about the use of civil law implications of fraud and mistake to assess the effect of mistakes about the circumstances of sexual intercourse. We would respectfully agree with what was said by Stephen J in *R v Clarence* (1888) 22 QBD 23 at 44, [1886–90] All ER Rep 133 at 144, that once an act of intercourse has taken place that fact is irrevocable. But we do not need to linger on this point because it is clear that Wills J was directing himself, as was Stephen J, to the question of whether the complainant had consented to the act that formed the basis of the alleged defence, that is the act of intercourse. That is how his observation was understood by this court in the case of *R v Linekar* [1995] 3 All ER 69 at 77–78, [1995] QB 250 at 260–261.

[19] It is only in the oddest sort of case, of which the most famous example in the books is the case of *R v Williams (Owen Richard)* [1923] 1 KB 340, [1922] All ER Rep 433, that anyone could be mistaken about the nature of that act: that is, whether what was done to the woman was in fact sexual intercourse at all. But in our case what is it that the complainants are said to have consented to? On one level they have consented to taking a ride in a motor car. As Mr Gibbs said, that is what they wanted all along; or, at least, what they wanted all along was transport to their ultimate destination. But that is not what the offence consists of and is not in law the offence, or the basic act, with which Mr Cort is discharged. The offence is taking away by fraud. The complainant simply has not consented to that. Indeed, it is difficult to see how one could ever consent to that once fraud was indeed established. The 'nature' of the act here is therefore taking the complainant away by fraud. The complainant did not consent to that event. All that she consented to is a ride in the car, which in itself is irrelevant to the offence and a different thing from that with which Mr Cort is charged.

[20] We revert to the comparison with the offence of rape. As this court said in *R v Linekar* (a passage already quoted) it was the absence of consent to sexual intercourse rather than fraud which constituted the offence of rape. But in kidnapping the fraud is part of the very definition of the offence. As we have said, it is very difficult to see where in a case where fraud is established the question of the victim's consent can re-enter the matter. We are quite satisfied that had Lord Brandon had a case such as the present in mind when he set out the elements of the offence in the case of *R v D* [1984] 2 All ER 449, [1984] AC 778 he would have addressed this matter by making it plain that issues of consent were unlikely, or impossible, to arise when the offence was taking away by fraud. As we have

already pointed out, the reference to consent in the case of *R v D* undoubtedly plays the role that it does in Lord Brandon's formulation, because it is that that the case was all about. It was quite different from this case. And fraud is not a principal element in the offence of rape, as this court said in terms in *R v Linekar*.

[21] In the case of ordinary assault, best illustrated in this area by the judgments in this court in the case of *R v Richardson (Diane)* [1999] QB 444, [1998] 3 WLR 1292, fraud equally is not a basic element of the offence. In the present species of kidnapping it is, and that requirement is not to be off-set by what, we have to say, are artificial appeals to the presence of consent on the part of the complainant.

[22] We therefore consider that these convictions were rightly obtained and should be upheld. We would make just three further observations in the particular context of this case. First of all, is the implication of our judgment that there is no room for the 'consent' limb of Lord Brandon's definition when one is dealing with a case of fraud? We think that the answer to that is probably yes. That answer does not present a difficulty. The definition in the case of *R v D* is not a statutory definition, and therefore the rule against redundancy that applies in the interpretation of the statute does not apply to it.

[23] Secondly, the courts that were dealing with cases like *R v Clarence* and *R v Linekar* were worried that an offence such as rape, rightly met with very large sentences, should not be undervalued to include disputes about payment. And if there is casual contact in the street, should the fact that somebody has concealed his disease inculpate him in assault? As Stephen J said in *R v Clarence* (1888) 22 QBD 23 at 39, [1886–90] All ER Rep 133 at 142:

> 'To seize a man's hand without his consent is an assault; but no one would consent to such a grasp if he knew that he risked small-pox by it, and if consent in all cases is rendered void by fraud, including suppression of the truth, such a gesture would be an assault occasioning actual bodily harm as much as the conduct of the prisoner in this case.'

[24] We would make two comments. First, in a kidnapping case the court is not constrained by way of sentence in the way that it properly is in a rape case, as the judge's sentence in this case demonstrated. Secondly, we revert again to the fact that what has to be established is fraud, almost certain to be positively misleading actions, as in our present case, and not just the suppression of the truth.

[25] Thirdly, is this a trivial case that should not be met with a conviction for something as serious as kidnapping? The answer to that, in our judgment, is No. Mr Cort's conduct was something that society should be able to control, and it is not difficult to think of other possibilities which would carry a more serious aspect than the conduct of Mr Cort. Let us say that another person, not Mr Cort, invites ladies into his car with a view to committing a rape on them at the end of their journey; or he simply invites them into the car with a view to finding out their address, or something like that, with further and less benign objects in view. He is intercepted on the journey, or at the bus stop. On those facts we do not think that there is any other offence that would have been committed, certainly not an offence of attempt of any form of sexual assault. There would be no recourse other than this offence of kidnapping. It is clear, in our view, that a proper social purpose is served by the offence in these circumstances, including those in which Mr Cort was convicted.

a [26] In our judgment, those convictions were rightly entered. For these reasons, which we have ventured to express at some length because of the unusual nature of this case and because it enters upon an area of the law of kidnapping not previously dealt with by authority, these appeals are dismissed.

Appeal dismissed.

Stephen Leake Barrister.

Ivorygrove Ltd v Global Grange Ltd

[2003] EWHC 1409 (Ch)

CHANCERY DIVISION

LAWRENCE COLLINS J

20, 21 MAY, 18 JUNE 2003

Landlord and tenant – Business premises – Application for new tenancy – Landlord intending demolition or reconstruction of premises or substantial work of reconstruction – Whether proposed works necessarily involving structure of building – Landlord and Tenant Act 1954, s 30(1)(f).

The respondent acquired a reversionary lease of hotel property occupied by the claimant tenant under a lease expiring in 2001 to which the provisions for security of tenure to tenants of business premises under the Landlord and Tenant Act 1954 applied. In 2000 the respondent gave notice to the claimant stating that it would oppose any application by the claimant for a new tenancy by virtue of s 30(1)(f)[a] of the 1954 Act on the ground that it intended to 'demolish or reconstruct the premises' or a substantial part of them or to carry out 'substantial work of construction'. The works it proposed to carry out were to upgrade the hotel and involved, inter alia, considerable alteration of non-load bearing internal partitions. The county court heard the claimant's application for a new tenancy and decided that the respondent could rely on s 30(1)(f) of the 1954 Act. The tenant appealed, contending, inter alia, that for the purposes of s 30(1)(f) some form of building which involved the structure was required and that partition walls, whatever their nature and composition, being non-load bearing, could not properly be described as structural.

Held – The wording of s 30(1)(f) of the 1954 Act did not require the demolition or construction of structural or load bearing features as a condition of its applicability, nor was such a condition to be read into it. Whether the relevant parts of premises were load-bearing was simply one of the factors to be taken into account in determining the question of whether there was demolition or reconstruction, or demolition or reconstruction of a substantial part, or substantial work of construction on the holding or part of it. It followed that it was a matter of fact and degree whether the replacement and reconfiguration of partitioning fell within either limb of s 30(1)(f) and, in the instant case, it had been open to the judge to find that the proposed works engaged and satisfied s 30(1)(f). The appeal would therefore be dismissed (see [66]–[69], [73], below).

Pumperninks of Piccadilly Ltd v Land Securities plc [2002] 3 All ER 609 considered.

Notes

For intended demolition, reconstruction or substantial work of construction, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 590–593.

For the Landlord and Tenant Act 1954, s 30, see 23 *Halsbury's Statutes* (4th edn) (1997 reissue) 152.

a Section 30, so far as material, is set out at [11], below

Cases referred to in judgment

Barth v Pritchard [1990] 1 EGLR 109, CA.

Bewlay (Tobacconists) Ltd v British Bata Shoe Co Ltd [1958] 3 All ER 652, [1959] 1 WLR 45, CA.

Cadle (Percy E) & Co Ltd v Jacmarch Properties Ltd [1957] 1 All ER 148, [1957] 1 QB 323, [1957] 2 WLR 80, CA.

Cerex Jewels Ltd v Peachey Property Corp plc [1986] 2 EGLR 65, CA.

City Offices (Regent Street) Ltd v Europa Acceptance Group plc [1990] 1 EGLR 63, CA.

Cook v Mott [1961] EGD 294, CA.

Graysim Holdings Ltd v P & O Property Holdings Ltd [1993] 1 EGLR 96; *rvsd* [1994] 3 All ER 897, [1994] 1 WLR 992, CA; *rvsd* [1995] 4 All ER 831, [1996] AC 329, [1995] 3 WLR 854, HL.

Joel v Swaddle [1957] 3 All ER 325, [1957] 1 WLR 1094, CA.

Marazzi v Global Grange Ltd (25 January 2002, unreported), Cty Ct; *affd* [2002] EWHC 3010 (Ch), [2003] 2 EGLR 42.

Pumperninks of Piccadilly Ltd v Land Securities plc [2002] EWCA Civ 621, [2002] 3 All ER 609, [2002] Ch 332, [2002] 3 WLR 898.

Romulus Trading Co Ltd v Henry Smith's Charity Trustees [1990] 2 EGLR 75, CA.

Cases referred to in skeleton arguments

Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577.

Atkinson v Bettison [1955] 3 All ER 340, [1955] 1 WLR 1127, CA.

Cunliffe v Goodman [1950] 1 All ER 720, [1950] 2 KB 237, CA.

English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409.

Fisher v Taylors Furnishing Stores Ltd [1956] 2 All ER 78, [1956] 2 QB 78, [1956] 2 WLR 985, CA.

Application and appeal

The claimant, Ivorygrove Ltd, the tenant of business premises at 34-37 Bedford Place, London WC1, applied for permission to appeal and to appeal from the decision of Judge Green QC in the Central London County Court refusing the claimant's application for a new tenancy under s 25 of the Landlord and Tenant Act 1954 on the ground that the works proposed to be done at the premises by the respondent, Global Grange Ltd fell within s 30(1)(f) of the 1954 Act. The facts are set out in the judgment.

Kelvin Rutledge (instructed by *Barnes & Partners*) for Ivorygrove.

James Thom QC (instructed by *Howard Kennedy*) for Global.

Cur adv vult

18 June 2003. The following judgment was delivered.

LAWRENCE COLLINS J.

I INTRODUCTION

[1] Part II of the Landlord and Tenant Act 1954 contains provisions which give some security of tenure to tenants of business premises. The landlord must give notice of termination in accordance with s 25 of the 1954 Act, and the tenant may

apply for a new tenancy. The grounds on which the landlord may oppose an application for a new tenancy are set out in s 30(1) of the 1954 Act, one of which is (s 30(1)(f)) that the landlord— a

> 'intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof ...' b

These proceedings have involved a question which has, on two occasions, been left open for decision by the Court of Appeal, namely whether s 30(1)(f) applies when the work, however extensive, does not involve the structure of the building in the sense of load-bearing elements.

[2] Ivorygrove Ltd was incorporated in 1983, and is a family company. For about 18 years it has been running a hotel called The Crichton Hotel, which consists of four Georgian houses at 34–37 Bedford Place, Bloomsbury, London WC1 built in about 1805. The Crichton Hotel caters for students and tourists on a low budget, and is close to University College London (and other parts of London University), and to Russell Square and the British Museum. c

[3] The freeholders of the premises are the trustees of the Bedford Estates. On 19 January 1984 the Bedford Estates let the four houses to a predecessor in title of Ivorygrove for a term of 20 years, expiring on 24 March 2001. The next day the lease was assigned to Ivorygrove. Ivorygrove obtained permission from the Bedford Estates to convert the four houses into one hotel by making connections between them at all levels, from basement to third floor. d

[4] Global Grange Ltd (Global) is a substantial privately owned company whose business is to refurbish and run some eight or nine hotels in London and the South East. Global was incorporated in 1980 and has been trading as a hotel company for over 18 years. e

[5] On 21 April 1999 the Bedford Estates entered into an agreement granting Global an option for a reversionary lease in relation to the four houses at 34–37 Bedford Place and also to three other hotels (which were run by other tenants of the Bedford Estates) consisting of 24–27, 31–32 and 39–40 Bedford Place. 24–27 Bedford Place (the St Margaret's Hotel run by Mr and Mrs Marazzi for some 50 years) was the subject of a decision by Judge Dean QC, and an appeal to Park J, to which I shall refer later. There were also proceedings in relation to 31–32 Bedford Place, which were adjourned to await the outcome of the trial before Judge Green QC, and which were subsequently settled. f g

[6] The lease of 34–37 Bedford Place was granted on 30 April 1999. Global paid a premium of £2,194,500, and the rent was to be £100 for 15 years and thereafter a rent of £100,000 per year or 30% of open market value whichever was the less. h

[7] The agreement of 21 April 1999 (Sch 2) required Global to carry out works of refurbishment to 34–37 Bedford Place (and the other properties)—

> 'in order that [it] shall have the characteristics of a three or four crown hotel being in general accordance with the current guidance for three or four crown hotels issued by the English Tourist Board' (cl 1.1). j

In default of completion by 23 March 2007 a penalty rent rising to £25,000 a year was to fall due. The cost estimates to be produced by Global were to demonstrate to the satisfaction of the Bedford Estates that the expenditure on 34–37 Bedford Place was to be (subject to adjustment) £2·6m.

[8] On 28 March 2000 Global gave notice to Ivorygrove under s 25 of the 1954 Act, saying that it would oppose the grant of a new lease. On 5 May 2000 Ivorygrove served a counter-notice. On 5 July 2000 Ivorygrove made application to the court for a new tenancy proposing a new term of 14 years with seven-year reviews and a starting rent of £100,000. Global in its answer proposed that, if a new tenancy was granted, there would be a ten-year term with a six-month break clause after the first six months. It proposed a rent of £200,000 pa.

[9] On 19 September 2001 the London Borough of Camden gave planning permission and listed building consent for a substantial part of the works proposed. On 12 August 2002 Camden gave planning permission and listed building consent for additional works. These works have been described in these proceedings as the 'approved scheme' and the 'revised scheme'. The main element of the revised scheme was the enlargement of the lift and the construction of a hoist from street to ground floor level for the disabled.

[10] On 13 November 2001 Barclays Bank, Global's bankers, gave it a letter of comfort for facilities up to £10,600,000 for the works to all four hotels. By a letter of 10 January 2002 the Bedford Estates confirmed to Global that it consented to the works and alterations to 34–37 Bedford Place in accordance with the planning permission and listed building consent already obtained, and also in connection with the recently submitted revised planning application and listed building consent application.

II THE 1954 ACT

[11] For present purposes the relevant provision of the 1954 Act is s 30(1)(f), which permits a landlord to oppose the grant of a new tenancy on the ground—

> 'that on the termination of the current tenancy the landlord intends to demolish or reconstruct the premises comprised in the holding or a substantial part of those premises or to carry out substantial work of construction on the holding or part thereof and that he could not reasonably do so without obtaining possession of the holding ...'

[12] The effect is that the landlord may oppose the grant of a new tenancy if he can show that he intends (which means not only a bona fide intention, but also a reasonable prospect of being able to bring about what he intends, including the obtaining of planning and listed building consent) one of the following: (a) demolition of the premises comprised in the holding; (b) reconstruction of the premises comprised in the holding; (c) demolition of a substantial part of the premises comprised in the holding; (d) reconstruction of a substantial part of the premises comprised in the holding; (e) substantial work of construction on the holding; (f) substantial work of construction on part of the holding: see *Woodfall on Landlord and Tenant* para 22.112.

III THE DECISION OF JUDGE GREEN QC

A *The issues*

[13] Among the issues before the judge were whether Global had established, the burden of proof being upon it: (1) that it had the requisite intention under the 1954 Act; (2) that it had a reasonable prospect of being able to carry out that intention; and (3) that the works which it intended to carry out satisfied s 30(1)(f), namely that they were works of demolition or reconstruction of the whole or a

substantial part of the premises and/or substantial works of construction on the whole of part of the holding.

[14] The judge found that Global satisfied the requirements of intention. In view of the letter from Barclays Bank and in view of the substantial income of Global, it had ample financial means to carry out its intention to do the works in the final scheme, and it had all the requisite consents.

B *The judge's findings of fact*

[15] The four houses were built in about 1805. They were grade 2 listed Georgian buildings. The external walls and party walls between the four houses were of load-bearing brick masonry. The internal walls were mainly of timber stud, supporting timber floors and roofs. Each house retained its staircase with brick surrounds. The houses consisted of basement, ground, and three upper floors, all connected at each level. The staircases of each remained, and one had a lift. Internally the houses had been substantially altered upon conversion to hotel use. Some original features remained but the original rooms had been subdivided and partitioned.

[16] The hotel bedrooms mainly had either a washbasin only or no facilities. A few had en suite bathroom or shower. The approved scheme had the following main elements. It would create 43 bedrooms with en suite facilities from 73 bedrooms. For this purpose doorways were to be blocked up and internal walls demolished. Some of the internal walls were originally load-bearing. These were the minority of internal walls and occurred mainly in the basement. By deflection of the floors, which had occurred on the third floor and to a lesser extent on the second and first floor, some of the internal partitions had become load-bearing. Floors would be strengthened. New partitions would be created with plywood stiffening. New doorways would be opened up. In the basement, the kitchen would be opened up with structural steel support. A second structural steel support would be inserted to the enlarged opening for the disabled lavatories. Excavations would be done to lay new drains and a connection to the sewer. A dumbwaiter would be installed. Two conservatories would be built. Windows of the upper floors of no 34 would be replaced to match the remainder. On the first to third floors, large areas of partitioning would be removed.

[17] These were substantial walls which had to be knocked down with a sledgehammer, so disturbing skirting, walls and ceiling finishes. All the floorboards would be taken up so that plywood stiffening could be put in. That was structural work on any definition. The stiffening was necessary because of deflection. The internal walls, excluding the party wall, amounted to 2,587 sq m. Of these 1,275 sq m (49%) would be demolished and 860 sq m (33%) of new walls were to be built. The existing partitions were mainly of plasterboard though some were brick, particularly in the basement. The new partitions would not be like demountable office partitions, but substantial structures stiffened by plywood, insulated and plastered. Completely new services would have to be put in for the new bathrooms and generally.

[18] In order to run those services there would be numerous holes in both load-bearing and non-load-bearing walls and in the floors. The services would run both horizontally and vertically.

[19] The revised scheme had the following main additional elements: the lift shaft would be demolished and reconstructed, and a larger lift would be installed;

the new lift would travel one floor further, to the basement; the lift motor room and roof overrun would be demolished and a new flat roof would be built below parapet level; a disabled hoist in no 36; lavatories in the basement and second floor bedrooms; an increase in the size of the first floor corridor and bedrooms on the first and second floors by demolishing and rebuilding 11 existing partition walls and alteration of stairs to rear extension rooms.

[20] As regards the final scheme, the drawings showed that there were no areas of the hotel which would be unaffected. Mr Bowles, the joint engineer, said: 'All parts of the interiors of all the buildings would be affected by the proposed works.' The building services, including their distribution routes, were all to be renewed. The boiler room, kitchen, reception and administration areas were to be relocated. The quality of the finishes was to be upgraded throughout the buildings. The removal of redundant services was bound to cause damage to finishes. Moving walls and forming new openings in existing walls was bound to cause damage to adjacent finishes. New service distribution routes would be created both horizontally and vertically, which would involve chasing plaster in the walls and lifting floorboards and drilling or notching joists to conceal pipes and cables. There would be joinery work to doors, skirting and architraves. New manholes and buried drainage runs would be constructed in the basement. The reconstruction of the lift to larger plan extended down into the basement with a pit and overrun at the top. The walls of a few bedrooms were to be moved to accommodate wheelchairs and an external disabled hoist was to be introduced at ground floor level.

[21] The report of the jointly-instructed engineer, Mr Bowles, was to this effect: (a) there were no structural problems in the houses, but the structure would be affected by the proposed works both because partition walls had come to be load-bearing due to deflection on the upper floors and because building services needed to be routed through the structure; (b) the proposed works would affect all parts of the interior of the premises; (c) the proposed bathroom finishes, which consisted of high quality but brittle tiling, required stiffening of the floors, but a client would be advised against these finishes because of the danger of cracking in spite of stiffening, but Mr Bowles accepted that if the client (as here) required them, he would accept the client's brief; (d) extensive opening up was not necessary before the work began on site, but extensive opening up would be necessary after work began; (e) the differences between the engineers as to the amount of stiffening and reinforcement needed was because they were adopting different approaches, neither of which was wrong in engineering terms but each of which was appropriate to the commercial objects of the party instructing him: for a client with the landlord's commercial objective Mr Redmond's proposed stiffening of the floor with plywood and plywood in the new stud partitions and additional reinforcements to beams would be reasonable and necessary; and (f) from an engineering point of view the works could be phased either in one or two houses at a time.

[22] The costs experts on both sides agreed as follows: with vacant possession of all four houses, the total estimated cost of refurbishment and upgrading the premises to three or four crown standard was £4.2m. The length of time which that work would take was 44 weeks. The engineers agreed the cost of works which the court might consider to be structural at £454,867, consisting of: (a) alterations to masonry walls, renewal of basement floor, reconstruction of lift shaft, new structural steelwork and structural wall reinforcement (£207,332);

(b) joist strengthening and levelling (£72,801); (c) removal of non-load-bearing walls (£24,205); (d) plywood flooring (£75,809); (e) construction of new conservatories (£25,007); (f) crack stitching to external walls (£13,765); and (g) construction of new partitions (£35,948). a

C *The judge's approach and conclusions*

[23] The judge directed himself as follows: (a) it was not right to analyse each item of work and argue that it was neither demolition nor reconstruction of a substantial part; (b) for there to be 'reconstruction' the work must involve the structure; (c) the structure could include internal and other non-load-bearing walls, since there was no warrant for the view that 'reconstruction' and 'construction' required works to load-bearing walls only; (d) the relevant parts of the premises amounted to a substantial part of the structure, although they were largely non-load-bearing; (e) the partitions enclosing the hotel rooms were an essential part of the structure, and a jury would take that view being uninfluenced by any term of art which the word 'structure' had acquired in the law of landlord and tenant; (f) the work must be looked at as a whole, including associated non-structural works; and (g) if a non-load-bearing wall was part of the structure then it was right to include plastering, stiffening and decoration as part of the work of construction. b c d

[24] He found that the partitions defined the extent and perimeter of hotel rooms and bathrooms. The rooms were the raison d'être of the hotel. The partitions were not the usual lightweight demountable office partitions. They had to be knocked down with sledgehammers. Doing so would damage skirting boards and plaster on walls and ceilings to a substantial extent. They were then to be rebuilt in a different position, requiring substantial making good. A jury would consider that the demolition of the partitions and their rebuilding in a different position were works which came within both limbs of the section, and the works were substantial in the light of the physical quantity of the work, its cost and the time it took, of which the first was by far the most important. e f

[25] That view was a fortiori when there was taken into account the construction of the larger lift, the excavations and underpinning required, the construction of two steel beams, the openings made in an admittedly only limited number of load-bearing internal walls, the amount of strengthening which was intended to the floor and laying of the new drains, the removal and insertion of services throughout the building. This was not a marginal case when properly considered. g

[26] Accordingly, the vast bulk of the work was either construction or ancillary to construction and the items which were neither were a comparatively small part of the whole scheme. The landlord could show an intention to demolish and reconstruct a substantial part of the premises (namely most of the interior) and a substantial work of construction on the holding. If it were necessary for the works to effect 'the structure' a large amount of work did so, given that 'structure' for these purposes did not mean 'load-bearing'. h

[27] Even if the large majority of the works was excluded, there was a bedrock of undoubted work to the structure set out in the agreement between the engineers totalling £454,867, and those works were substantial in the absolute sense, even though they formed only 10% or 11% of the entire scheme. j

[28] The undoubted structural works were: (a) the installation of the larger lift shaft and lift; (b) the excavation for and underpinning related to the new lift shaft;

(c) the essential stiffening of the upper three floors to cope with the deflection; (d) the insertion of two steel beams in the basement; (e) the plywood flooring; (f) the construction of two new conservatories; (g) most of the demolition at basement level, which was masonry and possibly load-bearing.

[29] Just as important, and probably more important than the undoubted structural works, were what he considered also to be structural, namely the substantial number of partitions to be demolished and reconstructed. Those partitions were part of the structure of the present and future hotel.

[30] All parts of the interior would be affected by the proposed works, there would be reinforcements to joists and beams and plywood reinforcement for the floors. The floors had to be stiffened, and plywood reinforcement would also be applied to the new and existing partition walls. Making good and decoration would be widespread if not universal.

[31] The total cost of the scheme would be £4·2m which would take 44 weeks to carry out, and a substantial proportion of that figure would qualify on the basis that they were works ancillary to the foregoing, and his estimate was something of the order of £3m or so.

[32] Accordingly the scheme qualified under both limbs of s 30(1)(f) of the 1954 Act. The works were works of demolition and reconstruction of a substantial part of the premises and were also a substantial work of construction on the holding.

[33] The judge refused permission to appeal. Neuberger J ordered that the application for permission to appeal be listed so that if permission were granted the appeal could be heard at the same time.

IV *MARAZZI V GLOBAL GRANGE LTD*

A *Decision of Judge Dean QC*

[34] On 25 January 2002 Judge Dean QC gave judgment in relation to one of the other Bedford Place properties leased by Global from the Bedford Estates, namely nos 24–27, which is the St Margaret's Hotel, which had been run by Mr and Mrs Marazzi for about 50 years. The judge held that Global had established that it had a settled intention to carry out the proposed work, and a reasonable prospect of being able to do so, with regard to the approved scheme. But he also held (although it was not necessary for decision in the light of his finding that the work contemplated by the revised scheme did not fall within s 30(1)(f)) that Global had not satisfied him that it had reasonable prospects of obtaining the requisite consent to the revised scheme.

[35] He accepted that structure did not necessarily mean load-bearing elements, but included the basic fabric of the building which gave it its essential form and character as a building. There were some works which could be said to involve demolition and reconstruction, notably the removal of the basement wall and its replacement by the steel beam, the installation of the lift involving floor timbers and the removal of part of the roof and the building of the overrun, the removal and restoration of part of the staircase in no 25 and the opening up of access in party walls. But the proposed work did not affect a substantial part of the premises, since the construction of the lift was limited to a small part of one basement, the trimming of a small area of timbers on each storey of one house and the removal and replacement of 9 sq m of one roof and building of the overrun. The work, apart from a few party wall openings, was confined to single

units and only to relatively limited areas within each unit. Some levelling of floors on two storeys with the incorporation of plywood, and the removal and replacement of non-original party walls, even when they may have acquired some non-designed load-bearing qualities, was not demolition or reconstruction of a substantial part.

[36] The partitions were stud partitions, and while not so temporary or insubstantial as the partitions commonly found in office buildings, fulfilled an essentially similar function of making convenient divisions to enable use of the building to suit the particular requirements of the occupier or tenant rather than being part of the essential structure of the premises. Levelling of some areas of floor on two levels did not amount to reconstruction of a substantial part. Those two categories of work formed the major part of the proposed redevelopment in terms of extent. The renewal, modernisation, rearrangement and extension of utility services did not amount to structural work. The external hoist was plant and had minimal impact upon the structure. General decorative refurbishment and refurnishing were not works falling within s 30(1)(f) of the 1954 Act.

[37] The more difficult question was whether, taken overall, the proposals could be said to be substantial works of construction. The cost and time involved suggested substantial work, but although time and money were relevant, the ultimate issue was the true character of the physical work. Even though some of the proposals included works of construction, ie in the basement kitchen, lift shaft, party wall openings, staircase restoration, opening and restoration of one external door and window, these were not substantial in the context of the physical extent of the premises and the overall proposals. He therefore came to the firm conclusion that Global had not satisfied him the proposals contained in either the approved or the revised scheme constituted work of demolition or reconstruction of a substantial part of the premises.

B *Judge Green QC's treatment of the* Marazzi *decision*

[38] The judge found that *Marazzi*'s case was different. First, in the Ivorygrove case, planning permission had actually been obtained for the revised scheme, but in *Marazzi* Judge Dean did not consider that the landlord would succeed in obtaining planning permission and listed building consent. In *Marazzi*'s case there was a stark contrast between the views of the parties' two engineers. Judge Dean found himself constrained to treat the views of the defendant's engineer, Mr Redmond, with circumspection. On the facts before him, Judge Green did not share Judge Dean's reservations about Mr Redmond's evidence. The conflicts between the engineers had very substantially been reduced by the views of the joint engineer, Mr Bowles. There was no such joint report before Judge Dean. Judge Green found that the criticisms of Mr Redmond and of Mr Lewis (Global's cost expert) were unjustified and should never have been made. Mr Lewis's figures were criticised at an earlier stage in Ivorygrove's reports as grossly unreasonable. Even without hindsight that criticism was baseless and extravagant.

[39] In *Marazzi*'s case the planning experts on both sides hotly contested the probability of obtaining planning permission for the revised scheme. Judge Dean preferred the views of the tenants' experts that it would not be obtained.

C *Appeal to Park J*

[40] Judge Green's decision was given on 25 September 2002, and it is unfortunate that this case, and *Marazzi*'s case, were not dealt with in the county court together. I was told that this was due, at least in part, to listing difficulties. There was an appeal to Park J in *Marazzi*'s case, which was decided on 20 December 2002: see *Marazzi v Global Grange Ltd* [2002] EWHC 3010 (Ch), [2003] 2 EGLR 42.

[41] Park J dismissed the appeal, as he put it (at [7]–[8]):

> '... essentially on the ground that the decision that the judge reached was properly open to him. Thus I cannot say that his decision was wrong. It does not necessarily follow that, if he had found that para (f) did apply, that finding would have been wrong ... I can well imagine that, if the question before me had been the question before Judge Dean, I might well have been persuaded that the conditions of para (f) did apply.'

[42] Park J said that the finding by Judge Dean that the levelling of the floorboards was not demolition or reconstruction was plainly open to him, and he would probably have made the same finding himself. Park J said that installing new partitions in the third floor was not reconstruction, but more in the nature of altering the internal layout, which was not the same thing as reconstructing the third floor. The same applied to any other area of the building in relation to which similar questions might be considered changes to the partitioning, which altered the layout but did not reconstruct it. But he accepted that there could be a question of degree. If the plans were to gut the whole interior of the hotel and rebuild the interior, that obviously would be reconstruction. But in the actual case the essence of the internal structure remained.

V THE APPLICATION BY IVORYGROVE

[43] The grounds on which Ivorygrove relies are as follows. (1) The judge failed to make a sufficient finding on the critical issue of whether Global enjoyed a reasonable prospect of achieving the purpose behind its proposed scheme of works, ie the transformation of a budget hotel into one which would attract a three to four crown rating, and that issue was relevant to the question whether Global had established that it had the requisite intention under the ground in s 30(1)(f) of the 1954 Act. (2) The judge misdirected himself and/or erred in law in finding that Global's proposed removal and/or erection of partition walls would constitute works for the purpose of the ground in s 30(1)(f) and he ought to have directed himself that, for the purposes of this ground, some form of building upon the premises which involved the structure was required and that partition walls did not fall within the definition of 'construction', or alternatively, the judge gave undue weight to this element of the proposed scheme. (3) The judge misdirected himself and/or erred in law in finding that general refurbishment works fell within s 30(1)(f), since for the purposes of this ground, it is not sufficient for a landlord to include in his scheme of intended works a core of construction work for virtually every other item comprised in the scheme to be taken into account, or, alternatively, the judge gave undue weight to the refurbishment element of the proposed scheme. (4) No reasonable judge would have concluded that the scheme of works was substantial in either context in s 30(1)(f).

[44] The first point relates to the failure of the judge to deal with an argument that the scheme would not itself qualify for three to four crown standard rating by the English Tourist Board because there were not enough rooms of the required size to take king- and queen-size beds. There is nothing in this ground of appeal, which is essentially one on lack of adequate reasoning. The judge did not have to deal with every argument, and the point that the scheme would not have actually qualified with the English Tourist Board for three or four crown standard was an obviously bad one. Global had a contractual obligation to the Bedford Estates to carry out works of refurbishment in order that the properties—

> 'shall have the characteristics of a three or four crown hotel being in general accordance with the current guidance for three or four crown hotels issued by the English Tourist Board.'

The Bedford Estates had confirmed approval of Global's scheme for the purposes of the contract.

[45] On the second ground, Ivorygrove argues that partitions, however extensive, would not fall within the definition of 'construction'. Such works, whatever the nature or composition of the partition walls in question, cannot properly be described as structural. If a partition wall did not form part of the structure of the building, and therefore fell outside ground (f), then it was difficult to see how it could be brought back within that ground because its removal would involve consequential damage to the skirtings or adjoining plasterwork, or its repositioning would involve substantial making good.

[46] Nor was it material that the partitions were arranged in such a way as to define the particular use of the building because ground (f) was concerned with the physical aspects of the building rather than the use to which it is put.

[47] Global's case on this ground is that there is not, and should not be, any rule of law that the removal and replacement of timber and plaster stud partitions can never amount to demolition, reconstruction or construction, and indeed that the authorities show the contrary. The judge's decision on the broad jury question was correct or at least supportable and there is no real prospect of it being reversed.

[48] On the third ground Ivorygrove accepts that both works of preparation ancillary to qualifying works and works closely associated with the completion thereof may properly be taken into consideration for the purposes of ground (f). But ground (f) does not include such items as fittings, fixtures, tiling, decoration or internal reorganisation. Such work can be described as general refurbishment and does not fall with the ground. It is not sufficient for the landlord to include in his scheme of intended work a substantial core of construction work for every item comprised in the scheme to be taken into account for the purposes of ground (f). The judge regarded 'the vast bulk' of the proposed works as works qualifying under ground (f) whereas, on his own analysis, only about 10% of the overall cost is attributable to structural works properly so-called. The judge therefore placed very heavy reliance on works which, at best, were ancillary to structural works and in many cases had nothing at all to do with the structure, including such items as making good damage to skirtings and decorations, bathroom tiling and redecoration, and redecoration of the walls. Had the judge restricted his consideration to items of structural works properly so-called, together with works necessarily ancillary or closely associated thereto, he would

not have concluded that they were not substantial in either sense deployed in ground (f).

[49] On the fourth ground, substantiality, Ivorygrove argues that even if, contrary to its principal submission, the erection and/or removal of partition walls properly fall within the ambit of ground (f), it is submitted that no reasonable judge would have concluded that Global's scheme met the test for substantiality as it appears in that ground. A fortiori, if the partition walls are not taken into account there is very little that does qualify under ground (f).

[50] This ground has to be addressed separately on the basis of the judge's finding that (a) the large majority of the works fell within ground (f), and (b) that alternatively the bedrock works qualified. As regards (a) unless the judge's findings can be impeached, the finding that the relevant work of construction is 'substantial' or that a 'substantial part' of the property is affected is obviously right, let alone not appealably wrong. The question is whether, since structure includes non-load-bearing elements, the walls are sufficiently substantial to be considered to be part of the structure. The judge's point that rooms are the raison d'être of the hotel does not confuse physical structure with purpose. The purpose clothes the physical structure with permanence and demands a degree of physical substance which other stud partitions might not have. He had seen the walls to be demolished and samples of what would replace them. As regards (b) the cost of the bedrock works was agreed at £454,867. The parties' contentions as to annual rent were £100,000 (Ivorygrove) and £200,000 (Global), and so the cost was three years' rent at the mid-point between those figures. The judge held (and there is no appeal against this finding) that by themselves these works would have taken 'rather more than 23 weeks'—approximately half a year. The work referred to in the 'bedrock' list affects every floor of the hotel. This was substantial, and a matter for the judge. On any view a scheme for 23 weeks' works costing over £400,000 was substantial, and there is no basis for interference with the judge's decision.

[51] Ivorygrove also argues that, in the interests of consistency, Judge Green should have followed the *Marazzi* decision unless there was good reason to the contrary. Judge Green's main reasons for differing from Judge Dean's decision were not compelling. Judge Dean had decided the substantive issues in *Marazzi*'s case on the assumption that Global *would* obtain planning and listed building consent. Therefore, his subsequent finding that it probably would not obtain such consent was irrelevant and did not undermine his decision on the principal issue. At any event Judge Dean was right, to an extent, because planning permission was only granted in the present case after some modification of the proposals. Secondly, although Judge Dean had taken a dim view of Mr Redmond's evidence, such view cannot be said to have coloured his judgment generally.

[52] Ivorygrove also relies on the decision of Park J. On partition walls Park J said (a) that ground (f) refers to demolition or reconstruction of a 'substantial part' of the premises; (b) Global's case had to be that partition walls were 'part' of the premises; (c) however, by 'part' the draftsman had in mind specific areas of the building, for example a particular floor; and (d) the erection of partition walls has more to do with altering the internal layout of the building, which is not the same thing as reconstruction: 'changes to the partitioning alter the layout of the area, but do not reconstruct it' (see [31]). Park J also indicated that the stiffening of floors was not work of 'demolition or reconstruction' and that construction of

a new, larger, drain did not fall within ground (f). On these points Ivorygrove argues that Park J's judgment undermines Judge Green's approach.

[53] Global's position is that the only matter before Park J, as he himself recognised, was whether Judge Dean's decision was outside the margin of appreciation available to him, and Park J recognised that 'a different judge might have taken a different view'. The decision provides no support for the view that removing and replacing partitions can never be demolition, reconstruction or construction, and on the contrary is persuasive authority for the view that they can be. In any event, even if the point is right, it only impeaches Judge Green's decision on demolition and reconstruction of 'a substantial part' of the premises, but would leave unaffected the finding that the works constituted a 'substantial work of construction'. The highest that Park J put the 'floor reinforcement' question was that it was open to the trial judge to say that this was not demolition or reconstruction, and that he 'would probably have made the same finding'. This falls far short of suggesting that the contrary finding would have been wrong. As to the drain, Park J did not find that installation of a drain could not be viewed as construction, *Cook v Mott* [1961] EGD 294 at 296 being Court of Appeal authority which precludes such a finding. The question was whether the trial judge's decision in *Marazzi's* case to exclude the drain was appealably wrong. Park J held that it was not. It does not follow that there would have been anything wrong with a contrary decision.

[54] Judge Green made two findings (para 30 of his decision): (a) that the large majority, but not the whole, of the intended works fell within the section; and (b) that the bedrock of work which the engineers agreed could be considered as structural was indeed structural work and fell within the section. It would have been wrong for the judge to seek to identify only those works which affected the 'structure' (however defined) and to exclude all the others: the position has to be looked at as a whole. The effect of the authorities is that the judge has to decide what works fall within the section, and is directed to look at the whole picture. Here, there was a single scheme with a single purpose. It was open to the judge to find that it affected the structure because it affected the basement drains, floor and masonry walls, the partition walls and the floors on the ground floor and upwards and it affected the roof. Much of the redecoration was required in order to make good the damage which these works would do. Furnishing and fitting out would have to be excluded. The judge's decision that the bulk of the scheme qualified should not be interfered with on appeal. The judge's primary decision was a reasoned decision and well within his rights on the primary facts which he found. The secondary decision related to works which both parties' cost consultants thought affected elements which could reasonably be considered to be structural, and did not include works of general refurbishment. If that was their view, it is impossible to argue that the judge could not find that the works amounted to demolition/reconstruction/construction.

VI CONCLUSIONS: LEGAL PRINCIPLES AND THE JUDGE'S FINDINGS

[55] The test for review of a judge's decision on whether the works which the landlord intends to do are works of demolition or reconstruction of a substantial part of the premises, or is a substantial work of construction on the premises or part thereof, has been variously stated as being whether the judge came to a conclusion which was clearly wrong or to which no reasonable man could have come, or whether there was evidence upon which he could have arrived at such

a a conclusion, or whether there any wrong approach or wrong appreciation of the evidence or assessment of it, or omission to consider any evidence: see, among other decisions, *Percy E Cadle & Co Ltd v Jacmarch Properties Ltd* [1957] 1 All ER 148, [1957] 1 QB 323, *Romulus Trading Co Ltd v Henry Smith's Charity Trustees* [1990] 2 EGLR 75 and *Marazzi*'s case [2003] 2 EGLR 42. The reason is that the question is prima facie a question of degree and fact, and one which will not be reviewed b in the absence of misdirection or of evidence to support the conclusion (see *Bewlay (Tobacconists) Ltd v British Bata Shoe Co Ltd* [1958] 3 All ER 652 at 653, [1959] 1 WLR 45 at 48). 'Ultimately, it is a jury question ...': see the *Romulus Trading Co* case [1990] 2 EGLR 75 at 78 per Mustill LJ.

c **[56]** For there to be reconstruction, there must be substantial work of construction, and 'reconstruct' means 'rebuild' (see the *Percy Cadle* case [1957] 1 All ER 148 at 149, [1957] 1 QB 323 at 328). Demolition involves the physical act of destruction, and reconstruction is equivalent to rebuilding, and contemplates a state of affairs where there has been a measure of demolition falling short of total demolition ([1957] 1 All ER 148 at 150, [1957] 1 QB 323 at 329). 'Reconstruction' connotes a physical reconstruction of the premises, and means d a substantial interference with the structure of the premises and then a rebuilding of such part of the premises as has been demolished by reason of the interference with the structure ([1957] 1 All ER 148 at 150, [1957] 1 QB 323 at 329–330 per Ormerod J, approved in *Joel v Swaddle* [1957] 3 All ER 325 at 329, [1957] 1 WLR 1094 at 1100).

e **[57]** It is necessary to look at the whole of the work, and then decide as a matter of fact and common sense whether it amounts to demolition or reconstruction of a substantial part of the premises, or the carrying out of substantial work of construction on them: see *Joel*'s case [1957] 3 All ER 325 at 328, [1957] 1 WLR 1094 at 1099, the *Bewlay* case [1958] 3 All ER 652 at 655, [1959] 1 WLR 45 at 49 and *Cerex Jewels Ltd v Peachey Property Corp plc* [1986] 2 EGLR 65 at 69.

f **[58]** Work associated with demolition and reconstruction, such as works of preparation ancillary to such works, or replastering and rewiring, or the laying of cables and drains, may be considered when looking at the totality of the work to determine whether the work is construction or is substantial or is on a substantial part of the premises (see the *Cerex Jewels* case [1986] 2 EGLR 65, the *Romulus* g *Trading Co* case [1990] 2 EGLR 75 and *Cook v Mott* [1961] EGD 294). Contrast *Barth v Pritchard* [1990] 1 EGLR 109. But that does not mean that the landlord has only to include in his scheme of intended work a substantial core of constructional work for every item comprised in the scheme to be taken into account (see the *Romulus Trading Co* case [1990] 2 EGLR 75 at 78). It is a matter of degree depending on the circumstances of each case (see *Cook v Mott* [1961] h EGD 294).

[59] There has been some discussion of the question whether the concepts of demolition and reconstruction inevitably involve load-bearing structures. Section 30(1)(f) of the 1954 Act does not refer to the 'structure', but several of the decisions refer to the demolition and reconstruction of the 'structure': see e g the j *Percy Cadle* case [1957] 1 All ER 148 at 149, 150, [1957] 1 QB 323 at 328, 329–330 and *Joel*'s case [1957] 3 All ER 325 at 329, [1957] 1 WLR 1094 at 1100.

[60] In the *Bewlay* case the proposal of the landlords included the removal of part of a non-load-bearing wall. Lord Evershed MR said ([1958] 3 All ER 652 at 655, [1959] 1 WLR 45 at 49):

'... I do not accept, first, that the removal of the wall is not "demolition", and, further, that the replacement of the wall by screens cannot fairly be called, in some real sense, "reconstruction" ...' a

[61] In the *Romulus Trading Co* case [1990] 2 EGLR 75 at 77 Farquharson LJ said:

'For works to qualify as "reconstruction" within para (f) it must be shown primarily that they are works of rebuilding involving a substantial interference with the structure of the building, but structure is not necessarily confined to outside or other load-bearing walls ...' b

[62] But in *Barth's* case [1990] 1 EGLR 109 at 111 Stocker LJ said: c

'I consider that whether or not works fall within the definition of "construction" must depend upon the facts in each case in which the problem falls to be considered ... If it is necessary to decide whether or not in any given case it is necessary for works to involve directly the structure of the building in some way, my own view would be that this is implicit in the generality of section 30(1)(f). In other words, that some form of building upon the premises which involves the structure is required. I would not consider wooden partitions, however extensive, as falling within the definition of "construction", but such a situation would have to be reviewed in accordance with the facts of any given case.' d

[63] In *Graysim Holdings Ltd v P & O Property Holdings Ltd* [1993] 1 EGLR 96 at 100, Mr Anthony Grabiner QC, as a deputy judge of this division, applied the *Bewlay* case and held that demolition and/or construction need not be confined to load-bearing walls. It was appropriate to describe the removal of the existing interior of the market hall as an exercise in demolition followed by a reconstruction of a substantial part of the premises. It was equally appropriate to describe all of these proposed works as the carrying out of a substantial work of construction on the holding. They were very extensive works which would result in a brand new market hall. There was no appeal from his decision on this aspect: see [1994] 3 All ER 897, [1994] 1 WLR 992; [1995] 4 All ER 831, [1996] AC 329. e f

[64] The most recent authority on this point is *Pumperninks of Piccadilly Ltd v Land Securities plc* [2002] EWCA Civ 621, [2002] 3 All ER 609, [2002] Ch 332. It was decided in May 2002, but was not cited to Judge Green, or to Park J, or to me, and I invited written submissions on it following the oral hearing. In that case the tenant had an 'eggshell tenancy', ie a tenancy in which the demise consisted of the internal skin of the part of the building occupied by the tenant, with all load-bearing parts excluded. It was held that nothing in the authorities justified the proposition that 'premises' in s 30(1)(f) referred only to parts of a built structure which were load-bearing and performed some structural function (see [2002] 3 All ER 609 at [67], [86] per Charles J and Chadwick LJ respectively). But the Court of Appeal left open the question whether the same result would flow where the demised property included load-bearing or structural parts. After referring to *City Offices (Regent Street) Ltd v Europa Acceptance Group plc* [1990] 1 EGLR 63 (a decision on the interpretation of the expression 'reconstruction of the demised premises' in the case of an 'eggshell tenancy'), where the Court of Appeal left open the question whether, if the demise included structural parts of g h j

the building, the clause in question could only apply if there were some alteration to a load-bearing part of the structure, Charles J said ([2002] 3 All ER 609 at [68]):

> '... the cases referred to therein (and, in my judgment, the other cases relied on by the tenant) may be authority for the proposition that where the demised property includes structural parts of the building there can never be reconstruction (or demolition) unless there is some demolition or alteration to a load-bearing part of the structure (or I would add, in agreement with the judge, enclosing walls, floor and ceiling even if not load-bearing or structural) included in the demised property ... in my judgment they go no further.'

[65] Chadwick LJ said (at [86]):

> 'I agree, also, with the view expressed by Charles J ... that there is nothing in the passages upon which the [tenant] relies (*Percy E Cadle & Co Ltd v Jacmarch Properties Ltd* [1957] 1 All ER 148 at 148–150, [1957] 1 QB 323 at 328–329, *Joel v Swaddle* [1957] 3 All ER 325 at 328–330, [1957] 1 WLR 1094 at 1099–1101, *Barth v Pritchard* [1990] 1 EGLR 109 at 111, and *Romulus Trading Co Ltd v Henry Smith's Charity Trustees* [1990] 2 EGLR 75 at 76–77) which compels, or even supports, the conclusion for which they were cited: that "premises" in s 30(1)(f) of the 1954 Act is confined to parts of a built structure which perform some structural function. What is plain, from those passages, is that cases on the meaning of "demolish" or "reconstruct" for the purposes of s 30(1)(f) turn on their particular facts. In each case the relevant questions are: (i) what are the physical features of the property comprised in the tenancy; (ii) what, amongst those features, is capable of being demolished and reconstructed; (iii) is what is being done to those features which are capable of being demolished and reconstructed, taken as a whole, properly to be described as demolition or reconstruction of those features or a substantial part of them? It is, I think, wrong to start from the premise that physical features which are not load-bearing are incapable of being demolished and reconstructed; although it may well be that, in the particular case where there are load-bearing features, work which does not involve the demolition or reconstruction of any of those load-bearing features will not meet the test under (iii). But there is no reason why, in a case where there are physical features which are capable of being demolished and reconstructed, but none which are load-bearing, the test under (iii) should not apply, or should not be met in appropriate circumstances.'

[66] There is plainly nothing in the wording of s 30(1)(f) which requires the demolition or construction of structural or load-bearing features as a condition of its applicability. I am satisfied that no judicial authority binds the court to read into the section such a condition. To do so would treat the references in the authorities to 'structure' in the *Percy Cadle* case [1957] 1 All ER 148 at 150, [1957] 1 QB 323 at 329 (as approved by Lord Evershed MR in *Joel v Swaddle* [1957] 3 All ER 325 at 329, [1957] 1 WLR 1094 at 1100) as if they were statutes. It would be quite wrong to import into s 30(1)(f) not only the word 'structure', which does not appear there, nor, still less, the case law on the meaning of 'structure' in other statutory contexts (such as s 11 of the Landlord and Tenant Act 1985). As Lord Evershed MR himself warned in the *Bewlay* case [1958] 3 All ER 652 at 655, [1959] 1 WLR 45 at 49:

'I prefer to avoid exegeses of the statutory language unless they are absolutely necessary; for the result would otherwise tend thereafter to substitute for the problem of construction of parliamentary language the problem of the construction of the judgments of the court.'

[67] It follows, in my judgment, that whether the relevant parts of the premises are load-bearing is simply one of the factors to be taken into account in determining the jury question of whether there is demolition or reconstruction, or demolition or reconstruction of a substantial part, or substantial work of construction on the holding or part of it, and not a precondition of the applicability of s 30(1)(f).

[68] It also follows that, where partitioning is concerned, it will be a matter of fact and degree whether their replacement and reconfiguration will be within either limb of s 30(1)(f). Plainly, as the judge recognised, s 30(1)(f) will not apply to demountable office partitioning. But I am satisfied that it was open to him to find that the nature of the work, and the role of the partitions, engaged s 30(1)(f). It was also open to him to find that view confirmed when there was taken into account the construction of the larger lift, the excavations and underpinning required, the construction of two steel beams, the openings made in some load-bearing internal walls, and the amount of strengthening to the floors and laying of the new drains.

[69] In any event it was plainly open to him on the agreed evidence to find that there was a bedrock of work to the structure totalling over £450,000, which on any view was a 'substantial work of construction'. That work included the installation of the larger lift shaft and lift, and associated works; the stiffening of the upper three floors to cope with the deflection; the insertion of two steel beams in the basement; and demolition at basement level of masonry and possibly load-bearing.

[70] The holding of the judge on the bedrock works is sufficient to dispose of the case, but I also consider that it was open to him on the evidence to find that the bulk of the work was so connected with the structural work that it could be taken into account in determining substantiality in both its aspects, namely that the relevant work of construction was 'substantial' or that a 'substantial part' of the property was affected.

[71] I was concerned about the difference of result between this case and *Marazzi*'s case. It would not be an acceptable answer to this difficulty simply to say that, where the question is one of fact and degree, different judges can come to different conclusions on substantially similar facts, and the principles of review by an appellate tribunal mean that each will stand. That would not be an attractive result where the tenants, as here, have each operated similar, and almost adjoining, hotels for many years, and where the landlord's scheme is very similar in each case. But because the cases were not heard together, in this case Global had the benefit of additional expert evidence and was able to bring forward material to show Judge Green that Judge Dean's misgivings about the expert evidence in *Marazzi*'s case were not justified.

[72] Moreover, it is clear from several passages in Park J's judgment that he was very mindful that his task was not to decide on the fulfilment of the conditions in s 30(1)(f), but to decide whether the judge had directed himself correctly and whether the decision was properly open to him. Park J also made it clear in several passages that if he had been the judge of fact he might well have

a been persuaded to come to a different conclusion himself, both as regards the work as a whole, and on the issue of the partition walls.

[73] My conclusion, therefore, is that the judge correctly directed himself on the legal principles and that the decision to which he came was open to him on the evidence. In the light of the way in which the case developed the appropriate order would be to grant the application for permission to appeal, and to dismiss b the appeal.

Application for permission to appeal allowed. Appeal dismissed.

Neneh Munu Barrister.

Malekshad v Howard De Walden Estates Ltd (No 2)

[2003] EWHC 3106 (Ch)

CHANCERY DIVISION

NEUBERGER J

27, 28 NOVEMBER, 19 DECEMBER 2003

Landlord and tenant – Leasehold enfranchisement – Tenant's notice – Tenant giving notice to landlord of desire to acquire freehold – Notice extending to property not properly included – Tenant subsequently giving notice to landlord relating to property not properly included in first notice – Tenant seeking to amend first notice – Whether amendment required – Whether conditions to be imposed – Whether tenant entitled to serve second notice – Leasehold Reform Act 1967, Sch 3, paras 3(1), 6(3).

The claimant was a tenant of the defendant landlord under a lease for a term expiring on 6 April 1997 relating to a large house (the main house), and an associated smaller house (the mews house). On 4 April 1997 the tenant served on the landlord a notice of claim (the 1997 notice) under the Leasehold Reform Act 1967 to acquire the freehold of the whole of the premises demised by the lease. By virtue of para 3(1)[a] of Sch 3 to the 1967 Act the effect of the claim was to continue the tenant's tenancy of the main house and the mews house during the currency of the claim. The landlord served a counter-notice and the tenant initiated proceedings in which the House of Lords eventually held, in late 2002, that the tenant could, in principle, enfranchise the main house but not the mews house. In February 2003, following an alteration in the law which entitled him so to do, the tenant served a second notice of claim (the 2003 notice) seeking to enfranchise the mews house and applied to the court to amend the 1997 notice so as to limit its ambit to the main house under para 6(3)[b] of Sch 3 to the 1967 Act which provided that a notice of claim was not invalidated by any inaccuracy in the particulars required or any misdescription of the property, 'and where the claim extends to property not properly included ... or does not extend to property that ought to be so included, the notice may with the leave of the court, and on such terms as the court may see fit to impose, be amended so as to exclude or include that property.' The county court judge held, inter alia, that the 1997 notice did not require amendment and the landlord appealed, contending, inter alia, (i) that certain conditions should be imposed on the amendment of the 1997 notice as the landlord had been unfairly prejudiced by the service of the 1997 notice because, had it been served with the correct notice of claim, referring to the main house alone, the tenancy of the mews house would not have been continued beyond 6 April 1997, the tenant would then have had to give up possession of the mews house, and would not have been able to serve the 2003 notice; and (ii) that while the tenancy of the whole property comprised in the lease had been continued beyond the contractual term date and was continuing at the date of the service of the 2003 notice, the tenant had not been entitled to serve that notice as he was no longer, as required, holding under a long tenancy,

a Paragraph 1, so far as material, is set out at [26], below

b Paragraph 6, so far as material, is set out at [28], [29], below

once the tenancy had been continued by virtue of para 3(1) of Sch 3. The tenant contended that the 1997 notice did not require amendment.

Held – (1) Paragraph 6(3) of Sch 3 to the 1967 Act distinguished between 'any inaccuracy in the particulars' and 'any misdescription of the property', which were errors of a nature which would not invalidate a notice, and the exclusion or inclusion of property which ought, or ought not, to be included as part of the relevant house and premises, which were types of error which would invalidate a notice unless it were appropriately amended. In the instant case the claim under the 1997 notice extended to property not properly included. The court had a discretion whether, and if so in what terms, to permit a necessary amendment to a tenant's notice (see [38], [40], [47], [49] below).

(2) Had the tenant instead of serving the 1997 notice, which had referred to the whole of the property comprised in the lease, and by virtue of para 3(1) of Sch 3 to the 1967 Act had continued the tenancy of the whole of the property, served a notice of claim relating only to the main house, as he ought to have done, the effect of para 3(1) would none the less have been to continue the tenancy, not merely in respect of the main house, but also in respect of the mews house (see [87], [94], below).

(3) The continuation tenancy, being the same tenancy as the original tenancy, which had been a long tenancy, was a long tenancy, and the tenant had therefore been entitled to serve the 2003 notice of claim in respect of the mews house even though the contractual term date of the lease had expired. The landlord's proposed conditions for the amendment of the 1997 notice would therefore be rejected and the appeal dismissed (see [119], [127]–[129], [138], below).

Notes

For form and contents of tenant's notice and continuation of tenancy, see 27(2) *Halsbury's Laws* (4th edn reissue) paras 1283, 1290.

For the Leasehold Reform Act 1967, Sch 3, paras 3, 6, see 23 *Halsbury's Laws* (4th edn) (2004 reissue) 343, 345.

Cases referred to in judgment

Collin v Duke of Westminster [1985] 1 All ER 463, [1985] QB 581, [1985] 2 WLR 553, CA.

Hankey v Clavering [1942] 2 All ER 311, [1942] 2 KB 326, CA.

Malekshad v Howard De Walden Estates Ltd [2002] UKHL 49, [2003] 1 All ER 193 [2003] 1 AC 1013, [2002] 3 WLR 1881, HL; *rvsg* [2001] EWCA Civ 761, [2001] 3 EGLR 47, [2002] QB 364, [2001] 3 WLR 824, CA.

Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd [1997] 3 All ER 352, [1997] AC 749, [1997] 2 WLR 945, HL.

Westminster (Duke of) v Birrane [1995] 3 All ER 416, [1995] QB 262, [1995] 2 WLR 270, CA.

Westminster (Duke of) v Oddy [1984] 1 EGLR 83, CA.

Cases also cited or referred to in skeleton arguments

Dugan-Chapman v Grosvenor Estates [1997] 1 EGLR 96.

Dymond v Arundel-Timms [1991] 1 EGLR 109, CA.

G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

Marazzi v Global Grange Ltd [2002] EWHC 3010 (Ch), [2003] 2 EGLR 42.

Methuen-Campbell v Walters [1979] 1 All ER 606, [1979] QB 525, [1979] 2 WLR 113, CA. a

Speedwell Estates Ltd v Dalziel [2001] EWCA Civ 1277, [2002] 1 EGLR 55.

Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

Wheeldon v Burrows (1879) 12 Ch D 31, [1874–80] All ER Rep 669, CA.

Appeal b

The defendant landlord, Howard de Walden Estates Ltd, appealed from the decision of Judge Cooke in the Central London County Court on 18 July 2003 that an enfranchisement notice under the Leasehold Reform Act 1967 served on the landlord by the claimant tenant, Nasser Malekshad, on 4 April 1997, relating to 76 Harley Street and 27 Weymouth Mews, London W1 did not require amendment. The facts are set out in the judgment. c

Judith Jackson QC and *Timothy Harry* (instructed by *Speechly Bircham*) for the landlord.

Paul Morgan QC (instructed by *Mishcon de Reya*) for the tenant. d

Cur adv vult

19 December 2003. The following judgment was delivered.

NEUBERGER J. e

THE FACTS

[1] This is an appeal brought by Howard de Walden Estates Ltd (the landlord), in its capacity as the landlord under a lease made on 6 July 1948 for a term expiring on 6 April 1997 (the lease). The lease related to a large house (now converted into flats) at 76 Harley Street (the main house), and an associated f smaller house, 27 Weymouth Mews (the mews house), in London W1. A small part of the basement of the main house (amounting to 27·3 sq m) extends under the mews house. The issues raised concern the meaning and application of certain provisions of the Leasehold Reform Act 1967, as amended. All references to sections or schedules hereafter are to sections of, or schedules to, the 1967 Act, g unless the contrary is stated.

[2] At all material times, the tenant under the lease was Mr Nasser Malekshad (the tenant). On 4 April 1997, he served on the landlord a notice in the prescribed form (a 'notice of claim') giving 'notice of [his] desire to have the freehold of the house and premises' described in the schedule to the notice. In that schedule 'the h address of the house' was given as 76 Harley Street and 27 Weymouth Mews. The 'Particulars of the house and premises sufficient to identify the property to which your claim extends' were stated to be: 'The house and premises ... are the whole of the premises demised by the Lease ...' In his notice of claim, the tenant said that he resided in a flat in the main house.

[3] On 28 August 1997, the landlord served a counter-notice challenging the j tenant's claim for the freehold on the grounds that: (i) the main house and the mews house did not 'taken together amount to a house' within the meaning of the 1967 Act; (ii) neither the main house nor the mews house could, 'taken separately', constitute a 'house' within the meaning of the 1967 Act; (iii) if the main house did constitute such a 'house', the mews house could not be acquired

with it; (iv) the tenant did not occupy any part of the main house as his residence, as he claimed.

[4] The tenant then applied to the Central London County Court for a declaration that he was entitled to acquire the freehold of the property comprising the main house and the mews house pursuant to the provision of the 1967 Act. In its answer in those proceedings (the first proceedings), the landlord challenged the tenant's claim, essentially on the same grounds as those raised in its counter-notice. It was agreed that the questions raised by the first three grounds of opposition, i e whether there was any property which was in principle enfranchiseable, and if so what property, should be determined as a preliminary issue.

[5] The issues between the parties arose in this way. Section 1 entitles 'a tenant of a leasehold house ... to acquire ... the freehold or an extended lease of the house and premises where ... his tenancy is a long tenancy' provided that certain conditions are fulfilled. Over the 35 years or so since the 1967 Act has been passed, it has been subject to a considerable number of amendments a fair proportion of which have involved relaxing, or even removing, many of those conditions. At the time of the 1997 notice, one of the conditions which a tenant had to fulfil was to establish that he resided in the house, and had done so for a total of three years in the previous ten years.

[6] Section 2 is concerned with the meaning of 'house' and 'house and premises'. Section 2(1) gives the word 'house' a generally fairly wide meaning. Section 2(2), however, excludes from the ambit of the 1967 Act 'a house which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house'. Section 2(5) entitles a landlord, within two months of the service of a notice of claim, to serve a counter-notice objecting to the inclusion in the enfranchisement of 'any part of [the house and premises] which lies above or below other premises'. Given the terms of s 2(2), this provision applies only where the 'part' of the house concerned was not 'material'. (For completeness, it should be mentioned that para 7(2) of Sch 3 gives the landlord the alternative right of giving a counter-notice within the two-month period which reserves his position on this point.)

[7] So far as the first proceedings were concerned, the position in summary in the county court was as follows. In light of the wide definition of 'house' in s 2(1), the first question was whether the main house and mews house, taken together, constituted a 'house' within the 1967 Act, as the tenant contended. If they did not, the next question was whether the main house alone was disqualified from constituting a 'house', in light of the provisions of s 2(2), as the landlord contended. If, as the tenant contended, the main house did constitute such a 'house', the third question was whether the tenant could none the less enfranchise the mews house together with the main house, on the basis that the mews house constituted 'premises', given that the right to enfranchise extends to the 'house and premises'.

[8] On 28 February 2000, Judge Ryland held that: (i) the tenant could not enfranchise the main house and the mews house because, taken together, they did not constitute a 'house' within s 2; (ii) the tenant could not enfranchise the main house, because a 'material part' of its structure was under the structure of the mews house. In reaching this conclusion the judge followed the decision of the Court of Appeal in *Duke of Westminster v Birrane* [1995] 3 All ER 416, [1995] QB

262; (iii) if the tenant could have enfranchised the main house, he could not also enfranchise the mews house, as the latter did not constitute 'premises'. a

[9] The tenant appealed. The Court of Appeal disagreed with Judge Ryland's first conclusion, and held that the property as a whole constituted a 'house', and that, consequently, subject to the outstanding issue of residence, the tenant was entitled to acquire the main house and the mews house pursuant to the 1967 Act. However, if that was wrong, they agreed with Judge Ryland on his other two conclusions: like him, they were bound by *Birrane's* case. b

[10] The decision of the Court of Appeal ([2001] EWCA Civ 761, [2001] 3 EGLR 47, [2002] QB 364) was appealed to the House of Lords by the landlord. The decision of the House of Lords ([2002] UKHL 49, [2003] 1 All ER 193, [2003] 1 AC 1013) resulted in yet another permutation of views on the first two points, and yet again the same view on the third point. In agreement with Judge Ryland, the House of Lords held that the two houses taken together were not a 'house' within the 1967 Act. However, in disagreement with both Judge Ryland and the Court of Appeal, the House of Lords, effectively overruling the reasoning in *Birrane's* case, held that the tenant could, in principle, enfranchise the main house, although the mews house was not enfranchiseable with it. c d

[11] Accordingly, as at the date of the House of Lords' decision, 5 December 2002, the position was as follows. First, the lease had contractually expired (indeed the contractual term date was more than five years passed). Secondly, before the expiry of the lease, the tenant had served a notice of claim in the appropriate form seeking the freehold of the main house and the mews house. Thirdly, the House of Lords had held that, subject to any other ground of opposition which the landlord could raise, the tenant could enfranchise the main house, but not the mews house. The position was alluded to in the speech of Lord Scott of Foscote in the following terms ([2003] 1 All ER 193 at [113]): e f

> '[The 1997 notice seeks] enfranchisement of 76 Harley Street and 27 Weymouth Mews together. There is, at present, no notice that seeks enfranchisement of 76 Harley Street alone. If [the notice] is proposed to be amended so as to exclude reference to 27 Weymouth Mews, the amendment should not, in my opinion, be permitted otherwise and on terms that allow the freeholders a reasonable period, not exceeding two months, within which to serve a sub-s (5) notice relating to the 27·3 sq m.' g

[12] Lord Hope of Craighead (at [18]) agreed with Lord Scott. It appears from para [1] that Lord Nicholls of Birkenhead agreed with Lord Scott generally, save in respect of one point not relevant to these proceedings. From [74], it seems that Lord Millett agreed generally with Lord Nicholls (and hence with Lord Scott), and indeed his observations at the end of that paragraph suggest specific agreement with what Lord Scott said (at [113]). h

[13] In February 2003, the tenant served a second notice of claim (the 2003 notice) on the landlord, seeking to enfranchise the mews house pursuant to the 1967 Act. The present application was issued by the tenant in the Central London County Court. In these proceedings, the tenant seeks permission to amend his notice of claim of 4 April 1997 (the 1997 notice) so as to limit its ambit to the main house, or, to put it another way, to delete the reference to the mews house from the 1997 notice. That application came before Judge Cooke. j

THE ISSUES

[14] As the case developed orally and in writing, the issues became crystallised as follows: (i) Does the tenant need to amend the 1997 notice at all? If, as he contends, the tenant does not need to amend the notice, then that is the end of the matter. Subject to the question of residence, the 1997 notice is valid, and, in light of the decision of the House of Lords, he is entitled to rely on it to enfranchise the main house, but not the mews house, always subject to the question of residence. However, if the tenant needs to amend, the following questions arise.

[15] (ii) Should the amendment of the 1997 notice be treated as little more than an administrative act? If the amendment of the 1997 notice would, as the tenant contends, be little more than an administrative act, then the consequences are effectively the same as if the notice does not need amending at all, and the remaining questions become irrelevant. (iii) If the 1997 notice needs amendment, and an amendment is not an administrative act, what is the correct approach to the application to amend?

[16] I turn to the conditions which the landlord contends should be imposed. (iv) Should the valuation date for the freehold of the main house be moved from 4 April 1997 to a date in 2003? (v) In relation to the 2003 notice served by the tenant (to enfranchise the mews house): (a) is it a valid notice of claim despite having been served after the lease contractually expired, and, if so, (b) should the court require it to be withdrawn as a condition of giving permission to amend the 1997 notice? (vi) Also in relation to the mews house: (a) is the tenant liable to pay a rack rent from 6 April 1997, and, if not, (b) should the tenant be required to pay such a rent as a condition of being permitted to amend the 1997 notice?

[17] Judge Cooke decided that the 1997 notice did not in fact require amendment. He also decided that the effect of the 1997 notice was to continue the lease, so that the 2003 notice was valid in principle, and that the tenant was not obliged to pay a rack rent for the mews house. Although he decided that the 1997 notice did not require amendment, he considered the three conditions for amendment for which the landlord contended, ie issues (iv), (v)(b), and (vi)(b), and concluded that he would not impose any of those conditions.

[18] The landlord now appeals, with the permission of Hart J. The issues other than the three issues to which I have just referred, are all issues of law, raising points of some difficulty under the 1967 Act. However, the three issues to which I have referred, namely issues (iv), (v)(b) and (vi)(b), above involved an exercise of discretion. As Mr Paul Morgan QC, who appears for the tenant, says, it is important to bear in mind that, when considering those issues, my jurisdiction is limited because I am reviewing the judge's discretion. In other words, it is not enough for me to reach a different view from that of Judge Cooke. I must be satisfied that he erred in the exercise of his discretion, either by taking into account something he ought not to have taken into account, or by failing to take into account something he ought to have taken into account, or by failing to apply the right principles, or by reaching a conclusion which, properly advised, no reasonable judge could have reached.

THE 1967 ACT

[19] In order to understand the various issues that need to be decided, it is necessary to set out some of the provisions of the 1967 Act. I have already dealt, so far as necessary, with the question of what constitutes a 'house'. Until 2002, the 1967 Act required a tenant who wished to enfranchise a house to be residing

in the house (or part of it) at the date of service of the notice, and for a minimum specified period prior to such service. As I have mentioned, there remains an issue between the landlord and the tenant in this case as to whether the tenant satisfied that requirement at the date of the service of the 1997 notice. The tenant did not reside in the mews house before 6 April 1997. It has not been necessary for the purposes of the present application to investigate the question whether he moved into the mews house after that date. It does not matter for the purposes of the 2003 notice whether the tenant did reside in the mews house before he served the 2003 notice because by virtue of s 138 of the Commonhold and Leasehold Reform Act 2002, the residence requirement was removed prior to service of the 2003 notice.

[20] As I have mentioned, in order to qualify under the 1967 Act, the tenant must hold the house concerned under 'a long tenancy', which is defined in s 3(1) as: '... subject to the provisions of this section, a tenancy granted for a term of years certain exceeding twenty-one years ...' Section 3(5) provides:

> 'References ... to a long tenancy include any period during which the tenancy is or was continued under Part I or II of the Landlord and Tenant Act 1954 under Schedule 10 to the Local Government and Housing Act 1989 or under the Leasehold Property (Temporary Provisions) Act 1951.'

[21] There are detailed provisions in the 1967 Act relating to the contents and consequences of service of a notice by a tenant claiming the freehold, and they are to be found in Sch 3. All references hereafter to paragraphs are to paragraphs of that Schedule.

[22] Paragraphs 1 and 2 are concerned with the inter-relationship of the Landlord and Tenant Act 1954 and the 1967 Act. Part I of the 1954 Act gives protection to an occupying residential tenant of premises held under a long lease, provided the value of the property is within certain limits. Part II of the 1954 Act gives protection to tenants of business premises (irrespective of the length of the lease or the value of the property concerned). Both Parts of the 1954 Act have the effect, in general terms, of continuing a tenancy within their ambit, unless and until either the landlord or the tenant serves a notice, in the prescribed form, terminating the tenancy (in which case certain consequences apply). However, the two Parts work in different ways where the tenant is occupying part only of the premises. Part I continues a tenancy, by virtue of s 3, but only in so far as it relates to that part of the demised premises which the tenant is occupying—see s 3(2)(b)—until the tenancy is determined by a notice from the landlord under s 4, or by the tenant under s 5, of the 1954 Act. Part II continues the tenancy in respect of the whole of the demised premises, by virtue of ss 23 and 24, even where the tenant is only occupying part, until determined by a notice from the landlord under s 25, or by the tenant under ss 26 or 27, of the 1954 Act.

[23] Paragraph 1(1) of Sch 3 to the 1967 Act effectively precludes a tenant from serving a notice of claim in respect of 'any property' under a tenancy after he has already given notice to terminate 'the tenancy of that property'. Paragraph 1(3) provides that a notice under ss 26 or 27 in Pt II of the 1954 Act is to be treated as a notice to terminate. It is also clear that a notice under s 5 in Pt I of the 1954 Act is included in para 1(1).

[24] Paragraph 2(1) effectively invalidates a notice of claim for the 'freehold ... of any property' if it is served more than two months after the service of a

landlord's notice 'terminating the tenancy of that property' under ss 4 or 25 of the 1954 Act.

[25] Paragraph 2(2) provides that a landlord's notice under the 1954 Act terminating 'a tenancy of any property' is to be 'of no effect if given ... during the currency of a claim made in respect of a tenancy to acquire the freehold ... of that property', and that such a notice 'shall cease to have effect on the making of such a claim'. Paragraph 2(3) provides that, where a landlord's notice under the 1954 Act ceases to have effect because of a claim made by the tenant for the freehold, then, if and when that claim fails, the landlord may serve a fresh notice under the 1954 Act, providing for termination in three months' time, rather than the normal six months' time.

[26] Paragraph 3(1) is in these terms:

> 'Where a tenant makes a claim to acquire the freehold ... of any property, then during the currency of the claim and for three months thereafter the tenancy in that property shall not terminate either by effluxion of time or in pursuance of a notice to quit given by the landlord ... but if the claim is not effective, and but for this sub-paragraph the tenancy would have so terminated before the end of those three months, the tenancy shall so terminate at the end of the three months.'

Section 37(1)(c) defines 'notice to quit' as 'a notice to terminate a tenancy ... given in accordance with provisions (whether express or implied) of that tenancy'.

[27] I must also mention para 5(1). Subparagraph (a) makes it clear that references to claims to acquire the freehold in Sch 3 apply to invalid claims. Subparagraph (b) states that a claim is 'effective' when the freehold is acquired pursuant to it. Subparagraph (c) provides that for the purposes of Sch 3—

> 'references to the currency of a claim shall be taken as references to the period from the giving of a notice which has effect or would, if valid, have effect to the time when the notice is effective or ceases to have effect, or (not being a valid notice) is set aside by the court or withdrawn or would, if valid, cease to have effect ...'

[28] Paragraph 6 is concerned with the tenant's notice of claim. Paragraph 6(1) is in these terms:

> 'A tenant's notice ... of his desire to have the freehold ... of a house and premises shall be in the prescribed form, and shall contain the following particulars:—(a) the address of the house, and sufficient particulars of the house and premises to identify the property to which the claim extends; (b) such particulars of the tenancy and ... of the rateable value of the house and premises as serve to identify the instrument creating the tenancy and show that ... the tenancy is and has at the material times been a long tenancy at a low rent; (c) the date on which the tenant acquired the tenancy; (d) the periods for which ... the tenant has and has not occupied the house as his residence [and stating] what parts, if any, of the house have not been in his own occupation and for what periods ...'

[29] Paragraph 6(3) provides:

> 'The notice shall not be invalidated by any inaccuracy in the particulars required by this paragraph or any misdescription of the property to which

the claim extends; and where the claim extends to property not properly included in the house and premises, or does not extend to property that ought to be so included, the notice may with the leave of the court, and on such terms as the court may see fit to impose, be amended so as to exclude or include that property.'

[30] Paragraph 7 requires a landlord to give a counter-notice within two months of the service of a notice of claim. In such a counter-notice, the landlord must say whether or not he admits the tenant's right to acquire the freehold, and if he does not admit it, on what grounds. As I have mentioned, para 7(2) entitles the landlord, albeit within two months, to preserve his position in relation to the possible exercise of a right under s 2(5).

[31] Section 1(1) entitles a qualifying tenant to acquire the freehold of the house and premises 'on fair terms'. Those terms include 'the price payable' being determined in accordance with s 9(1) or (1A), depending on the value of the house. Whichever subsection applies (and it is s 9(1A) which applies in relation to the main house) the valuation exercise is to be carried out by reference to a notional sale of the freehold of the relevant house and premises 'at the relevant time', an expression defined in s 37(1)(d) as the date, in effect, of the notice of claim.

[32] Section 9(3) enables the tenant to withdraw the notice of claim if he finds, or expects to find, the price determined unacceptable. However, in such a case, s 9(3)(b) precludes the service of a further notice of claim for three years.

[33] Finally, I should refer to s 20. Section 20(5) provides that where a notice of claim is not served in good faith or was in some other way dishonest, the court may award the landlord compensation. Section 20(6) further entitles the court in such a case to forbid the tenant from serving a fresh notice of claim for five years.

[34] I can now turn to the various issues which have to be determined, and which have been ably argued by Miss Judith Jackson QC and Mr Timothy Harry for the landlord, and by Mr Paul Morgan for the tenant.

DOES THE 1997 NOTICE REQUIRE AMENDMENT?

[35] The 1997 notice, upon which the tenant relies for the purpose of enfranchising the main house, seeks to enfranchise the mews house as well as the main house. Miss Jackson contends that, unless the notice is amended pursuant to the second part of para 6(3), the tenant cannot enfranchise the main house, because there is no notice of claim seeking to enfranchise the main house. This is on the basis that the notice he relies on seeks to enfranchise a different entity, albeit a composite entity which includes the main house, namely the main house and the mews house. For the tenant, Mr Morgan, on the other hand, relies on the familiar proposition that the greater includes the less, and that the there is nothing wrong in the tenant relying on a notice of claim which seeks to enfranchise the mews house as well as the main house, in order to support his claim to enfranchise the main house alone. He draws support from the first part of para 6(3), on the basis that the reference to the mews house in the 1997 notice and 'inaccuracy in the particulars' or a 'misdescription of the property', which does not invalidate the notice. Judge Cooke agreed with the tenant on this point.

[36] I take a different view. Where an applicant serves a notice seeking to enforce certain rights in relation to property, and the notice refers to more property than that to which his rights extend, it seems to me that there are arguments, based both on practicalities and on principle, which could be fairly

invoked to support such a notice being valid or invalid. In broad terms, the applicant can say that the greater includes the less, and that the respondent can scarcely complain if the applicant is ultimately seeking less than what was being asked for in the notice. On the other hand, the respondent can contend that the applicant should not be allowed to claim something different from that which he asks for in his notice, and that the respondent may well have acted to his detriment on the justified assumption that the applicant was seeking that which he stated in his notice.

[37] In the present context, one is concerned with the effect of a notice seeking to invoke a statutory right, and whose form, content, and consequences are statutorily prescribed. In those circumstances, it appears to me that the consequences of a tenant including more property in his notice of claim than he is entitled to claim, must primarily be governed by the relevant statutory provisions. In that connection, it appears to me that the only provision which directly bears on the present issue is para 6(3).

[38] In my judgment, in this connection, the natural and sensible reading of para 6(3) as a whole is as follows. The paragraph distinguishes between 'any inaccuracy in the particulars' and 'any misdescription of the property', on the one hand, and, on the other hand, the exclusion (or inclusion) of property which ought (or ought not) be included as part of the relevant house and premises. The former types of error are of a nature which will not invalidate the notice: that is what the first part of para 6(3) provides. The second type of error will, unless the notice is appropriately amended, invalidate the notice: that is implicit.

[39] It seems to me that the way in which para 6(3) is worded effectively drives one to this conclusion. If the wrongful inclusion or exclusion of property constitutes an 'inaccuracy' or 'misdescription', then it would not invalidate the notice, and I cannot see any sensible reason why the notice would need to be amended. Mr Morgan suggests that it might be a sensible tidying up, or that it would be required if the tenant applied to the court for a declaration that he was entitled to acquire the relevant house and premises and the landlord did not attend. I am unpersuaded by that. Either the parties will agree the extent of the house and premises, in which case amendment of the notice is pointless, or the court will declare the extent of the house and premises, in which case an amendment is also pointless, unless of course an amendment is necessary to validate the notice.

[40] Quite apart from this, it does not seem to me that, as a matter of ordinary language, the inclusion of the mews house in the 1997 notice constituted an 'inaccuracy in the particulars' or 'misdescription of the property', as those terms are commonly used. The reference in the notice to the mews house as well as the main house 'accurately' 'described' the property to which the tenant intended his claim to extend: there was therefore neither an 'inaccuracy' nor a 'misdescription'. What the claim under the 1997 notice undoubtedly did was to '[extend] ... to property not properly included in the house or premises'.

[41] It is true that there is nothing in the second part of para 6(3) which provides that, if a notice of claim extends to property not properly included in the house or premises, or does not extend to property that ought to be so included, it will be invalid in the absence of an appropriate amendment. However, it appears to me that it is effectively implicit in the second part of para 6(3) that, unless a notice of claim which claims too much or not enough, is amended appropriately, it will be invalid.

[42] It is hard otherwise to understand what the purpose of the amendment provision towards the end of para 6(3) is. Further, there is the contrast between the terms and effect of the two parts of para 6(3). I think it is important to emphasise that it is not merely a question of trawling through the detailed provisions of Sch 3, and alighting upon the second part of one subparagraph, to reach such a conclusion. As I have indicated, it appears to me, in the absence of a provision such as para 6(3), that there are arguments both ways as to whether a notice which claimed too much or little, or indeed was otherwise defective because of an inaccuracy or misdescription, could, without more, be valid. In the absence of a provision such as para 6(3), there would be a powerful argument for saying that, if the notice did not comply with para 6(1)(a) and inaccurately specified the 'particulars of the house and premises' and 'the property to which the claim extends' it would be an invalid notice, and therefore could not give rise to a valid claim under the 1967 Act.

[43] A number of miscellaneous points appear to me to support this conclusion. First, at the time the 1967 Act came into force, the common law relating to notices was believed to be more strict than it is now: contrast *Hankey v Clavering* [1942] 2 All ER 311, [1942] 2 KB 326 with *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352, [1997] AC 749. Accordingly, the legislature would probably have envisaged that, in the absence of a provision such as para 6(3), a notice which failed to comply relatively strictly with all the requirements of para 6(1) would be likely to be ineffective.

[44] Secondly, the effect of a notice of claim is to create a 'statutory contract' between the landlord and the tenant for the transfer of the freehold 'of the house and premises' by the landlord to the tenant. In this connection, see s 8(1) of the 1967 Act and *Collin v Duke of Westminster* [1985] 1 All ER 463 at 467–468, [1985] QB 581 at 595 per Oliver LJ. In my view, if the effect of a notice of claim is to give rise to this statutory contract, one would expect it, either by virtue of its initial drafting, or by an amendment, accurately to reflect the house and premises the subject matter of the contract.

[45] Thirdly, there is the effect of a notice of claim. The relationship of landlord and tenant gives rise to many types of notice, some under common law, some pursuant to the contract, and some pursuant to statute. There can be few types of notice which impinge more greatly on a landlord's rights than a tenant's notice of claim under the 1967 Act: if valid, its effect is to deprive the landlord, against his will, of the whole of his interest in a substantial part (indeed, normally all) of the property comprised in the tenancy. In those circumstances, it is, to put it at its lowest, unsurprising that the law should require such a notice, either in its original form or by amendment, to reflect wholly accurately that which the tenant is entitled to acquire.

[46] Finally, although the point was not argued in any detail in the House of Lords, and although the passage is (unsurprisingly) not wholly unequivocal on the point, it appears to me, that Lord Scott ([2003] 1 All ER 193 at [113]) proceeded on the assumption that, before the 1997 notice in this case could be valid, it would have to be amended.

IS THE AMENDMENT TO THE 1997 NOTICE PURELY AN ADMINISTRATIVE ACT?

[47] On behalf of the tenant, Mr Morgan contends that, if the 1997 notice requires amendment in order to be effective (as I have concluded that it does), the amendment is little, if anything, more than a 'tidying up operation'. It seems to me that that amounts to saying the amendment is little more than an

administrative act. In my opinion, while in some, indeed in many, cases under the second part of para 6(3), an amendment will be permitted without difficulty and without conditions, it would be wrong to treat the jurisdiction as being no more than a tidying-up operation. In my judgment, the paragraph makes it clear that a necessary amendment might be refused, in light of the word 'may', and also by providing that the amendment may only be allowed 'on ... terms'. Furthermore, whether to allow the amendment is a matter 'for the court', as is the question of the terms on which the amendment is to be allowed.

[48] Quite apart from this, the condition proposed by Lord Scott in the House of Lords (at [113]) is difficult to reconcile with the notion that any necessary amendment should be allowed effectively as a matter of course. More generally, a landlord might establish that, if a necessary amendment sought by the tenant were granted, it would cause the landlord substantial prejudice for which the landlord himself could in no way be held responsible, and for which the tenant could fairly be blamed because of the way in which the defective notice was drafted. In such a case, it would seem quite unfair if the court had no jurisdiction to refuse a necessary amendment, or at least to permit such an amendment only on terms that the tenant fully compensates the landlord for any loss he suffers thereby.

PRINCIPLES UPON WHICH AN AMENDMENT WOULD BE PERMITTED

[49] Given that I am satisfied that the wording of para 6(3), and the application of normal principles, indicate that the court has a discretion whether, and if so in what terms, to permit a necessary amendment to a tenant's notice, it appears to me that it could be dangerous to seek to lay down any general rules upon which the court should exercise its statutory discretion.

[50] Where a statutory provision appears to give the court a wide and unfettered discretion, I would have thought it inappropriate for any court to lay down any rules, other than of the most general nature, as to how that discretion is to be exercised. The circumstances in which an amendment is sought can be so infinitely various. The laying down of general rules, which may well seem appropriate in light of the facts of one particular case, may lead, in light of the unforeseeable facts of the later case, either to an unjust result in the later case or to a re-writing of those rules. That point is all the more telling in the present instance, because this appears to be the first case in which an application of the second part of para 6(3) has had to be directly considered.

[51] Having said that it is dangerous, indeed inappropriate, to lay down any rules, other than of the most general nature, I think it is possible to make one or two general points, albeit that even they cannot be regarded as absolute rules.

[52] First, except where the amendment is required because of dishonesty, or something akin thereto, on the part of the tenant, I believe that the court should normally grant the amendment without conditions, unless the landlord can establish any relevant prejudice as a result of the amendment. As with amendments to statements of case in proceedings (the analogy proffered by Mr Morgan), it would appear disproportionate and unfair to refuse a tenant permission to amend his notice of claim so as to enable him to obtain the freehold, in circumstances where the need for the amendment arises from an honest error in drafting the notice, which the court can permit to be put right, and as a result of which the landlord can show no relevant prejudice.

[53] Secondly, what I have called 'relevant prejudice', which the landlord can invoke, is not the prejudice which he suffers as a result of an invalid notice

becoming a valid notice. It is the prejudice which reasonably arises from the fact that he was served with the invalid notice which is now to be validated, rather than having been served with a valid notice initially. Thirdly, even when the landlord can show relevant prejudice, it may, depending on the circumstances, be appropriate to permit an amendment without terms, or at least without terms which fully compensate the landlord for all the relevant prejudice. However, in the absence of special factors, it seems to me that it would normally be unfair not to impose terms which effectively compensate the landlord for all the relevant prejudice he suffers, unless he can be said to be in some way to blame for some or all of that relevant prejudice.

[54] Fourthly, when considering what, if any terms to impose, I would have thought that the court would normally be restricted to compensating the landlord for some or all of the relevant prejudice he had suffered. In that connection, it again appears to me that the fact that the amendment converts an invalid notice into a valid notice, with the result that the tenant can now acquire the freehold of the relevant house and premises, is not in itself relevant prejudice. Miss Jackson argues that it does constitute relevant prejudice because, in the absence of permission to amend the notice, the tenant would have no right to acquire the freehold. That submission overlooks the point that it is inherent in every notice of claim that it can be amended by the court under para 6(3). Accordingly, to be a little pedantic, what was served by the tenant in this case on 4 April 1997 was not an invalid notice pursuant to which he could not acquire the freehold, but a notice which, if unamended, would not enable him to acquire the freehold, but which always had the potential to be amended so that he could acquire the freehold. I return to Mr Morgan's analogy. When considering whether to give permission to amend a claimant's statement of case to add a new claim, and if so on what terms, the court will rarely (save where there is a limitation factor) take into account in favour of the defendant the fact that, without the amendment, the defendant may escape liability.

[55] It cannot be too strongly emphasised that even the general observations, which I have set out above as to the exercise of the discretion under the second part of para 6(3), cannot be treated as general rules as to how the discretion conferred by that paragraph should be exercised. Each case must turn on its own particular facts. However, as there has been a debate between counsel as to the general approach to be adopted in a case such as this, it seemed to me to be appropriate to discuss the issue generally, before turning to the specific issues before me.

[56] In that connection, the landlord maintained the position which it took before Judge Cooke, namely that, realistically, it did not object to the tenant amending the 1997 notice, so as to limit it to the main house, provided that certain conditions were imposed. One condition was that the valuation date should be varied, and I shall consider that first. The second and third conditions related to the mews house, and, before considering whether it is right to impose those conditions, it will be necessary to consider two points of principle, relating to the effect of notices under the 1967 Act. I shall accordingly consider those two points of principle after discussing the proposed change to the valuation date, and before turning to the two conditions which the landlord contends should be imposed in relation to the mews house.

SHOULD THE VALUATION DATE BE VARIED?

[57] As I have explained, the effect of ss 9(1A) and 37(1)(d) is that, unless a term to the contrary is imposed through the medium of the court's discretion under para 6(3), the valuation date in the present case will be 4 April 1997. As Judge Cooke said, house prices, especially in central London, have notoriously and substantially increased since then.

[58] On behalf of the landlord, Miss Jackson contends, as did Mr Harry before Judge Cooke, that it would be unfair on the landlord if the 1997 notice were amended to limit it to the main house, without a term bringing forward the valuation date from 4 April 1997 to the date on which the 1997 notice is amended (and if necessary, served) pursuant to the permission of the court.

[59] Judge Cooke refused to impose any such term. In my view, he was right to take that course, and, indeed, I agree with his reasoning. The essential point is this. If the 1997 notice had been limited to the main house, as the landlord says it ought to have been, then the delay which had occurred would have happened in any event. As the judge said, there is no explanation for the delay between the service of the 1997 notice and the issue of the first proceedings. However, in that connection, I consider that the important point is that there is nothing which even begins to suggest that any part of that delay was attributable to the fact that the 1997 notice referred to the mews house as well as to the main house. Accordingly, if the 1997 notice had not needed amendment, and had correctly referred to the main house alone, there is no reason for believing that this initial period of delay would not have occurred anyway.

[60] The delay following the issue of the first proceedings was occasioned by a dispute between the parties on two issues, namely whether the tenant could enfranchise the main house and the mews house, and whether the tenant could enfranchise the main house alone. Both issues went to the House of Lords. It is obvious that the first issue would not have arisen, let alone have gone to the House of Lords, if the 1997 notice had referred to the main house alone. However it also seems clear that the second issue would have been raised, and would have gone to the House of Lords, even if the 1997 notice had referred to the main house alone. If the notice had referred to the main house alone, the landlord would have been entitled, almost as of right, to defeat the claim to enfranchise, at first instance and in the Court of Appeal, as in fact happened in light of the reasoning in *Duke of Westminster v Birrane* [1995] 3 All ER 416, [1995] QB 262. It would thus have been necessary, as it was in fact necessary, for the tenant to take the matter to the House of Lords in order to proceed with his claim to enfranchise the main house. Accordingly, as I see it, there is no reason to think that the delay following the issue of the first proceedings which went to the House of Lords was significantly different from what it would have been if the 1997 notice had been limited to the main house.

[61] As indicated in the previous section of this judgment, I do not accept Miss Jackson's contention that the valuation date should be moved to the date of the amended notice, on the basis that, in the absence of the amendment to the 1997 notice, the tenant would not be able to enfranchise at all. The 1997 notice, when served, was inherently capable of amendment because of the provisions of para 6(3). Indeed, as Mr Morgan points out, from the date of the landlord's counter-notice, the parties proceeded on the basis that there were two issues of principle in relation to the property which was enfranchiseable, namely whether it was both houses or the main house alone. In other words, the parties were proceeding on the basis (which was correct) that (albeit perhaps subject to the

question of amendment) the 1997 notice was in principle capable of triggering the right to purchase either both houses or the main house. To impose a term with regard to the valuation date for which the landlord contends would appear to me to involve the wrong assumption that there had to be a new notice served by the tenant before he had a right to enfranchise the main house.

[62] Quite apart from this, it seems to me that, even it were right to impose some sort of valuation-related term in connection with the delay resulting from the proceedings, it would be wrong to impose the type of term for which the landlord contends. Once the 1997 notice was served, the tenant was entitled, subject to establishing his case, and subject to any amendment to the notice, to acquire the freehold of certain property (the precise identity of which was to be determined by the court) at a price which the statutory formula required to be fixed as at 4 April 1997. If there was a substantial delay in that price being fixed, and therefore received by the landlord, due to the defective notice, I would have thought that it would be more appropriate to compensate the landlord for that delay through the medium of interest, rather than through the medium of moving the valuation date. If a notice of claim seeking to enfranchise the main house alone had been served on 4 April 1997, and if (which would not have happened) that notice would immediately have led to the landlord accepting the tenant's right to enfranchise, then the valuation date would have been 4 April 1997, and the landlord would presumably have received his money substantially earlier than is actually to be the case.

[63] However, for the reason accepted by Judge Cooke, with which I agree, that line of argument does not need to be developed.

THE CONDITIONS RELATING TO THE MEWS HOUSE

[64] As I have mentioned above, the landlord argued for two terms to be imposed in relation to the mews house, both of which terms Judge Cooke rejected. Those terms were: (i) that the 2003 notice served in relation to the mews house should be withdrawn by the tenant; and (ii) that the tenant should be required to pay a full market rent in respect of the mews house from 6 April 1997 (the contractual term date) until the tenancy finally expires pursuant to the provision of the 1967 Act.

[65] Before turning to the question of whether those terms should be imposed, I have to deal with two questions of principle. The first question, raised by both proposed conditions, is whether the effect of the 1997 notice, if it had related to the main house alone, would have been to continue the tenancy in relation to the whole of the property comprised in the lease (ie the main house and the mews house) or whether it would have continued the tenancy only in relation to the main house. The second question, which is only raised by the first proposed condition, is whether it was, in fact, open to the tenant to serve the 2003 notice in respect of the mews house at all.

[66] Each of those questions (especially the latter) encapsulates an issue of some complexity and real difficulty under the 1967 Act. I shall deal with them in turn, including explaining how they impinge on the terms which the landlord is seeking to impose in relation to the mews house.

WOULD THE TENANCY OF THE MEWS HOUSE HAVE CONTINUED IF THE 1997 NOTICE HAD REFERRED TO THE MAIN HOUSE ONLY?

[67] The tenant served a notice in 1997 to enfranchise the main house and the mews house. It is common ground that the effect of para 3(1) is that the tenancy

of the whole of the property comprised in the lease continued as a result of that notice, because that notice referred to the whole of the property comprised in the lease. The tenant contends that, even if the 1997 notice had referred to the main house alone, as it ought to have done, the tenancy of the whole of the property, including the mews house, would have continued as a result of the notice. The landlord, on the other hand, contends that, if such a notice had been served, it would only have continued the tenancy in so far as it related to the main house, and the tenancy in relation to the mews house would not have continued.

[68] If the tenant is right on this issue, then he can say that neither of the two proposed terms relating to the mews house should be imposed, because the effect of serving a notice of claim relating to the main house alone would have had exactly the same result, in relation to the mews house, as the effect of the notice of claim which the tenant did serve, namely a notice relating to both the main house and the mews house. On the other hand, if the landlord is correct on this issue, it can argue that it was unfairly prejudiced by the service of a notice of claim relating to the main house and the mews house together, because, had it been served with the correct notice of claim, namely one referring to the main house alone, the tenancy of the mews house would not have been continued beyond 6 April 1997 (with the consequence, so at least it is argued, that the tenant would have had to give up possession of the mews house on that date, and would not have been able to serve the 2003 notice).

[69] The issue between the parties in this connection turns on the proper meaning of para 3(1), which I should set out again, albeit with certain added emphasis:

> 'Where a tenant makes a claim to acquire the freehold ... *of any property*, then during the currency of the claim and for three months thereafter *the tenancy in that property* shall not terminate ... but if the claim is not effective, and but for this sub-paragraph *the tenancy* would have so terminated before the end of those three months, *the tenancy* shall so terminate at the end of the three months.'

[70] The landlord's argument is that it is not 'the tenancy' which is prevented from terminating for the relevant period, but 'the tenancy in that property', and that the reference to 'that property' is clearly a reference back to 'any property', which is self-evidently the property, and only the property, which the tenant is, by his notice of claim, seeking to enfranchise. Accordingly, runs this argument, where a tenant serves a notice of claim seeking to enfranchise only part of the property comprised in his tenancy, para 3(1) applies so as to continue the tenancy beyond its contractual term date in relation only to that part of the property which the tenant is seeking to enfranchise, with the consequence that the tenancy of the balance of the property is not prevented from expiring on the term date.

[71] As a matter of language, it seems to me that the expression 'the tenancy in that property' could either mean 'the tenancy in so far as it relates to that property' or 'the tenancy which includes that property'. To put it another way, the words 'in that property' could, as the landlord contends, be limiting in their effect, or they could, as the tenant contends, be descriptive in their effect.

[72] There are powerful reasons for concluding that para 3(1) has the effect for which the landlord contends. First, when reading para 3(1) it strikes me that the words 'in that property' more naturally suggest a limiting effect on the words 'the tenancy' rather than being merely descriptive. Otherwise, they could be said to

be unnecessary words. Secondly, given that para 3(1) represents a statutory interference with a contractual relationship, one should lean in favour of an interpretation of such a provision which represents a lesser, rather than a greater, interference with the contractual relationship. Thirdly, given that, as at 6 April 1997, the contractual term date, the tenant was seeking only to enfranchise 'that property', and had no claim under the 1967 Act to any other land comprised in the relevant tenancy, it is not immediately apparent why the tenant should have the benefit, and the landlord the disadvantage, of the tenancy continuing at a low rent, not merely in respect of the property sought to be enfranchised, but also in respect of the other land comprised in the tenancy. In a sense, it may be said that this third point is an aspect of the second point, but I think it goes a little further, because it shows that, on the tenant's construction, para 3(1) appears to confer an adventitious benefit or disadvantage on the tenant or landlord respectively, for which there is no apparent justification in the 1967 Act itself.

[73] Fourthly, in the tenant's reading of para 3(1) there could be said to be a lacuna in the second part of that paragraph. Thus, if the 1997 notice had been served in respect only of the main house, on the tenant's case it would have continued the tenancy of the main house and the mews house. If that is correct and the notice had been valid, there is nothing in the second part of para 3(1) to indicate when the tenancy of the mews house would determine: that second part would only apply if the notice had been invalid. It would not be necessary for the second part of the paragraph to deal with a case of a valid notice of claim on the landlord's case because the freehold would become vested in the tenant, who also has the tenancy. Thus, the tenancy would either merge, or it would be under the control of the tenant.

[74] However, there are also strong arguments the other way. First, it is clear that, in a case such as the present, although the claim to enfranchise could only apply to the main house, namely to part of the property comprised in the tenancy, there is a single tenancy which applies to the mews house as well as the main house. Accordingly, there is force in the point that, if 'the tenancy in that property', ie on the assumption of a notice of claim for the main house alone, the tenancy in the main house, is 'not [to] terminate' until a certain date, then, absent a clear provision to the contrary, the tenancy would not terminate in relation to any other property comprised therein, ie the mews house.

[75] When enacting the 1967 Act, the legislature plainly had in mind the provisions of Pt I of the 1954 Act (which are referred to in a number of places in paras 1 and 2, and indeed in paras 3(2) and (3), of Sch 3 to the 1967 Act). In this context, it is significant that, where the legislature intended a tenancy to continue only in respect of part of the property comprised in the tenancy, the point was spelt out in clear terms in the 1954 Act. In this connection, s 3(2) of the 1954 Act provides:

> 'Where by virtue of the last foregoing subsection a tenancy is continued after the term date, then—(a) if the premises qualifying for protection are the whole of the property comprised in the tenancy, the tenancy shall continue ... on the same terms ... (b) if the premises qualifying for protection are only part of the property comprised in the tenancy, the tenancy while continuing after the term date shall have effect as a tenancy of those premises to the exclusion of the remainder of the property, and at a rent to be ascertained by [an appropriate apportionment], and in other respects on the same terms (subject to any necessary modifications) as before the term date.'

[76] Secondly, if, as the landlord contends, the effect of para 3(1) would be to continue the tenancy only in respect of part of the whole property comprised in the tenancy, Mr Morgan argues that there is nothing in the 1967 Act, or indeed in any other statute or in any principle of land law, which would enable the tenant or the landlord to claim easements (such as rights of way) which may be desirable, or even necessary, for the enjoyment of either or both parts of the property once the right to possession is severed. For instance, if a notice of claim was served in respect of the main house, and it served to continue the tenancy, but only in so far as it related to the main house, and the only means of access to the mews house was through the main house (or vice versa), there would seem to be no way in which the landlord could obtain access to the mews house (or, as the case may be, the tenant could obtain access to the main house) while the tenancy of the main house alone was continuing under para 3(1). The problem could also arise under s 3(2)(b) of the 1954 Act, but, in that case, the legislature has specifically dealt with the matter by including the words '(subject to any necessary modifications)'. Further, in the 1967 Act itself, the legislature has dealt in some detail with the rights and easements which are to be included with, and reserved over any property acquired pursuant to its provisions: see s 10.

[77] Miss Jackson has not identified any statutory provision, or any principle of property law, whereby any easements or rights could be implied to deal with this problem. However, she points out that the legislature presumably envisaged the problem lasting for a relatively short time, although, as the facts of this case (and indeed of a number of reported cases relating to enfranchisement) show, the gap between the service of a notice of claim and actual enfranchisement can be many years.

[78] Thirdly, the landlord's contention involves reading 'the tenancy in that property' in para 3(1) as being strictly limited to the tenancy in so far as it relates to the property referred to earlier in that paragraph. However, when one considers some other subparagraphs of Sch 3, it appears to me that the expression 'that property' is used in a somewhat looser way. Indeed, it is used so as to be plainly capable, in an appropriate case, of meaning the property previously referred to together with other land comprised in the tenancy (ie as the tenant contends here), and even of meaning part of such property.

[79] Paragraph 1(1) applies to a case under Pt I of the 1954 Act, where the demise extends to a house and the tenant occupies a flat constituting part only of the house. In such a case 'the tenancy of that property' extends to less property than the 'any property' referred to earlier in the subparagraph. Even more in point, para 1(1) also applies to a case under Pt II of the 1954 Act, where the property comprised in the tenancy is more extensive than the house and premises which the tenant was seeking to enfranchise. In such a case, 'the tenancy of that property' would clearly extend to premises over and above the 'any property' referred to earlier in the subparagraph. (As with para 3(1), there would, of course, be many cases where the two sets of property were identical, but the essential point is that the same expression in para 1(1) can have the meaning which the tenant gives that expression in a very similar context in para 3(1).)

[80] The same points may be made about these expressions in para 2(1). As to para 2(2), effectively the same points may be made about the meaning of 'that property' in so far as it relates back to 'a tenancy of any property'.

[81] Indeed, and fourthly, consideration of the effect of paras 1 and 2 appears to me to suggest that the tenant's construction of para 3(1) results in a somewhat

more consistent result than that of the landlord. Where a notice of claim extends to the whole of the demised property, then, whether Pts I or II of the 1954 Act apply, or neither Part applies, the tenancy of the whole continues. Where Pt II applies, and the notice of claim extends to only part of the demised property, the effect of para 2(2) is to continue the tenancy of the whole, not just the part to which the claim extends. Consistency would tend to suggest that one would expect the same result where Pt I, or where neither Part, applies. The same result does obtain on the tenant's case (because either Pt I does not apply at all so para 3(1) applies, as here, or Pt I applies only to a part of the demised property, in which case para 3(1) applies to the rest), but not on the landlord's case.

[82] The point can be overstated, because, as I have mentioned, any difference would have its origin in the different ways in which the two Parts of the 1954 Act work. None the less, one is here concerned with the operation of the 1967 Act, not the 1954 Act, and if one reading of para 3(1) produces a consistent result in all types of case, and the other does not, I consider that tends to favour the former reading.

[83] Fifthly, it is worth considering the effect of an amendment to a notice of claim, pursuant to para 6(3). If the notice does not claim enough, and it is amended by adding property after the contractual term has expired, it could lead to obvious difficulties if the added property had reverted to the landlord, as it would have done on the landlord's case, as the landlord may have sold or re-let the added property.

[84] While the landlord would no doubt say that that should result in the court refusing to amend the notice, the tenant might well say that the landlord should not have taken the risk of selling or re-letting the added property, for instance, if the tenant had already warned the landlord that he would or might apply to amend the notice by adding the property in question. In any event, it might seem a little harsh that a tenant, who had served a notice of claim which extended to insufficient property in good faith, could lose his rights under the 1967 Act in their entirety. The uncertainty and risk of injustice just described would be avoided if the tenant's construction of para 3(1) is adopted.

[85] I turn to the position where, as here, the notice of claim is amended to delete property. On the tenant's construction of para 3(1), it makes no difference: the tenancy is continued with regard to the deleted property whether it is included in the notice or not. On the landlord's construction, the tenancy will continue in relation to the deleted property while it is included in the notice. When it is deleted from the notice the landlord would presumably argue that the tenancy of the deleted property will cease pursuant to the second part of para 3(1). That would mean that para 5(1), when referring to the currency of a claim or a claim being effective, can apply to part of the rest of the property comprised in the notice of claim. That would not, of itself carry the issue I have to determine any further, save that as I understood it, one of Miss Jackson's criticisms of the tenant's case, at least on one point, was that it involves reading para 5(1) in such a way that it could apply to part of the property comprised in a notice of claim.

[86] Although the wording of para 4, whose general effect is to stay forfeiture proceedings during the currency of a claim under the 1967 Act, does not shed any direct light on the proper construction of para 3(1), it can be said to lend a little support for the tenant's construction in this case. It is clear from para 4(1) that, where a tenant serves a notice of claim in respect of part only of the property

comprised in a lease, the landlord is precluded from taking steps to forfeit the lease, and not merely that part of the lease which applies to the property the subject of the claim. It may be said with some force that the concept of forfeiture of part (unlike relief from forfeiture in respect of part) is not possible in common law, but it would have been quite possible for the legislature to have permitted a landlord to seek forfeiture of that part of the premises comprised in the lease which the tenant was not seeking to enfranchise. The fact that it is the whole of the lease which is protected from forfeiture, can be said to be at least consistent with the notion of para 3(1) continuing a tenancy in its entirety, and not merely is so far as it relates to the property the subject of the notice of claim.

[87] With these arguments in mind, I turn back to the central issue. The arguments appear to me to be fairly finely balanced, and it is idle to pretend that either answer is plainly correct. Having said that, I have reached the conclusion that the tenant's construction of para 3(1) is to be preferred on this point. First, while first impressions should not be disregarded, they cannot be given great weight, particularly once one accepts that, on a fair reading, a particular provision could have more than one meaning.

[88] Secondly, the fact that the tenant's construction involves a greater interference with, and prejudice to, the landlord's contractual rights, and can work to the landlord's detriment, appears to me to be answered, albeit only to some extent, by Miss Jackson's own point that the legislature would have anticipated a tenancy continuing under para 3(1) for a relatively short time in most cases. In any event, the fact that the whole of the tenancy will continue, while a claim for the freehold of the whole or part of the demised property is current, is justifiable as a convenient and simple, if somewhat rough and ready, piece of machinery. Further, as para 5(1)(a) makes clear, the legislature contemplated and intended that a wholly invalid notice of claim (even if served in bad faith, apparently) would have the effect of prolonging the tenancy. That makes the landlord's argument based on prejudice a little weaker.

[89] The fact that there are no provisions such as the relatively detailed ones contained in s 10 of the 1967 Act, or the much more abbreviated reference in s 3(2)(b) of the 1954 Act, directed to the implied grant or reservation of easements and similar rights, may well be explained by it being more trouble than it was worth for the parties to have to negotiate, or even litigate, such provisions for the relatively short period during which the para 3 continuation might be expected to apply. Accordingly, the legislature could well have concluded that it would be easier to continue the tenancy as a whole rather than having to solve such problems for a relatively short time.

[90] Indeed, if the landlord's construction is correct, it would not only be necessary to provide for such easements and similar rights: it would also be necessary to apportion the rent between the property the subject of the notice of claim and the remainder of the demised property. Although Mr Morgan accepts that such apportionment could be effected pursuant to s 10 of the Inclosure Act 1854, it seems unlikely that the legislature would have had that in mind, partly because this legislation is rather abstruse, and partly because the apportionment would have to be effected by the Secretary of State.

[91] Fourthly, as to the point that (on the tenant's construction) the second part of para 3(1) does not deal with the determination of the tenancy in relation to the balance of the property comprised in the lease, if the notice of claim relates only to part of that property, I think there is an answer, albeit that it is not wholly

satisfactory. By reference to the facts of this case, that answer is as follows. If a notice of claim extending to the main house were served, the first part of para 3(1) would prohibit the tenancy as a whole expiring during 'the currency of the claim and for three months thereafter'. By virtue of para 5(1)(c) that prohibition expires three months after a valid notice of claim 'is effective'. Accordingly, the tenancy would continue as a whole under para 3(1), and, in so far as it relates to the mews house, it would expire three months after the notice of claim is effective. On the other hand, if the notice of claim was ineffective, the second part of para 3(1) would apply. The consequence in such a case would be the continuation of the tenancy in relation to both houses for three months after the notice ceases to have effect. That analysis does not provide a complete answer to the point, because it results in the second part of para 3(1) being unnecessary or only explicable as being included for the avoidance of doubt. None the less, it is not as if there is anything inconsistent between the first and second parts of para 3(1) on the tenant's case.

[92] Furthermore, while it is rather an esoteric point, it can be said that, where the notice of claim is effective in circumstances where a tenant acquires the freehold with a provision against merger, there is the same problem with para 3(1) on the landlord's case (as well as on the tenant's case) as there is (on the tenant's case) if the notice of claim is effective in respect of part only of the property comprised in the tenancy. An enfranchising tenant may acquire the freehold with a provision against merger (which is a practical possibility for the reasons discussed in *Hague on Leasehold Enfranchisement* (3rd edn, 1999) pp 134–135 (para 6-36)). In such a case, the tenancy will continue despite the fact that the freehold and the tenancy are vested in the same person. On the landlord's argument, the absence of a reference to an effective notice in the second part of para 3(1) means that, if the tenancy was at that time being continued by that paragraph, it could not end. On the tenant's case, no such problem arises: the first part of para 3(1) ensures the determination of the tenancy.

[93] In light of this discussion it clearly cannot be said that the tenant has fully satisfactory answers to all the landlord's points. None the less, one has to weigh those points against the various points which I have identified as calling the landlord's construction into question. Adopting that approach, it appears to me that, taken together, the points in favour of the tenant's construction, are more powerful, and less easily answered.

[94] In those circumstances, I conclude that, if the tenant had served a notice of claim relating only to the main house, the effect of para 3(1) would none the less have been to continue the tenancy, not merely in respect of the main house, but also in respect of the mews house.

CAN THE TENANT SERVE A NOTICE OF CLAIM AFTER THE CONTRACTUAL TERM DATE OF THE LEASE?

[95] It will be recalled that the tenant served a notice of claim in 2003 in respect of the mews house. This was, of course, long after the contractual term date of the lease. Accordingly, unless the tenancy under the lease was being continued in some way in respect of the mews house, the service of the 2003 notice would not have been by 'a tenant of a leasehold house [whose] tenancy is a long tenancy at a low rent', within the meaning of s 1(1).

[96] The landlord accepts that the tenancy of the whole property comprised in the lease, namely of the main house and of the mews house, was continued

beyond the contractual term date, and was continuing as at the date of the service of the 2003 notice, by virtue of the provisions of para 3(1). However, the landlord does not accept that the tenant was entitled to serve the 2003 notice, or indeed any notice of enfranchisement relating to any part of the property comprised in the lease, once the contractual term date of the lease expired. In this connection, the landlord's argument is put in two alternative ways.

[97] The landlord's first argument is based on the closing words of para 3(1), which provide that, where a tenancy is continued pursuant to that paragraph as a result of a notice of claim, and that notice turns out to be ineffective, 'the tenancy shall ... terminate at the end of... three months [after the notice ceases to have effect]'. The landlord argues that, if a second notice of claim (such as the 2003 notice) could be served after an earlier notice of claim (in this case the 1997 notice) has been held to be invalid, then it would conflict with those closing words. That is because the effect of the second notice of claim, according to para 3(1) itself, would be to continue the tenancy beyond the date upon which it is required to 'terminate' by para 3(1), as a consequence of the first notice ceasing to have effect.

[98] The landlord's second argument is that, in order to be able to serve a valid notice of claim, a tenant must, at the time, hold under 'a long tenancy', and a tenancy which was a long tenancy under s 3(1) ceases to be a long tenancy once it is being continued by virtue of the provisions of para 3(1). In this connection, the landlord relies on the fact that s 3(5) provides that, where a contractual long tenancy is extended pursuant to certain statutory provisions, it is treated as remaining a long tenancy, but those statutory provisions, which include Pts I and II of the 1954 Act, do not include para 3(1). Accordingly, runs the argument, it is not open to a tenant to serve a notice of claim during a period of continuation effected by a statutory provision, such as para 3(1), which is not expressly referred to in s 3(5) of the 1967 Act.

[99] These two arguments were briefly ventilated in the judgment of Eveleigh LJ (with whom Kerr LJ agreed) in *Duke of Westminster v Oddy* [1984] 1 EGLR 83 at 87. The second argument was raised, but the Court of Appeal did not 'obtain much assistance' from the way in which s 3(5) was expressed. The court, however, accepted the first argument. None the less, as Miss Jackson and Mr Morgan agree, the observations on both points were obiter. Indeed, they could be said to be 'doubly obiter', because the issue was the third point in the case, and the court's decision on the first point rendered any decision on the second and third points obiter, and, over and above that, the court's decision on the second point would itself have rendered any determination on the third point obiter.

[100] Miss Jackson, I think, accepts that the landlord's first argument, which found favour with the Court of Appeal in *Oddy*'s case, has problems. Carried to its logical conclusion, once one gets near the contractual term date, it would invalidate a second, protective, notice of claim served by a tenant after he has served a first notice of claim which might be invalid. Examples where that might happen come readily to mind. A tenant might serve a notice of claim a couple of years before the contractual term date in circumstances where he had arguably not yet achieved the period of residence required by the 1967 Act (initially five years, then reduced to three years, until it was abolished in 2002). Subsequently, he may serve a second 'protective' notice of claim a year later, on the basis that he has, by then, undoubtedly satisfied the residency requirement. Or a tenant might serve a notice of claim a couple of years before the contractual term date, where

the particulars in the notice are so defective that it may invalidate the notice. In such a case, the tenant may wish to serve a second, protective, notice of claim when the point is taken by the landlord. Another possibility is that a tenant may serve a notice of claim which (as in this case) seeks to enfranchise more property than he is entitled to enfranchise, again a couple of years before the contractual term date. Such a tenant may then wish to serve a second notice, in case the court, in its discretion, does not permit him to amend the first notice. In each such case, the tenant would normally want to hold on to the first notice if he can, because the date of valuation is the date of the notice of claim, and the residential property market generally rises over time, sometimes quite sharply.

[101] In each of those cases, unless the tenant unreservedly withdraws the first notice at least three months before the contractual term date, then, if and when the first notice is held to be invalid, the logic of the landlord's first argument is that the tenancy must come to an end three months thereafter. In those circumstances, there would be a logical paradox, because, on the one hand para 3(1) absolutely requires that the tenancy comes to an end three months after the first notice is held to be invalid or is withdrawn, while on the other hand, para 3(1) equally requires the tenancy to continue because the second notice is current.

[102] Miss Jackson suggests that the answer to this apparent conundrum is that the tenant in such a case would effectively have to elect between the two notices on or before the date which is three months before the contractual term date. I do not find that a very attractive contention. A tenant entitled to serve a notice (whether under a contract or statute) cannot usually be limited to one notice or be required to elect between notices, when he has served two notices, the latter without prejudice to the validity of the former. Further, it is not clear what happens if the tenant does not make an election as Miss Jackson suggests.

[103] In my view, this line of argument does cause one to revisit the brief reasoning which was put forward by the Court of Appeal in *Oddy*'s case for accepting the landlord's first argument. One is, I think, faced with two alternatives. The first involves implying a restriction on a tenant's freedom to rely, at least after a date three months before the contractual term date, on two notices of claim, one served without prejudice to the other. The second is that the obiter conclusion on this point in *Oddy*'s case is wrong. I have reached the conclusion that the latter alternative is correct.

[104] First, it is not merely a question of it being unusual for a person in a landlord and tenant relationship being precluded from serving a second, protective, notice. So long as the contractual term date is more than three months away, the landlord's first argument would not prevent a tenant serving, and relying on, such a notice. It would, to my mind, be very peculiar, if a tenant could rely on a protective notice, but only until his contractual tenancy had more than three months to run. It appears especially unlikely that this could have been intended, if one considers a case where the protective notice is served, say, some six years before the contractual term date. The tenant's ability to rely on the notice would depend solely on how long it took to sort out his claims, a matter which would turn on the issues, the landlord's attitude, and, quite possibly, the court and valuation tribunal procedures.

[105] Secondly, if it is not open to a tenant to rely upon a second notice of claim, if the first notice of claim has not been withdrawn or held invalid by the commencement of the last three months of the contractual term, it would

represent something of a trap for tenants. The reasoning which would give rise to such a conclusion is extremely subtle and could not reasonably occur to a tenant or his advisers, based as it is on a fairly obscure inference from para 3(1). It seems unlikely that the legislature could have intended this result.

[106] Thirdly, as I indicated in the previous section of this judgment, a degree of consistency is to be expected as to the way in which the provisions of Sch 3 work in different types of case. Paragraph 2 is concerned with cases where the 1954 Act applies, which would have been the great majority of cases, when the 1967 Act was originally enacted, applying as it did to relatively low value houses. Paragraph 2(2) is not only concerned with a case where the landlord has served the 1954 Act notice before the tenant has served a notice of claim. It also prohibits the landlord from serving a 1954 Act notice 'during the currency of a claim'. It seems to me that those words are quite unambiguous, in a case where the tenant serves more than one notice of claim. So long as there is a notice of claim that is current, the landlord cannot serve a 1954 Act notice, even though one or more other notices of claim may have been withdrawn or been ineffective. In my view, that provides a degree of support for the view advanced by the tenant in this case, namely that so long as there is a current notice of claim, the first part of para 3(1) applies.

[107] Fourthly, it appears to me that, without doing significant violence to the words, para 3(1) can be read in such a way as to permit of the possibility of a tenant serving two successive notices of claim, and with the result that para 3(1) does not result in a tenancy determining until the fate of the later of the notices has been determined. The first way in which para 3(1) can be read is on the basis that the singular includes the plural, as is the prima facie position in any statute. This would involve para 3(1) having the following effect:

> 'Where a tenant makes *claims* to acquire the freehold ... then during the currency of the *claims or any of them* ... the tenancy ... shall not terminate ... but if the *claims are* not effective ... the tenancy shall so terminate ...'

[108] The only criticism that can be made of this reading is that the second 'claim' in the paragraph extends not merely to 'claims', but to 'claims or any of them'. In my view, that is a small departure from the literal meaning of para 3(1), and is a permissible departure in light of the problem which would otherwise arise.

[109] An alternative way of construing para 3(1), while it also involves implying words, is to read the second part of the paragraph in this way:

> 'But if the claim is not effective and, but for this sub-paragraph *in so far as it relates to that particular claim*, the tenancy would have so terminated before the end of those three months, the tenancy shall also terminate at the end of the three months.'

In other words, if the tenancy is being continued under para 3(1) by virtue of a second notice, then the second part of para 3(1) is not engaged by the fact that the first notice was not effective.

[110] I believe that the same points may be made about the effect of para 2(2) and (3) where 1954 Act notices have already been served.

[111] Fifthly, if a tenant serves two notices of claim sequentially, one without prejudice to the validity of the other, the basic structure of the 1967 Act would suggest that, if the first notice is not valid, the second notice should be valid,

whereas if the first notice is valid, the second notice should be invalid. That is because, as I have mentioned, the effect of s 8(1) is that, when a valid notice of claim is served, it gives rise to a statutory contract. If the first notice is valid, a statutory contract comes into existence, and it is difficult to see how the second notice could be valid, because there cannot sensibly be two contracts between the same parties to buy the same property on different terms. On the other hand, if the first notice is invalid, no statutory contract can arise under s 8, and it is therefore hard to see why the second notice should not be valid, because there is nothing in s 8 to prevent it giving rise to a statutory contract. That would tend to suggest that the legislature intended a tenant to be able to serve a second notice of claim, without prejudice to the validity of a first notice, to protect the tenant in case the first notice turns out to be invalid.

[112] Sixthly, where the legislature intended a tenant (or indeed a landlord) not to be able to serve an effective statutory notice, whether under the 1967 Act or another Act, it expressly said so. Thus, paras 1(1) and 2(1) effectively render invalid a notice of claim, if served after a 1954 Act notice has already been served. Similarly, paras 1(2) and 2(2) effectively render invalid a 1954 Act notice, if served after a notice of claim. Furthermore, as I have mentioned, ss 9(3)(b) and 20(6) give the court power to preclude a tenant from serving a second notice of claim for a specified period, namely five years, where a first notice of claim, which suffers from bad faith or dishonesty, has been served. It is true that none of these provisions is directed towards a notice of claim served during the currency of (and without prejudice to the validity of) an earlier notice of claim, but they do suggest that, where the legislature intended notices, including notices of claim, which are valid on their face, to be rendered ineffective, that intention was spelt out. That would suggest that the absence of any specific provision precluding a tenant from serving a second notice of claim, without prejudice to the validity of the first, is supportive of the conclusion that such a course is permissible.

[113] I turn to the landlord's second argument, namely that, once a tenancy is being continued pursuant to para 3(1), it is no longer open to a tenant to serve a notice of claim. In principle, in a case such as the present, where the 1954 Act does not apply, the tenancy in question would normally come to an end on its contractual term date, namely 6 April 1997. Accordingly, it would not, on the face of it, be open to the tenant to serve a notice of claim after that date, because he would no longer be the tenant, let alone would he be holding under a long tenancy.

[114] The contention that he could none the less serve a notice of claim because his tenancy was being continued under para 3(1), can be said to involve his pulling himself up by his own bootstraps. The only reason he could argue that he was permitted to serve a notice of claim after the contractual term date of the tenancy was because the tenancy is being continued thanks to an earlier, and, indeed invalid, notice of claim. After all, the only circumstances in which he would normally require to serve a second notice of claim, and have to argue the point, would be because the earlier notice of claim was invalid. The notion that a tenant is entitled to serve a notice of claim and to acquire his landlord's freehold, because he had previously served an invalid notice of claim, does not strike me as a particularly attractive contention.

[115] A particularly stark example would be in a case where the residence requirements applied (as they did until 2002). A tenant who had not resided long enough by the contractual term date could serve a dishonest notice of claim,

which would serve to extend his tenancy under para 3(1), thereby enabling him to clock up the requisite period of residency. Of course, the fact that it is not a particularly attractive contention does not mean that it is wrong.

[116] Further, it is a less surprising result than might first appear, essentially for three reasons. The first is that I rather doubt that the legislature directed its mind to this rather abstruse issue and therefore the point may be something of a casus omissus. Secondly, the legislature has said that the terms on which the tenant can acquire the freehold are 'fair terms', irrespective of when he serves the notice of claim, which indicates fairness to the landlord as well as to the tenant, a point which I accept can be characterised as lacking in reality. Perhaps a more attractive way of putting essentially the same point is that the legislature plainly thought that justice required that certain tenants should be able to enfranchise, and if, in somewhat unusual circumstances, this leads to the result for which the tenant contends on the present issue, it should not cause much surprise. Thirdly, I refer again to para 5(1)(a), which shows that the legislature intended a tenant to be able to benefit from the service of an ineffective, and even, it appears, a dishonest, notice of claim.

[117] As to the dishonest (and ineffective) notice of claim which a tenant might use as a springboard for a second (and effective) notice, the landlord would not be without a remedy. On any view, that notice would, sooner or later, cease to have effect. As it would have been a dishonest notice, s 20(5) would be engaged. Accordingly, if, by having served that notice, the tenant has thereby been able to enfranchise (by serving a later notice), I consider that any damage that the landlord has suffered as a result of the tenant acquiring the freehold would be recoverable from the tenant: considerations of remoteness and foreseeability would not apply, as the damages claim would be based on dishonesty.

[118] It cannot be pretended that, even taken together, these various points provide a complete answer to the 'bootstraps' argument, but, in my judgment, they do blunt its effect.

[119] As para 3(1) provides that the effect of the first notice of claim is to continue the tenancy, it would seem, at least on the face of it, that if, as in the present case, the tenancy in question is a long tenancy within s 3(1), then the continuation tenancy, being the same tenancy as the original tenancy (albeit a statutory continuation thereof) must be a long tenancy. The argument the other way is that s 3(5) specifically deals with statutory continuations, and it does not include the continuation pursuant to para 3(1). That is an attractive argument for the reasons I have just been discussing. None the less, I have ultimately decided that it is to be rejected.

[120] First, as I have said, para 3(1) has the effect of continuing the tenancy, and, therefore, as a matter of ordinary language and legal concept, it is the same tenancy granted by the original lease, in this case the lease, and it is hard to see how a tenancy which was originally a long tenancy can stop being a long tenancy.

[121] Secondly, although s 3(5) does not refer to continuation under para 3(1), it does provide that references to a long tenancy 'include' any continuation under the 1954 Act. I accept that the word 'include' can effectively be exclusive, but that is not its sole, or, ultimately, its more natural meaning, as Eveleigh LJ appears to have thought in *Duke of Westminster v Oddy* [1984] 1 EGLR 83.

[122] Thirdly, I return to the provisions of para 2(1) and (2). It seems to me that, where (as frequently could be the case) either Pt II of the 1954 Act applies,

or Pt I of the 1954 Act applies to the whole of the property sought to be enfranchised, the tenant could pull himself up by his own bootstraps, using a first, invalid, notice of claim to prolong his tenancy in order to enable him to serve a second, valid, notice. For instance, before the contractual term date, the tenant could serve a notice of claim, whose effect would be to prevent the landlord from serving a 1954 Act notice, so long as the notice of claim was current, and this would, in light of s 3(5), have the effect of continuing his tenancy (under ss 4 or 24 of the 1954 Act) with the consequence that he could then serve another notice of claim. Accordingly, where the 1954 Act applies (as it would have done in the great majority of cases when the 1967 Act was passed) a first, invalid notice of claim could be used as a springboard for a second, valid, notice. That not only weakens the landlord's bootstraps argument, as the legislature was prepared to let a tenant pull himself up by his bootstraps in certain circumstances. It enables the tenant to raise a pretty strong argument in favour of its case, based on the expectation that Sch 3 would adopt a consistent approach to all types of tenant.

[123] This point goes a little further. There will be cases where both paras 2 and 3 apply to a tenancy. Consider the case of a house whose value is such that it is within the ambit of Pt I of the 1954 Act, but which has been converted into flats, in one of which the tenant lives. In the absence of any notice of claim being served, with effect from the contractual term date, the tenancy would continue solely in respect of the flat (see s 3(2)(b) of the 1954 Act). Once the tenant has served a notice of claim, the effect of para 2(2) would be to prevent the landlord from serving a notice under s 4 of the 1954 Act. However, para 3(1) will also be engaged, because it will prevent the tenancy, in so far as it relates to the rest of the house, expiring 'by effluxion of time'.

[124] If a second notice of claim is served in such a case, and the first notice of claim is ineffective, it is instructive to consider the effect of the second notice. Under para 2(2), as I have said, it seems fairly clear that, so long as the second notice of claim was current, it would not be open to the landlord to serve a notice under s 4 of the 1954 Act in respect of the flat: a second notice of claim would prevent that. If that is right, it would seem something of a nonsense if the effect of para 3(1), in relation to the rest of the house, was different. If para 3(1) had the effect which the landlord's second argument suggests, then the tenancy, in so far as it related to the rest of the house, would expire three months after the first notice was held to be invalid. However, there is nothing in the 1967 Act to suggest that that would thereby invalidate the second notice of claim. Accordingly, the second notice of claim would still remain current, so that the tenancy of the flat occupied by the tenant would continue under s 3(2)(b) of the 1954 Act, because of para 2(2). It seems to me far more likely that, in such a case, para 3(1), in relation to the rest of the house, would have the same effect that para 2(2) has in relation to the flat occupied by the tenant.

[125] One practical argument raised by Miss Jackson is that it would be open to a tenant holding a lease of a number of houses to invoke the provisions of para 3(1) to enable him to enfranchise successive houses. By serving a notice in respect of one house, he could prolong the tenancy in respect of all the houses, and could thereby serve notices in respect of each house successively. I am not persuaded that that is a telling argument. Under the 1967 Act, as originally enacted, a tenant could not acquire the freehold of a house unless, at the date of the notice of claim, he was residing in it, and had resided in it for at least five years in the previous ten years. If a tenant served a notice of claim in respect of one

house, he would have to be living in that house at the time he served the notice, and, if he wished to enfranchise another house, he would not merely have to move into it before he served a notice of claim in respect of it: he would have to have lived there for five years in the past ten years. While I accept that the first notice of claim could continue the tenancy for more than five years (and the present case is an example of precisely that happening), that would only occur either in an exceptional case or where the landlord had let it happen. That suggests that, when the 1967 Act was enacted, this would not have been seen as a problem.

[126] Further, if one looks at the 1967 Act in its present form, there does not seem to me to be anything to prevent a tenant, who holds a lease of several qualifying houses at a low rent, from enfranchising all of them, now that the residence requirement has gone altogether. All that is required is that the tenant has been a tenant of the house under a long tenancy, not that he resides, or has resided, there. Accordingly, whether one looks at the 1967 Act in its original form, or in its present form, Miss Jackson's point does not establish that my conclusion is wrong.

[127] These rather esoteric arguments ultimately persuade me that, on this very difficult point, both the landlord's arguments are to be rejected and that the tenant's case is to be preferred. I am conscious that this involves deciding that the obiter conclusion reached by the Court of Appeal in *Oddy*'s case is wrong. I draw some comfort from the fact that the leading textbook in this field, namely *Hague on Leasehold Enfranchisement* (3rd edn, 1999) p 106, note 57, appears to take the same view.

THE CONDITIONS IN RELATION TO THE MEWS HOUSE

[128] My conclusions on the two questions of principle therefore are: (i) if the 1997 notice had referred only to the main house, it would still have extended the tenancy of the mews house, under para 3(1); and (ii) it is open to a tenant to serve a notice of claim while his tenancy is being continued by para 3(1).

[129] In light of that, it appears to me that the landlord's proposed two conditions in relation to the mews house must be rejected. If the tenant had, in April 1997, served a notice of claim limited to the main house, it would have continued the tenancy of the main house and the mews house, and that continuation would have been up to and including the time when the 2003 notice was served, which was a notice of claim which the tenant was entitled to serve. Accordingly, it would be inappropriate to impose a condition either that the tenant is required to pay a full market rent for the mews house from 7 April 1997, or that he should be required to withdraw the 2003 notice, as a condition of being given permission to amend.

[130] However, it is right to add this. First, if I am right in my conclusion that the notice of claim relating to the main house alone would none the less have continued the tenancy in relation to the mews house, but I am wrong in my view that it is open to a tenant to serve a notice of claim once his tenancy has been continued pursuant to para 3(1), then that would not cause me to alter my view that the two conditions sought by the landlord in relation to the mews house should not be imposed. On this hypothesis, it would plainly be wrong to require the tenant to pay a rack rent for the mews house, because the service of a notice of claim relating to the main house alone would still have continued the tenancy of the mews house. The reason it would be inappropriate to impose a condition that the 2003 notice be withdrawn is that, on this hypothesis, I would have

concluded that that notice was invalid. In those circumstances, there would be no reason to require the tenant to withdraw it. a

[131] However, if I am wrong in my conclusion that a notice of claim relating to the main house would continue the tenancy in relation to the mews house as well, then, whether or not I am right about the ability of a tenant to serve a notice of claim while the tenancy is continuing under para 3(1), the imposition of the two conditions relating to the mews house becomes a more difficult question. b On the face of it, the landlord has a powerful case along the following lines. The only notice of claim which the tenant was entitled to serve was a notice relating to the main house alone. On the hypothesis under which I am proceeding, such a notice would not have continued the tenancy of the mews house. In those circumstances, with effect from 7 April 1997, the landlord would have been entitled to possession of the mews house, and therefore to receive a rack rent in c respect thereof, and the tenant would not have been entitled to serve a notice of claim in respect of the mews house, and in particular would not have been entitled to serve the 2003 notice. In those circumstances, given that, without amendment, the 1997 notice will be ineffective, and that the tenant is seeking to amend it to limit it to the main house alone, it appears to me that there is a d powerful case for imposing the two conditions. To put the matter shortly, if the tenant wants the court's discretion to be exercised so as to amend the notice so that it is treated as applying to the main house alone, then that benefit should only be accorded to him if he and the landlord are put in the same position as if the 1997 notice had so provided when it was served. After all, it was only a couple of e days after it was served that, on this hypothesis, it became impossible for the tenant to serve any further notice of claim.

[132] Mr Morgan has put forward two reasons as to why such terms should not be imposed on this hypothesis. First, he relies on the fact that the tenant might have served two notices of claim in April 1997. The first is the notice that f was actually served, namely seeking the freehold of the main house and the mews house; the second, which would have been secondary and without prejudice to the first, would have sought the freehold of the main house alone. Mr Morgan argues that, if the tenant had taken that course, which is a course he would have been quite entitled to take, then the first notice (although ultimately invalid) would have continued the tenancy of the mews house as well as the main house, g so that the tenant would not have had to pay a full market rent and would have been entitled to serve the 2003 notice, and the second notice would have enabled the tenant to acquire the freehold of the main house. In those circumstances, there would have been no question of the court imposing the conditions which the landlord seeks in relation to the mews house, because there would have been h no application by the tenant to amend either of the two notices of claim served in 1997. The notice relating to the main house and the mews house would simply have been invalid, and that relating to the main house alone would have been effective.

[133] That argument is beguiling, but I do not accept it. It may well be that, if I am wrong on the question of whether the tenant could have served a notice j while the tenancy was continuing under para 3(1), it would not have been open to him to serve two notices of claim a few days before the contractual term date of the lease (in light of the reasoning which found favour with the Court of Appeal in *Oddy*'s case). However, even ignoring that point, I think that the simple answer to Mr Morgan's first point is that, assuming that the tenant could have

served two such notices of claim, thereby avoiding the need for any amendment, he did not do so: he only served one notice of claim, namely the 1997 notice. In those circumstances, it appears to me that, if that notice is not amended by the court, the tenant would lose his right to enfranchise the main house, at any rate by reference to values in 1997. The fact that the tenant could have arranged things so that he did not need an amendment to a notice of claim in order to enfranchise is therefore simply not in point.

[134] Mr Morgan's second argument rests on the proposition that, even though I might have thought it right to impose either or both the two conditions sought by the landlord in relation to the mews house, this is not a case where I am exercising a discretion. It is a case where I am reviewing the exercise of Judge Cooke's discretion. That is obviously right, but I can, indeed should, interfere with the exercise of his discretion if I am of the view that he reached a conclusion which he could not reasonably have reached, or that he was wrong when considering the relevant factors. On the hypothesis upon which I am proceeding, I think it would be right to interfere with Judge Cooke's decision not to impose the two conditions.

[135] The court has a discretion whether or not to amend the 1997 notice so that it applies only to the main house. If that discretion is not exercised in the tenant's favour, he will have no right to enfranchise the main house. The amendment will, to all intents and purposes, be retrospective to the date on which the 1997 notice was served, both in the technical sense (because the 1997 notice is being made effective, and there is no other notice which is going to be served) and in the practical sense (because the price payable for the main house will be by reference to 1997 market values). In those circumstances, I consider that, in the absence of special factors to the contrary, it would be indefensibly unfair on the landlord that the tenant should have the indulgence of such an amendment, without the landlord being placed in the same position as it would have been in if the 1997 notice had been served in the form in which it is now to be retrospectively amended, ie in a form seeking only the freehold of the main house.

[136] As I understand it, Judge Cooke considered that (on the basis of the hypothesis under which I am proceeding) the fact that, by extending to the mews house, the 1997 notice enabled the tenant to remain in occupation of the mews house at a very low rent and to serve the 2003 notice (neither of which would have been possible if the 1997 notice had only referred to the main house) was a consequence of the relevant provisions of the 1967 Act, and that therefore it would be inappropriate to impose the conditions. I do not agree with the logic of that analysis. Indeed, it seems to me that it is inconsistent with the logic of what Lord Scott said ([2003] 1 All ER 193 at [113]) when the first proceedings went to the House of Lords. It could just as well be said that the landlord's inability to serve a s 2(5) counter-notice by the time the case had gone to the House of Lords was just as much a consequence of the 1967 Act as the ability of the tenant to remain in occupation of the mews house at a low rent and to serve the 2003 notice. Yet the House of Lords considered that the amendment to the 1997 notice should only be permitted if time was extended to the landlord to serve a s 2(5) counter-notice.

[137] Accordingly, if, contrary to my view, the effect of a notice of claim relating to the main house alone would not have been to continue the tenancy of the mews house, I would have thought it appropriate to allow the landlord's

appeal, but only in so far as it relates to the two conditions sought to be imposed in relation to the mews house. *a*

CONCLUSION

[138] In the event, however, for the reasons which I have expressed at regrettable length, I would dismiss this appeal.

Appeal dismissed. *b*

Pamela Hardisty Barrister (NZ).

R (on the application of S) v Chief Constable of South Yorkshire

R (on the application of Marper) v Chief Constable of South Yorkshire

[2004] UKHL 39

HOUSE OF LORDS

LORD STEYN, LORD RODGER OF EARLSFERRY, BARONESS HALE OF RICHMOND, LORD CARSWELL AND LORD BROWN OF EATON-UNDER-HEYWOOD

21–23 JUNE, 22 JULY 2004

Police – Powers – Fingerprints and DNA samples – Retention of fingerprints and DNA samples lawfully taken from persons who are not convicted – Whether power of retention compatible with convention right to privacy – Police and Criminal Evidence Act 1984, s 64(1A) – Human Rights Act 1998, Sch 1, Pt I, art 8.

The police lawfully took fingerprints and DNA samples from claimants in two separate cases after each had been arrested and charged. Neither had previous convictions. One of the claimants was acquitted and proceedings against the other were discontinued. Until the coming into effect of the relevant section of the Criminal Justice and Police Act 2001, the retention by the police of fingerprints and DNA samples taken in connection with the investigation of an offence would have been unlawful under s 64 of the Police and Criminal Evidence Act 1984. Thereafter, s 64(1A)[a] of the 1984 Act authorised the police to retain such fingerprints or DNA samples after they had fulfilled the purposes for which they had been taken, and provided that they were not to be used 'except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution'. The defendant chief constable decided to retain the fingerprints and DNA samples taken from the claimants, in accordance with his policy to do so in all cases, save in exceptional circumstances. The claimants each applied for judicial review, contending, inter alia, that s 64(1A) of the 1984 Act infringed their rights to respect for their private life under art 8(1)[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The Divisional Court held that the retention of the fingerprints and DNA samples of individuals who had not been convicted of a criminal offence did not contravene the right under art 8(1), and rejected a challenge to the exercise of the discretion of the chief constable under s 64(1A) in relation to the retention of fingerprints and other samples. On appeal the Court of Appeal held, that having regard to the cultural traditions of the United Kingdom, the claimants' rights under art 8(1) had been infringed, but that that interference was justified under art 8(2) as being in accordance with the law and necessary in a democratic society for the prevention of crime. The claimants appealed, contending, inter alia, (i) that the range of genetic information derivable from retained DNA samples was of a highly private nature and provided more information about the donor

a Section 64(1A) is set out at [3], below

b Article 8 is set out at [6], below

than was needed for the identification of those involved in crime; and (ii) that the blanket policy of the defendant chief constable was unlawful, being a fetter on his discretion and disproportionate, in that it led to the retention of fingerprints and DNA samples of persons untainted by suspicion.

Held – (1) (Baroness Hale of Richmond dissenting) The retention of fingerprints, DNA samples and DNA profiles under s 64(1A) of the 1984 Act did not engage art 8(1) of the convention. While cultural traditions in the United Kingdom as to the state storing information about individuals were material in considering the question of objective justification under art 8(2), they were not material in considering whether art 8(1) was engaged, which was a question which should receive a uniform interpretation throughout member states, unaffected by different cultural traditions. Rigorous safeguards were in place to protect against the misuse of retained DNA samples, and their retention did not have an impact on the private lives of individuals (see [27], [29]–[31], [41], [63], [80], [85], below); *McVeigh v UK* (1981) 25 DR 15 and *Kinnunen v Finland* App No 24950/94 (15 May 1996, unreported) considered.

(2) The policy of the defendant to retain, save in exceptional cases, all fingerprints and DNA samples taken from those who had been acquitted of criminal offences or against whom proceedings had not been pursued was lawful. The aim of the policy was directed to the prevention or detection of crime, the investigation of offences, the facilitation of prosecutions and the speedy exculpation of the innocent as well as the correction of miscarriages of justice. The appeals would therefore be dismissed (see [39], [58], [60]–[63], [67], [79], [80], [84], [85], [89], below).

Decision of the Court of Appeal [2003] 1 All ER 48 affirmed on different grounds.

Notes

For the right to respect for private life, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149, 150.

For the Police and Criminal Evidence Act 1984, s 64, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 795.

For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 555.

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A-G's Ref (No 3 of 1999) [2001] 1 All ER 577, [2001] 2 AC 91, [2001] 2 WLR 56, HL.
Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 WLR 1232.
Friedl v Austria (1996) 21 EHRR 83, [1995] ECHR 15225/89, E Com HR.
Ghaidan v Mendoza [2004] UKHL 30, [2004] 3 All ER 411, [2004] 3 WLR 113.
Griggs v Duke Power Co (1971) 401 US 424, US SC.
Kinnunen v Finland App No 24950/94 (15 May 1996, unreported), E Com HR.
Kjeldsen v Denmark (1976) 1 EHRR 711, [1976] ECHR 5095/71, ECt HR.
Leander v Sweden (1987) 9 EHRR 433, [1987] ECHR 9248/81, ECt HR.
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McVeigh v UK (1981) 25 DR 15, E Com HR.
R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions [2002] EWHC 978 (Admin), [2002] 3 All ER 994; *affd* [2003] EWCA Civ 797, [2003] 3 All ER 577.

R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23.
R v Dyment (1988) 45 CCC (3d) 244, Can SC.
R v Weir [2000] All ER (D) 751, CA.
Reyntjens v Belgium (1992) 73 DR 136, E Com HR.
Silver v UK (1983) 5 EHRR 347, [1983] ECHR 5947/72, ECt HR.
Wandsworth London BC v Michalak [2002] EWCA Civ 271, [2002] 4 All ER 1136, [2003] 1 WLR 617.

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Allenet de Ribemont v France (1995) 20 EHRR 557, [1995] ECHR 15175/89, ECt HR.
Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2003] 3 All ER 1213, [2004] 1 AC 546, [2003] 3 WLR 283; *rvsg* [2001] EWCA Civ 713, [2001] 3 All ER 393, [2002] Ch 51, [2001] 3 WLR 1323.
Belgian Linguistic Case (No 2) (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR.
Botta v Italy (1998) 4 BHRC 81, ECt HR.
Brazil v Chief Constable of Surrey [1983] 3 All ER 537, [1983] 1 WLR 1155, DC.
British Oxygen Co Ltd v Minister of Technology [1970] 3 All ER 165, [1971] AC 610, [1970] 3 WLR 488, HL.
Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.
Bullock v UK (1996) 21 EHRR CD 85, E Com HR.
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G v Federal Republic of Germany (1989) 60 DR 256, E Com HR.
Gaygusuz v Austria (1997) 23 EHRR 364, [1996] ECHR 17371/90, ECt HR.
Geitling Selling Agency for Ruhr Coal v ECSC High Authority Case 2/56 [1957] ECR 3, ECJ.
Harrow London BC v Qazi [2003] UKHL 43, [2003] 4 All ER 461, [2003] 3 WLR 792.
Hilton v UK (1988) 57 DR 108, E Com HR.
Hoffmann v Austria (1994) 17 EHRR 293, [1993] ECHR 12875/87, ECt HR.
International Transport Roth GmbH v Secretary of State for the Home Dept [2002] EWCA Civ 158, [2003] QB 728, [2002] 3 WLR 344.
Inze v Austria (1988) 10 EHRR 394, [1987] ECHR 8695/79, ECt HR.
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R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.

R (on the application of Douglas) v North Tyneside Metropolitan BC [2003] EWCA Civ 1847, [2004] 1 All ER 709.

R (on the application of Hooper) v Secretary of State for Work and Pensions [2003] EWCA Civ 813, [2003] 3 All ER 673, [2003] 1 WLR 2623.

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R v DPP, ex p Kebeline, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.

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Spadea v Italy (1996) 21 EHRR 482, [1995] ECHR 12868/87, ECt HR.

Sporrong v Sweden (1983) 5 EHRR 35, [1982] ECHR 7151/75, ECt HR.

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Van der Mussele v Belgium (1984) 6 EHRR 163, [1983] ECHR 8919/80, ECt HR.

Wilson v First County Trust Ltd [2003] UKHL 40, [2003] 4 All ER 97, [2003] 3 WLR 568.

Appeals

R (on the application of S) v Chief Constable of South Yorkshire

S, a child, acting by his mother and litigation friend, B, appealed with permission of the House of Lords' Appeal Committee given on 4 February 2003 from the decision of the Court of Appeal (Lord Woolf CJ, Waller and Sedley LJJ) on 12 September 2002 ([2002] EWCA Civ 1275, [2003] 1 All ER 148) dismissing his appeal from the decision of the Divisional Court (Rose LJ and Leveson J) on 22 March 2002 ([2002] EWHC 478 (Admin), [2002] All ER (D) 367 (Mar)) dismissing his application for judicial review of the decision of the defendant, the Chief Constable of South Yorkshire, to retain fingerprints and DNA samples lawfully taken from him in a criminal investigation which had not resulted in his conviction. The Secretary of State for the Home Department appeared as an interested party. The facts are set out in the opinion of Lord Steyn.

R (on the application of Marper) v Chief Constable of South Yorkshire

Michael Raymond Marper appealed with permission of the House of Lords' Appeal Committee given on 4 February 2003 from the decision of the Court of Appeal (Lord Woolf CJ, Waller and Sedley LJJ) on 12 September 2002 ([2002] EWCA Civ 1275, [2003] 1 All ER 148) dismissing his appeal from the decision of the Divisional Court (Rose LJ and Leveson J) on 22 March 2002 ([2002] EWHC 478 (Admin), [2002] All ER (D) 367 (Mar)) dismissing his application for judicial review of the decision of the defendant, the Chief Constable of South Yorkshire, to retain fingerprints and DNA samples lawfully taken from him in a criminal investigation which had not resulted in his conviction. The Secretary of State for the Home Department appeared as an interested party. The facts are set out in the opinion of Lord Steyn.

Richard Gordon QC and *Stephen Cragg* (instructed by *Howells*, Sheffield) for the appellants.

David Bean QC, *David N Jones* and *Garreth Wong* (instructed by *Dr Theresa Searl*, Sheffield) for the chief constable.

Rabinder Singh QC and *James Strachan* (instructed by the *Treasury Solicitor*) for the Home Secretary.

Their Lordships took time for consideration.

22 July 2004. The following opinions were delivered.

LORD STEYN.

[1] My Lords, it is of paramount importance that law enforcement agencies should take full advantage of the available techniques of modern technology and forensic science. Such real evidence has the inestimable value of cogency and objectivity. It is in large measure not affected by the subjective defects of other testimony. It enables the guilty to be detected and the innocent to be rapidly eliminated from inquiries. Thus in the 1990s closed circuit television (CCTV) became a crime prevention strategy extensively adopted in British cities and towns. The images recorded facilitate the detection of crime and prosecution of offenders. Making due allowance for the possibility of threats to civil liberties, this phenomenon has had beneficial effects.

[2] The use of fingerprint evidence in this country dates from as long ago as 1902. In due course other advances of forensic science followed. But the dramatic breakthrough was the use of DNA techniques since the 1980s. The benefits to the criminal justice system are enormous. For example, recent Home Office statistics show that while the annual detection rate of domestic burglary is only 14%, when DNA is successfully recovered from a crime scene this rises to 48%. It is, of course, true that such evidence is capable of being misused and that courts must be ever watchful to eliminate risks of human error creeping in. But as a matter of policy it is a high priority that police forces should expand the use of such evidence where possible and practicable.

I RETENTION OF FINGERPRINTS AND SAMPLES

[3] It is not in doubt that the *taking* of fingerprints and samples from persons suspected of having committed relevant offences is a reasonable and proportionate response to the scourge of serious crime. What the present appeals are concerned with is the *retention* of such material in cases when a

suspect is subsequently acquitted or the charge is discontinued. Until the coming into effect on 11 May 2001 of s 82 of the Criminal Justice and Police Act 2001, the retention by the police of such fingerprints and samples was unlawful under s 64 of the Police and Criminal Evidence Act 1984 (PACE). There was public disquiet that this rule sometimes enabled defendants who had in all likelihood committed grave crimes to walk free. Parliament decided to reverse it. Section 64(1A) of PACE, as substituted by s 82 of the 2001 Act, authorises the retention of such fingerprints and samples. It provides:

> 'Where—(a) fingerprints or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person *except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.*' (My emphasis.)

This statutory provision lies at the heart of the present appeals. Its effect is that if a match is made between a fingerprint or a sample found at a crime scene and a fingerprint or sample taken from an individual before he was cleared of an earlier offence, the police will be able to use the underlying information in the investigation of the offence. It can play a significant role in the elimination of the innocent, the correction of miscarriages of justice and the detection of the guilty.

II THE EXPLANATORY NOTES

[4] The mischief against which s 64(1A) of PACE is aimed is set out in the explanatory notes which, in accordance with the system introduced in 1999, accompanied the Bill in its progress through Parliament. Explanatory notes are not indorsed by Parliament. On the other hand, in so far as they cast light on the setting of a statute, and the mischief at which it is aimed, they are admissible in aid of construction of the statute. After all, they may potentially contain much more immediate and valuable material than other aids regularly used by the courts, such as Law Commission reports, government committee reports, Green Papers, and so forth. The explanatory notes relating to what became the new s 64(1A) read as follows:

> '186. An additional measure has been included to allow all lawfully taken fingerprints and DNA samples to be retained and used for the purposes of prevention and detection of crime and the prosecution of offences. This arises from the decisions of the Court of Appeal (Criminal Division) in *R v Weir* [2000] All ER (D) 751 and [*A-G's Ref (No 3 of 1999)* [2001] 1 All ER 577, [2001] 2 AC 91]. These raised the issue of whether the law relating to the retention and use of DNA samples on acquittal should be changed. In these two cases compelling DNA evidence that linked one suspect to a rape and the other to a murder could not be used and neither could be convicted. This was because at the time the matches were made both defendants had either been acquitted or a decision made not to proceed with the offences for which the DNA profiles were taken. Currently section 64 of PACE specifies that where a person is not prosecuted or is acquitted of the offence the sample must be destroyed and the information derived from it can not be used. The subsequent decision of the House of Lords overturned the ruling of the Court of Appeal. The House of Lords ruled that where a DNA sample fell to be destroyed but had not been, although section 64 of PACE prohibited its

use in the investigation of any other offence, it did not make evidence obtained as a failure to comply with that prohibition inadmissible, but left it to the discretion of the trial judge. The Bill removes the requirement of destruction and provides that fingerprint and samples lawfully taken on suspicion of involvement in an offence or under the Terrorism Act [2000] can be used in the investigation of other offences. This new measure will bring the provisions of PACE for dealing with fingerprint and DNA evidence in line with other forms of evidence.'

The light cast on the interpretation of s 64(1A) by the notes is limited but it does show exactly what problem Parliament was addressing.

[5] The reference in the explanatory notes to fingerprints is readily intelligible. But it is necessary to make clear what DNA evidence is. The Forensic Science Service on its website under the legend 'What is DNA?' gives a simple and useful explanation. So far as material it reads as follows:

'DNA stands for Deoxyribonucleic Acid. DNA is the chemical which is found in virtually every cell in the body and which carries genetic information from one generation to the next. The genetic information carried in DNA is in the form of a code or language which, when translated, determines our physical characteristics and directs all the chemical processes in the body. Except for identical twins, each person's DNA is unique. Half of the DNA is inherited from our father and the other half from our mother. DNA can be extracted from any cells that contain a structure called the nucleus. This includes blood, semen, saliva or hair samples.'

To this general description it is necessary to add that in the present appeal a distinction has been drawn between DNA samples and DNA profiles derived from the samples. Dr Bramley, chief scientist of the Forensic Science Service and custodian of the national DNA database, explained in a witness statement:

'The samples consist of what is taken by the police under PACE, and any sub-samples or part samples retained from these after analysis. The DNA profiles are digitised information and it is this digitised information that is stored electronically on the national DNA database together with details of the person to whom it relates.'

III THE QUESTIONS

[6] The principal question before the House concerns the compatibility of s 64(1A) with the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), and in particular with the convention rights contained in arts 8 and 14. Respectively these articles provide as follows:

'Article 8

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime,

for the protection of health or morals, or for the protection of the rights and freedoms of others ... a

Article 14
Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, b colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

In addition there is a separate question whether the policy of the Chief Constable of South Yorkshire Police (the chief constable) to retain, save in exceptional circumstances, fingerprints and samples of acquitted individuals in all cases is c lawful and compatible with the fundamental rights of individuals.

IV THE VALUE OF SUCH REAL EVIDENCE

[7] The value of retained fingerprints and samples taken from suspects who were subsequently acquitted is considerable. This is graphically illustrated by a real case which has been referred to as 'I'. In 1999 a rape and robbery took place. The d perpetrator was not know to the victim. DNA was recovered from the semen on the victim. A search of the national database showed that the DNA matched that of 'I'. The sample should have been destroyed. It was not Following the decision of the House of Lords in *A-G's Ref (No 3 of 1999)* [2001] 1 All ER 577, [2001] 2 AC 91 the prosecution went ahead. 'I' pleaded guilty to rape and was sentenced to a term e of seven years (subsequently reduced on appeal to six years) in a young offenders institution. But for the wrongly retained sample the offender might have escaped detention, possibly to commit other serious crimes.

[8] This is one concrete illustration of the value of such evidence. It is part of a broader picture. DNA can be detected from very small samples (such as might be found on the saliva on a cigarette end). The power of this technique to f eliminate those suspected or to incriminate others is enormous. The Court of Appeal had before it statistical evidence from Dr Bramley, which demonstrated the value of such evidence. In a witness statement of 16 July 2002 he said:

'Matches with profiles retained under the new provisions of the Criminal Justice and Police Act 2001 g

9.1 To date, approximately 1,700 offences have been detected involving over 1,000 offenders that might have otherwise gone undetected using profiles that would previously have been removed from the database prior to implementation of the 2001 Act. These include 5 murders, 9 attempted murders, 23 rapes, 6 other sexual offences, 15 aggravated burglaries, h 14 [offences of] the supply of controlled drugs and a number of serious assaults.'

Two years later Dr Bramley updated the statistics. The effect is summarised in the printed case of the Home Secretary:

j 'As at 31 March 2004, the total number of DNA profiles on the DNA database which relates to entries where the parent Police National Computer (PNC) records has been deleted is 162,433. It is estimated that approximately 86% of the PNC record deletions are attributable to subsequent acquittals. Allowing for an 8% replication rate among acquittals (for example, reflecting dual entries through use of aliases etc), it is estimated

a that there are approximately 128,517 DNA profiles on the DNA database which would previously have been required to be deleted. From these, approximately 5,922 DNA profiles have linked with crime scene stain profiles in respect of 6,280 offences. These offences include 53 murders, 33 attempted murders, 94 rapes, 38 sexual offences, 63 aggravated burglaries and 56 offences of the supply of controlled drugs.'

b The Home Office statistics show that there is a 40% chance that a crime scene sample will be matched immediately with an individual's profile on the database. These statistics show that fingerprints and samples, which may under s 64(1A) of PACE be retained, have in the last three years played a major role in the detection and prosecution of serious crime.

c [9] This is the context in which the questions before the House must be considered.

V THE TWO CASES BEFORE THE HOUSE

[10] There are two appeals before the House. Neither appeal involves an unusual set of facts. They can be regarded as appropriate test cases to consider d the questions of law involved.

The case of S

[11] When he was arrested on 19 January 2001 S was an 11-year-old boy. He has no previous convictions, cautions or warnings. He was charged with the e offence of attempted robbery. Fingerprints and samples were taken from him. Following a trial on 14 June 2001, S was acquitted of the charge. On 18 July 2001, the principal fingerprint officer of South Yorkshire Police wrote to the solicitors acting on behalf of S in these terms:

f 'I wish to inform you that the South Yorkshire Police will retain fingerprints and samples that were previously required to be destroyed under section 64 of the Police and Criminal Evidence Act 1984. The Criminal Justice and Police Act 2001 now gives the police the right to retain fingerprints and samples to aid crime and investigation and is retrospective. All fingerprints and samples that were due for destruction will be retained.'

g Then followed further correspondence between the solicitors for S and the South Yorkshire Police in which the solicitors demanded the destruction of the fingerprints and samples of S and the police refused to do so. It is unnecessary to summarise the rival legal contentions of the parties. On 12 October 2001, S sought judicial review of the decision of the police. The standard Form N461 h summarised the relief sought as follows:

'(1) Quashing order to quash the policy to retain fingerprints and samples in all cases.

(2) A declaration that the [chief constable] has acted in a manner incompatible with [S's] Convention rights pursuant to Article 8 and j Article 14 of the ECHR.

(3) A mandatory order to enforce the destruction of [S's] fingerprints and samples.

(4) A declaration that section 64 of PACE (as amended) is incompatible with Article 8 and Article 14 of the ECHR to the extent that it permits the retention of fingerprints and samples of persons with no criminal record.'

Mr Marper

[12] On 13 March 2001, Mr Marper (who was then 38 years of age and of good character) was arrested and charged with harassment of his partner. The police took his fingerprints and samples. When he appeared in court he pleaded not guilty. The court adjourned his case for a pre-trial review. By the time of that hearing, his partner had become reconciled with him and decided not to press the charge. On 11 June 2001, the Crown Prosecution Service wrote to his solicitors enclosing a notice of discontinuance. On 14 June the case was formally discontinued by the magistrates' court.

[13] There was correspondence between the solicitors for Mr Marper and the South Yorkshire Police in which the former demanded destruction of his fingerprints and samples and the police refused to do so. Again the rival legal contentions need not be set out. On 12 December 2001, Mr Marper applied for judicial review of the decision of the police. The application was based on the same legal grounds as those advanced by S.

VI THE DIVISIONAL COURT

[14] The applications for judicial review came before the Divisional Court (Rose LJ (the Vice-President of the Court of Appeal (Criminal Division)) and Leveson J). The judgment was given by Leveson J with the agreement of Rose LJ. The court held that the retention of the fingerprints and DNA samples of individuals who had not been convicted of a criminal offence did not contravene either the individual's right to a private life under art 8 or his right not to be discriminated against under art 14 of the convention. The court also rejected a challenge to the discretion exercised by the chief constable under s 64(1A) in relation to the retention of fingerprints and other samples.

VII THE APPEAL TO THE COURT OF APPEAL

[15] The shape of the case changed before the Court of Appeal. Liberty was given permission to intervene. In particular Liberty emphasised in their intervention:

> 'In contrast to fingerprints and DNA profiles, the physical *samples* which are retained and used under PACE (swabs etc) and from which DNA is taken, potentially contain very much greater, more personal and detained information about an individual. This may include highly private matters such [as] information about a latent genetic illness, or the birth gender of a transsexual person. It may even reveal behavioural tendencies, or important information about the individual that he does not even know about himself such as the true nature of his familial relationships.'

Liberty contended that 'the range of genetic information that may be derived from DNA *samples* is of a highly private nature'. In short Liberty argued that the samples provided more information about the person who provided the samples than is needed for the identification of those involved in crime. Faced with these new issues, which the Secretary of State and the chief constable had no opportunity at the oral hearing to deal with, the Court of Appeal gave them leave to produce further evidence and to make further written submissions. That was done. The most important document placed before the Court of Appeal after the oral hearing was the affidavit of Dr Bramley to which some reference has already been made.

[16] Addressing the issues, as amplified by Liberty's intervention, the Court of Appeal by a majority (Lord Woolf CJ and Waller LJ) upheld for somewhat different reasons the decision of the Divisional Court. In a dissenting judgment Sedley LJ concluded that the chief constable was required to consider whether in each particular case the individual concerned is free of any taint of suspicion.

VIII THE ISSUES BEFORE THE HOUSE

[17] The agreed statement of facts and issues summarises the issues before the House as follows: (1) whether the retention of fingerprints, samples and DNA profiles is an interference with the appellants' right to respect for private life pursuant to art 8(1) of the convention and, if so, whether it can be justified under art 8(2); (2) whether a distinction should be made between the retention of DNA profiles and samples; (3) whether the retention of the appellants' fingerprints, samples and DNA profiles amounts to discrimination against them for the purposes of art 14 of the convention and, if so, whether it is objectively justified; (4) if the retention of fingerprints and DNA profiles and/or samples is an unjustified interference with the appellants' convention rights, whether it would be possible to give s 64(1A) of PACE a convention-compatible interpretation under s 3 of the 1998 Act; (5) if that is impossible, whether s 64(1A) should be declared to be incompatible with arts 8 and/or 14 of the convention; (6) whether the policy of the chief constable to retain samples and fingerprints in all cases subject to exceptional circumstances is unlawful and incompatible with the appellants' convention rights. These issues must primarily be considered in the light of the competing arguments of the parties. But the contentions of Liberty are also important. Although the Appellate Committee was willing to allow Liberty to intervene in writing and orally, that did not happen. The House has, however, considered in detail the written intervention of Liberty in the Court of Appeal as well as a petition by Liberty to the House of Lords to intervene which was subsequently withdrawn.

[18] A procedural issue arose at the oral hearing of the appeals in the House. Counsel for the appellants applied for leave to introduce a letter dated 11 June 2004 from the Information Commissioner to Liberty about the national DNA database as well as associated materials. The Information Commissioner is not a party to the proceedings and, although aware of the proceedings, did not seek leave to intervene. Not surprisingly, the Home Secretary and the chief constable strongly objected to the admission of this material. In my view this eleventh-hour attempt to introduce new material must be strongly deprecated and by itself this factor is sufficient reason to refuse the application. In the result the House looked at the material de bene esse. In my view the material does not assist in the disposal of the issues. I would reject the application.

IX THE LEGISLATIVE SCHEME

[19] Before it will be possible to examine the issues directly it is necessary to explain the legislative scheme in some detail. Inherent in the PACE regime are three different concepts, viz the taking of fingerprints and samples, the retention of them, and the use of them.

Taking

[20] The powers to take fingerprints and samples are to be found in PACE. Since fingerprints and samples were taken from the appellants in early 2001 those powers have in various respects been enlarged by statutory amendment but these

changes are not material to the issues to be considered. PACE deals with fingerprints and samples separately. Sections 27 and 61 contain the main powers to take fingerprints in carefully regulated circumstances involving, amongst other things, a reasonable suspicion that a person has committed a criminal offence. The main power to take samples was to be found in s 63. It covers the case where a person was charged with a recordable offence.

[21] It is true that the taking of fingerprints and samples involves an interference with the individual's private life within the meaning of art 8(1) of the convention. On the other hand, such interference for the very limited statutory purposes is plainly objectively justified under art 8(2).

Retention

[22] The terms of s 64(1A) of PACE have already been quoted. In order to place it in context, I set it out again:

> 'Where—(a) fingerprints or samples are taken from a person in connection with the investigation of an offence, and (b) subsection (3) below does not require them to be destroyed, the fingerprints or samples may be retained after they have fulfilled the purposes for which they were taken but shall not be used by any person except for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution.'

Section 64(1B) extends by definition the use for the purposes of s 64(1A) of checks of fingerprints and samples. It is also necessary to refer to the following subsections of s 64:

> '(3) If—(a) fingerprints or samples are taken from a person in connection with the investigation of an offence; and (b) that person is not suspected of having committed the offence, they must, except as provided in the following provisions of this section, be destroyed as soon as they have fulfilled the purpose for which they were taken.
>
> (3AA) Samples and fingerprints are not required to be destroyed under subsection (3) above if—(a) they were taken for the purposes of the investigation of an offence of which a person has been convicted; and (b) a sample or, as the case may be, fingerprint was also taken from the convicted person for the purposes of that investigation.
>
> (3AB) Subject to subsection (3AC) below, where a person is entitled under subsection (3) above to the destruction of any fingerprint or sample taken from him (or would be but for subsection (3AA) above), neither the fingerprint nor the sample, nor any information derived from the sample, shall be used—(a) in evidence against the person who is or would be entitled to the destruction of that fingerprint or sample; or (b) for the purposes of the investigation of any offence; and subsection (1B) above applies for the purposes of this subsection as it applies for the purposes of subsection (1A) above.
>
> (3AC) Where a person from whom a fingerprint or sample has been taken consents in writing to its retention—(a) that sample need not be destroyed under subsection (3) above; (b) subsection (3AB) above shall not restrict the use that may be made of the fingerprint or sample or, in the case of a sample, of any information derived from it; and (c) that consent shall be treated as comprising a consent for the purposes of section 63A(1C) above; and a

consent given for the purposes of this subsection shall not be capable of being withdrawn.

(3AD) For the purposes of subsection (3AC) above it shall be immaterial whether the consent is given at, before or after the time when the entitlement to the destruction of the fingerprint or sample arises.'

Subsection (3AC) is of particular interest in so far as it may have to be accommodated in the submissions on behalf of the appellants.

Use

[23] Counsel for the Home Secretary accepted that it is possible to conceive of uses which might theoretically be capable of amounting to an interference with respect for private life under art 8(1). He gave the example that where samples were used to extract personal genetic information about an individual and that information was used in a way linked to that individual it might represent an interference with the right to respect for private life. Subject to such unusual cases, the use of retained fingerprints and samples in the context of the detection and prosecution of crime should cause no problem of principle.

[24] Under this heading it is also important to bear in mind the decision of the House in *A-G's Ref (No 3 of 1999)* [2001] 1 All ER 577, [2001] 2 AC 91. It was decided under the old s 64 and in respect of a sample which should undoubtedly have been destroyed. The House held that:

'... whereas section 64(3B)(a) of [PACE] made express prohibition against the use in evidence of a DNA sample which should have been destroyed, section 64(3B)(b), in prohibiting the use of an unlawfully retained sample for the purposes of any investigation, did not amount to a mandatory exclusion of evidence obtained as a result of a failure to comply with that prohibition but, read with section 78 of [PACE], left the question of its admissibility to the discretion of the trial judge; that a decision by a judge in the exercise of his discretion to admit such evidence would not amount to an unlawful interference with the defendant's right to private life under article 8 of the Convention ...' (See headnote [2001] 2 AC 91.)

The House was influenced by the broad policy consideration that—

'respect for the privacy of defendants is not the only value at stake. The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.' (See [2001] 1 All ER 577 at 584, [2001] 2 AC 91 at 118.)

This approach may be of continuing relevance.

X ISSUE (1): ART 8 OF THE CONVENTION

Does retention interfere with the right under art 8(1)?

[25] There is no decision of the European Court of Human Rights on the question whether the retention of fingerprints or samples amounts to an interference with the right to respect for private life. On the other hand, the European Commission of Human Rights (the Commission) has considered the

point. In *McVeigh v UK* (1981) 25 DR 15 at 48–50 (paras 223–226) the Commission distinguished between the taking of fingerprints, photographs and records, and their retention. About retention the Commission stated (at 50 (para 227))— a

> 'that it is open to question whether the retention of fingerprints, photographs and records of such information amounts to an interference with the applicants' right to respect for private life under Article 8(1) of the Convention.' b

McVeigh v UK involved charges of terrorism but the same reasoning may be applicable to other serious crimes. Subsequently, in the context of photographs and fingerprints retained in connection with a charge of fraud the Commission concluded that there was not an interference with respect for private life under art 8: see *Kinnunen v Finland* App No 24950/94 (15 May 1996, unreported). c

[26] These decisions are relevant but far from conclusive. In the Divisional Court ([2002] EWHC 478 (Admin) at [21], [2002] All ER (D) 367 (Mar) at [21]) Leveson J was content simply to record that he was 'far from convinced that the retention of fingerprints and DNA samples engages art 8 in any form'. A different approach prevailed in the Court of Appeal. The court held that art 8(1) applied to the retention. Lord Woolf CJ found the solution in the different cultural traditions of member states. He said ([2002] EWCA Civ 1275 at [32], [2003] 1 All ER 148 at [32]): d

> 'So far as this jurisdiction is concerned it is my view that fingerprints and DNA samples are material which is regarded as being personal to the individual from whom it is taken and so requires legal justification before it can be retained.' e

He explained:

f

> '[34] ... while not substantial, the interference is still real. There are no doubt a rainbow of reactions which are possible to intrusions of this nature, but at least for a substantial proportion of the public there is a strong objection to the state storing information relating to an individual unless there is some objective justification for this happening. The objection to the storage is reflected in the appreciative public response to novels such as Aldous Huxley's *Brave New World* and George Orwell's *1984*. As to the persuasive decisions of the commission, it has to be remembered that just as in the appropriate circumstances a margin of appreciation has to be extended for any shortcomings in this jurisdiction in relation to observing the convention, so there can be situations where the standards of respect for the rights of the individual in this jurisdiction are higher than those required by the convention. There is nothing in the convention setting a ceiling on the level of respect which a jurisdiction is entitled to extend to personal rights. In this jurisdiction I would not expect a court to necessarily follow the decision of the commission in *Reyntjens v Belgium* (1992) 73 DR 136 at 152 that—"The obligation to carry an identity card and to show it to the police whenever requested to do so does not as such constitute an interference in a person's private life within the meaning of Article 8 of the Convention."' g h j

Waller LJ said (at [58]) that Liberty's intervention persuaded him that there was a breach of art 8(1) in the retention and use of the samples. Sedley LJ agreed with

the observations of Lord Woolf CJ on the application of art 8(1). He added (at [68]) that—

> 'we are fully entitled to take into account the strong cultural unease in the United Kingdom about the official collection and retention of information about individuals.'

Counsel for the appellants relied on these observations in the Court of Appeal. It is necessary to examine them.

[27] While I would not wish to subscribe to all the generalisations in the Court of Appeal about cultural traditions in the United Kingdom, in comparison with other European states, I do accept that when one moves on to consider the question of objective justification under art 8(2) the cultural traditions in the United Kingdom are material. With great respect to Lord Woolf CJ the same is not true under art 8(1). Expressing the unanimous view of the House in *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23 Lord Bingham of Cornhill observed (at [20]) that the convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. He added:

> 'It is of course open to member states to provide for rights more generous than those guaranteed by the convention, but such provision should not be the product of interpretation of the convention by national courts, since the meaning of the convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'

The question whether the retention of fingerprints and samples engages art 8(1) should receive a uniform interpretation throughout member states, unaffected by different cultural traditions. And the current Strasbourg view, as reflected in decisions of the Commission, ought to be taken into account.

[28] That brings me to the concerns of Liberty. They centre on the retention of DNA samples. To the extent that Liberty expresses fears about the misuse of retained samples, Dr Bramley has shown the extent of the rigorous safeguards in place. In any event, the trial process ought to weed out such abuses. Liberty's fears of what may happen in the future in the light of the expanding frontiers of science is not relevant in respect of contemporary use of retained samples in connection with the detection and prosecution of crime. If future scientific developments require it, judicial decisions can be made, when the need occurs, to ensure compatibility with the convention.

[29] In the Divisional Court Leveson J helpfully explained why the retention of DNA samples does not have an impact on the private lives of individuals. He said at ([19]):

> 'A person can only be identified by fingerprint or DNA sample either by an expert or with the use of sophisticated equipment or both; in both cases, it is essential to have some sample with which to compare the retained data. Further, in the context of the storage of this type of information within records retained by the police, the material stored says nothing about the physical make-up, characteristics or life of the person to whom they belong.'

Since the hearing in the Divisional Court, Dr Bramley has provided detailed and powerful support for this view. Dr Bramley explained that: (1) the scientific

testing of the sample which leads to the generation of a DNA profile is based upon analysis of the non-coding region of DNA namely short tandem repeats (STRs); (2) the STR analysis performed to create a DNA profile does not generally permit extraction of potential medical information about an individual; (3) although other genetic information from samples could be obtained in theory (such as medical information), the use of samples obtained and retained under PACE is limited to purposes related to the prevention or detection of crime; (4) as explained by Dr Bramley:

> 'The use to which the retained scrapes can be put is restricted by the legislation which permits their retention only for purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution. This is not interpreted so widely as to allow general testing of the retained CJ scrapes for medical conditions or susceptibilities and linking the results to a specific known individual.'

[30] Counsel for the appellants then approached the matter from a different angle. He emphasised that the use of retained fingerprints and samples under s 64(1A) of PACE extends to 'purposes related to the prevention or detection of crime, the investigation of an offence or the conduct of a prosecution'. He argued that the words 'for purposes related to' are capable of permitting uses other than for the investigation, detection or prosecution of crime. The text shows that the words 'for purposes relating to' apply to each of the three specified uses: i e (a) for purposes related to the prevention or detection of crime; (b) for purposes related to the investigation of an offence; (c) for purposes related to the conduct of a prosecution. And the context shows that the words 'for purposes related to' fulfil a meaningful role. These words permit use of fingerprints and samples for *exculpation* of a potential suspect, or use of fingerprints and samples on a criminal appeal or for investigation of a miscarriage of justice. Such permitted uses might otherwise be said to have been excluded if a very restrictive definition of 'conduct of prosecution' or 'investigation of an offence' were to be adopted. In these circumstances, and bearing in mind the interpretive obligation in s 3 of the 1998 Act, the fears of counsel for the appellants are not justified. In so far as it may be necessary s 64(1A) will be given a convention-compatible meaning under s 3 of the 1998 Act.

[31] Looking at the matter in the round I incline to the view that in respect of retained fingerprints and samples art 8(1) is not engaged. If I am wrong in this view, I would say any interference is very modest indeed.

If the retention of DNA profiles, samples and fingerprints is a breach of art 8(1), is it justified under art 8(2)?

[32] This issue does not arise if the conclusion is correct that art 8(1) is not engaged. I will consider it, however, on the hypothesis that there is some interference with private life, albeit rather modest.

[33] The effect of the decision of the House in *A-G's Ref (No 3 of 1999)* [2001] 1 All ER 577, [2001] 2 AC 91, in conjunction with s 64 of PACE in unamended form, left the law in a distinctly unsatisfactory state. There was an obligation to destroy fingerprints and samples in respect of persons who were acquitted. Nevertheless, if such material was unlawfully retained, it could be used for the purpose of investigating another offence, and the evidence could be used in a subsequent trial unless it was excluded at the judge's discretion. This distinction did not reflect well on the law. Parliament could have reversed *A-G's Ref (No 3 of*

1999). Instead, adopting the underlying philosophy of the House in that decision, Parliament decided to provide for the retention of fingerprints and samples. This legislative choice must be approached with due deference to a policy decision made by Parliament.

[34] The appellants argued that an interference with art 8(1) cannot be justified under art 8(2). The Divisional Court dismissed this argument. The Court of Appeal unanimously rejected an appeal on this part of the case.

[35] In the House counsel for the appellants renewed the submissions: (1) that retention is not 'in accordance with law'; and (2) that the power of retention is disproportionate.

[36] The first contention can be dealt with briefly. Counsel cited *Silver v UK* (1983) 5 EHRR 347 at 372 (para 88) for the proposition that '[a] law which confers a discretion must indicate the scope of that discretion'. Standing alone this is an impractical and unworkable prescription. But the European Court of Human Rights added:

> '... the Court has already recognised the impossibility of attaining absolute certainty in the framing of laws and the risk that the search for certainty may entail excessive rigidity ... [t]he Court points out once more that "many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice" ...'

The discretion involved in the power to retain fingerprints and samples makes allowance for exceptional circumstances, e g where an undertaking to destroy the fingerprints or sample was given or where they should not have been taken in the first place, as revealed by subsequent malicious prosecution proceedings. Sometimes an obviously unmeritorious point does not require elaborate examination. In agreement with his colleagues Sedley LJ dealt with the argument as follows ([2003] 1 All ER 148 at [69]):

> 'The next question is whether retention of fingerprints or of bodily samples which is permitted under s 64 of (PACE) is justified under art 8(2). The purposes of retention—the prevention of crime and the protection of the right of others to be free from crime—are foursquare within art (8(2), and retention is provided for by law.'

I respectfully agree.

[37] The second contention is based on the principle of proportionality. Counsel for the appellants argued that the retention of fingerprints and DNA samples creates suspicion in respect of persons who have been acquitted. Counsel for the Home Secretary said that this argument focuses on the wrong target. The retention of fingerprints and DNA samples is not aimed at the past. Its purpose is to assist in the investigation of offences in the future. The retention and use of fingerprints and samples in this way does not affect the appellants unless they are implicated in a future crime by a DNA sample found at the scene. It is only if and when there are two profiles which match each other that the database will generate a bull's eye.

[38] The following propositions seem to be established: (i) the fingerprints and samples are kept only for the limited purpose of the detection, investigation, and prosecution of crime; (ii) the fingerprints and samples are not of any use without a comparator fingerprint or sample from the crime scene; (iii) the fingerprints and samples will not be made public; (iv) a person is not identifiable to the untutored eye simply from the profile on the database, any interference

represented by the retention being minimal; (v) and, on the other hand, the resultant expansion of the database by the retention confers enormous advantages in the fight against serious crime. Cumulatively these factors suggest that the retention of fingerprints and samples is not disproportionate in effect.

[39] Counsel for the appellants submitted that the legislative aim could be achieved by less intrusive means. It became clear that this contention would require a case-by-case consideration of the circumstances of alleged offences of which the individual has been acquitted. Counsel was able to rely on the conclusion of Sedley LJ. He said (at [94]):

> 'The power of a chief constable to destroy data which he would ordinarily retain must in my judgment be exercised in every case, however rare such cases may be, where he or she is satisfied on conscientious consideration that the individual is free of any taint of suspicion.'

In my view this would not confer the benefits of a greatly extended database and would involve the police in interminable and invidious disputes (subject to judicial review of individual decisions) about offences of which the individual had been acquitted. In any event, Waller LJ pointed out (at [66]):

> 'to introduce a concept of a chief constable having to consider whether a person is free of any taint of suspicion has great difficulties, and as it seems to me is raising a consideration which in fact should not apply at the retention stage. At the retention stage consideration of the circumstances of the *offence* of which the person has by this stage been acquitted seem to me almost certainly irrelevant. I accept that if some form of undertaking were given to destroy to induce a person to co-operate in the taking of a sample, that would be relevant, but the circumstances of the offence itself would as I see it not be. Apart from the "undertaking type case", retention is only relevant to the question whether the details on the data bank will assist in either the elimination or the conviction of a person so far as some future criminal investigation is concerned. If justification for retention is in any degree to be by reference to the view of the police on the degree of innocence, then persons who have been acquitted and have their samples retained can justifiably say this stigmatises or discriminates against me—I am part of a pool of acquitted persons presumed to be innocent, but I am being treated as though I was not. It is not in fact in any way stigmatising someone who has been acquitted to say simply that samples lawfully obtained are retained as the norm, and it is in the public interest in its fight against crime for the police to have as large a database as possible. I accordingly do not subscribe to the view that the chief constable is bound to exercise his discretion in the way suggested by Sedley LJ.'

These observations were made in the context of the issue of discretion but are apposite to the question whether there are less intrusive but realistic means available to achieve the legislative purpose. In my view the answer is that there are not.

[40] I would, therefore, hold that if art 8(1) is engaged, there is plainly an objective justification under art 8(2).

XI ISSUE (2): DISTINCTION BETWEEN THE RETENTION OF DNA PROFILES AND SAMPLES

[41] It will be apparent from my examination and discussion of the undoubted distinction between DNA profiles and samples that, for the reasons already given,

the legal consequences are not as contended for by counsel for the appellants and Liberty. It is unnecessary to traverse the same ground again.

XII ISSUE (3): DOES THE RETENTION OF FINGERPRINTS AND SAMPLES AMOUNT TO DISCRIMINATION UNDER ART 14 AND, IF SO, CAN IT BE OBJECTIVELY JUSTIFIED?

[42] Based on the approach of Brooke LJ in *Wandsworth London BC v Michalak* [2002] EWCA Civ 271 at [20], [2002] 4 All ER 1136 at [20], [2003] 1 WLR 617, as amplified in *R (on the application of Carson) v Secretary of State for Work and Pensions, R (on the application of Reynolds) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin) at [52], [2002] 3 All ER 994 at [52] and [2003] EWCA Civ 797, [2003] 3 All ER 577, five questions can be posed as a framework for considering the question of discrimination: (1) Do the facts fall within the ambit of one or more of the convention rights? (2) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison? (3) If so, was the difference in treatment on one or more of the proscribed grounds under art 14? (4) Were those others in an analogous situation? (5) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim?

[43] But a caveat must be mentioned. In *Ghaidan v Mendoza* [2004] UKHL 30, [2004] 3 All ER 411, [2004] 3 WLR 113 Baroness Hale of Richmond explained (at [134]):

> 'the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided.'

That is how I will approach the matter.

Question 1: a convention right

[44] There is no free standing right under art 14 against discrimination. In this case the question is whether the facts fall within the ambit of art 8. If my conclusion is right that art 8(1) is not engaged, it follows that art 14 is not triggered. I will assume, however, that the retention of fingerprints and samples does amount to an interference under art 8(1), albeit a justified interference under art 8(2). On this supposition the first *Michalak* question must be answered in the affirmative.

Question 2: less favourable treatment

[45] The appellants' chosen comparators are the general body of persons who have not had fingerprints and samples taken by the police in the course of a criminal investigation. There is different treatment between those comparators and the appellants in relation to s 64(1A) of PACE.

Question 3: a proscribed ground?

[46] This question is important because if the different treatment is not on a relevant ground for the purposes of art 14, then this article is not applicable. In

any event, identification of the ground for different treatment is material to the question of justification. a

[47] The different treatment afforded to the appellants and comparators was on the ground that the former had already provided samples and fingerprints to the police in a criminal investigation while the comparators had never been required to do so.

[48] The list of grounds in art 14 is not exhaustive, and necessarily includes b each of the specifically proscribed grounds as well as 'other status'. The European Court of Human Rights has interpreted 'other status' as meaning a personal characteristic: see *Kjeldsen v Denmark* (1976) 1 EHRR 711 at 732–733 (para 56). I do not understand Lord Woolf CJ to have expressed a different view (see [2003] 1 All ER 148 at [47]). On the other hand, the proscribed grounds in art 14 cannot be unlimited, otherwise the wording of art 14 referring to 'other c status' beyond the well-established proscribed grounds, including things such as sex, race or colour, would be unnecessary. It would then preclude discrimination on any ground. That is plainly not the meaning of art 14.

[49] It is, therefore, necessary to examine whether the ground for different treatment in this case amounts to a status in the sense of a personal characteristic d within the meaning of art 14.

[50] There is a difference in treatment between those who have had to provide fingerprints and samples pursuant to a criminal investigation as compared with the rest of the public who have not. But that difference is not necessarily on grounds of 'status'. Counsel for the chief constable and counsel for the Home Secretary submitted that it is a difference simply reflecting historical e fact, namely that the authorities already hold the fingerprints and samples of the individuals concerned which were lawfully taken. Counsel for the chief constable illustrated the point with an analogy. He asked the House to imagine that Mr Marper had been involved in an accident and admitted to hospital. In routine fashion notes would have been made, tests done and X-rays taken. A subsequent f request by his solicitors to destroy the materials would have been refused by the hospital. First, it is good practice to keep them. Secondly, medical negligence is a growing area of litigation and prudence requires records to be kept. Had Mr Marper then sought a judicial review of this decision, an art 8 challenge would have failed and an art 14 challenge would have met the answer that the existence of the records is not a matter of status. It is an historical fact that is unrelated to g any personal characteristic. I find the analogy, and the argument which it supports, persuasive. This is, however, not the only possible explanation. In the Court of Appeal Sedley LJ observed (at [86]):

> 'The line between those unconvicted people who have faced charges and h those who have not, while not a bright line, is not arbitrarily drawn. It does not tarnish the innocence of the unconvicted in the eye of the law. But it recognises that among them is an indeterminate number who are likelier than the rest of the unconvicted population to offend in the future or to be found to have offended in the past.'

j

This view was adopted by counsel on behalf of the chief constable but not by counsel on behalf of the Home Secretary. Given my acceptance of the rationale put forward jointly by the chief constable and the Home Secretary it is not necessary to rule on the observation of Sedley LJ.

[51] By way of summary the position is as follows. The difference in treatment is not analogous to any of the expressly proscribed grounds such as sex,

race, gender or religion. The fact that the police are now in possession of fingerprints and samples which were previously lawfully acquired as a result of a criminal investigation does not give rise to a 'status' within the meaning of art 14. The appellants, and other individuals in their position, are as fully entitled to the presumption of innocence as the general body of citizens.

[52] I would accept the analysis of counsel that the difference in treatment of the appellants and those who have not been investigated and provided fingerprints is not a proscribed ground under art 14.

Question 4: analogous situation?

[53] For reasons already given there is a material distinction between individuals who have had their fingerprints and samples lawfully taken in consequence of being charged with a recordable offence and those who have not. It cannot be said that the circumstances are so similar as to call for a positive justification of the difference in treatment. I have taken into account the analogy of indirect discrimination advanced by Sedley LJ (at [89]–[92]). In my view we are dealing with an allegation of direct discrimination apparent on the face of the legislation. The analogy is not apposite. Within the *Michalak* framework the pool of comparators has been wrongfully identified by the appellants. It follows that I would answer the question by concluding that the appellants and the suggested comparators are not in an analogous situation.

Question 5: objective justification

[54] If, contrary to my view, it is necessary to consider the justification for the difference in treatment, I would conclude without hesitation that objective justification is established. First, the element of legitimate aim is plainly present inasmuch as the increase in the database of fingerprints and samples promotes the public interest by the detection and prosecution of serious crime and by exculpating the innocent. This conclusion is powerfully reinforced by the recent statistics which I have cited in [8], above.

[55] Secondly, in my view, the requirement of proportionality is satisfied. Section 64(1A) of PACE objectively represents a measured and proportionate response to the legislative aim of dealing with serious crime. Moreover, this conclusion is supported by the need, in the circumstances, to approach with due deference the policy decision made by Parliament in enacting s 64(1A) in the fight against serious crime. And the results of the new scheme provide cogent vindication of the decision of Parliament.

Conclusion on art 14

[56] I would hold that there is no breach of art 14.

XIII ISSUES (4) AND (5)

[57] Given these conclusions, issue 4 (interpretation under s 3 of the 1998 Act) and issue 5 (incompatibility under s 4 of the 1998 Act) fall away.

XIV ISSUE (6): DISCRETION

[58] The nature of the policy adopted by the chief constable and other chief constables is plain. It is to retain, save in exceptional cases, all fingerprints and samples taken from those who have been acquitted of criminal offences or against whom proceedings have not been pursued. The aim of the policy is directed to the prevention or detection of crime, the investigation of offences, the

facilitation of prosecutions, and the speedy exculpation of the innocent as well as the correction of miscarriages of justice. a

[59] Counsel for the appellants argued that this 'blanket policy' is unlawful. He submitted that the policy is a fetter on the discretion of the chief constable. He said that retaining fingerprints in the case of persons untainted by suspicion is disproportionate. Counsel argued that the only fair solution is a case-by-case examination of the circumstances of each case. That, of course, would mean an b examination of the circumstances which led to the fingerprints and samples being taken in respect of the alleged offence of which the individual was subsequently cleared. He accepted that this would involve the examination of many thousands of cases and involve large numbers of decision-makers.

[60] As I pointed out in [39], above such a system would probably not confer c the benefits of a greatly extended database and would involve the police in interminable and invidious disputes (with individual decisions subject to judicial review) about the circumstances of offences of which individuals had been cleared. Moreover, in such a decision-making process individuals who are not eliminated as being without a taint of suspicion could truly complain that they have been deprived of the benefit of the presumption of innocence. This d suggested alternative is unrealistic and impractical.

[61] I would, therefore, reject the challenge to the policy. It is lawful.

XV DISPOSAL

[62] I would dismiss the appeals. e

LORD RODGER OF EARLSFERRY.

[63] My Lords, I have had the advantage of reading the speech of my noble and learned friend, Lord Steyn, in draft. I agree with it and, for the reasons he gives, I too would dismiss the appeals. f

[64] In particular, it respectfully appears to me that the Court of Appeal ([2002] EWCA Civ 1275, [2003] 1 All ER 148, [2002] 1 WLR 3223) attached too much weight to what they saw as a greater cultural resistance in Britain than in other European countries to the collection and retention of data about individuals. For one thing, I am doubtful whether the reaction of the educated public at the time to novels published many years ago can be taken as an accurate reflection of g British public opinion in the very different conditions of today. Recent press reaction to the failure of police and other bodies to store information about those suspected of sexual offences might well point to a rather different attitude. And it may well be that, with their bitter experience of life under totalitarian regimes, people in some other European countries would nowadays be more concerned h than people here about official files on individuals.

[65] In any event the attitude in Britain alone cannot be decisive. At most, it would be a basis on which Parliament might have chosen to enact legislation to prevent the storing of information about suspects or on which the courts might have developed the common law so as to provide such protection. But, in fact, j by enacting s 82 of the Criminal Justice and Police Act 2001, Parliament has removed the provision which previously made it unlawful to retain the fingerprints and samples of those who were subsequently not charged or who were acquitted. And that must be regarded as the most recent expression of public policy on this topic in England and Wales. (In Scotland no such change has been made so far.)

[66] In these circumstances the appellants seek to rely on the art 8(1) convention right which they enjoy under the Human Rights Act 1998 (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act). That is a right under domestic law, but a right of a special kind which was, in the words of Lord Nicholls of Birkenhead in *Re McKerr* [2004] UKHL 12 at [25], [2004] 2 All ER 409 at [25], [2004] 1 WLR 807, 'created by the 1998 Act by reference to the convention'. So, in order to interpret art 8 and the other convention rights in Sch 1 to the 1998 Act, courts must have regard to the scope of the equivalent rights in the convention. For that reason, while the decisions of the European Court of Human Rights on the interpretation of the convention are not binding, they provide authoritative guidance which courts have to take into account when interpreting the rights in domestic law. In formulating its decisions the court considers the spectrum of attitudes across the contracting states in order to determine the contemporary content of rights under the convention. It is the decisions reached in this way that help to shape the content of the convention rights in our domestic law. I refer to the observations of Lord Bingham of Cornhill in *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26 at [20], [2004] 3 All ER 785 at [20], [2004] 3 WLR 23. So far at least, as Lord Steyn has shown, the Strasbourg case law does not support the appellants' argument that there has been a violation of art 8 in the circumstances of these cases.

BARONESS HALE OF RICHMOND.

[67] My Lords, sadly, while I agree with everything else in the opinion of my noble and learned friend, Lord Steyn, I cannot agree with the view, to which he is inclined, that the retention and storage of fingerprints, DNA profiles and samples is not an interference with the appellants' rights under art 8(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[68] I agree that it is necessary to distinguish between the taking of fingerprints and samples, the deriving of information from those samples, the storage of samples and information, and the use of either samples or information for some particular purpose. The justifications for each of these may be very different. But all of them, in my view, constitute an interference by the state in a person's right to respect for his private life. This is an aspect of what has been called informational privacy.

> 'This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit.' (See *R v Dyment* (1988) 45 CCC (3d) 244 at 255–256 per La Forest J.)

[69] In the powerful words of the Canadian Privacy Commissioner in his report on *Genetic Testing and Privacy* (1995) p 2:

> 'The measure of our privacy is the degree of control we exercise over what others know about us. No one, of course, has absolute control. As social animals, few would want total privacy. However, we are all entitled to expect enough control over what is known about us to live with dignity and to be free to experience our individuality. Our fundamental rights and freedoms—of thought, belief, expression and association—depend in part upon a meaningful measure of individual privacy. Unless we each retain the

power to decide who should know our political allegiances, our sexual preferences, our confidences, our fears and aspirations, then the very basis of a civilised, free and democratic society could be undermined.'

[70] It could be said that the samples are not 'information' (see, for example, the doubts expressed about this by the Australian Law Reform Commission in *Essentially Yours: The Protection of Human Genetic Information* (Report 96) para 8.8). But the only reason that they are taken or kept is for the information which they contain. They are not kept for their intrinsic value as mouth swabs, hairs or whatever. They are kept because they contain the individual's unique genetic code within them. They are kept as information about that person and nothing else. Fingerprints and profiles are undoubtedly information. The same privacy principles should apply to all three.

[71] It can also be said that not all information about a person is so private that it enjoys the protection of art 8. This is so. There must be a reasonable expectation of privacy before it is protected (see *Campbell v MGN Ltd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 WLR 1232). But there can be little, if anything, more private to the individual than the knowledge of his genetic make-up. Again in the words of the Canadian Privacy Commissioner: 'No surveillance technology is more threatening to privacy than that designed to unlock the information contained in human genes.'

[72] Hence it is common ground that the *taking* of fingerprints and DNA samples is an interference with the art 8(1) right, even though the invasion of bodily integrity involved is minimal. It is also common ground that the *use* of the information derived from them is such an interference. This must be because the information is regarded as intrinsically private.

[73] If the taking and use of the information is an interference, it is difficult to see why the retention, storage or keeping of that information is not also an interference. Storing information almost inevitably involves someone else knowing it. It is an interference with privacy for someone to know or have access to private information even if they make no other use of it. The mere fact that someone has read my private correspondence or seen my bank accounts is an interference with my privacy even if that person tells no one else what he has seen. That is why access to private information such as that contained in medical records has to be carefully controlled. The fact that only a few people can understand the information does not affect the principle, although it may affect the justification.

[74] Nor can it be irrelevant that storing this information is a necessary prelude to using it. Some uses, in particular those for which the information in this case is permitted to be used, are entirely justifiable and beneficial. But others may not be. To return to the Canadian Privacy Commissioner:

'Modern explorers have set sail on voyages into the genetic microcosm, seeking a medically powerful but potentially dangerous treasure: information about how our genes make us tick. Today, we can ask who among us is likely to have healthy babies or fall ill with a genetic disease. In the future, we may be able to use genetic testing to tell us who will be smart, be anti-social, work hard, be athletic or conform to prevailing standards of beauty.'

[75] No one is thinking of using the samples collected here for such purposes. But the fact that they could be so used, perhaps many years in the future, means

that the appellants have a very real interest in how they are stored and who has access to them while they are stored. I do not believe that this interest is peculiar to the cultural traditions of this country. There is ample evidence of concern about them elsewhere in the world. Our data protection laws were originally the product of a Council of Europe convention in 1981 (Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data).

[76] The general tenor of the jurisprudence of the European Court of Human Rights (the Court of Human Rights) and European Commission of Human Rights (the Commission) is that the retention, keeping or storage of private information by state institutions is an interference with art 8(1) rights. In *Leander v Sweden* (1987) 9 EHRR 433 at 450 (para 48), the Court of Human Rights held that both the storage of private information in a secret police register and its release, coupled with a refusal to allow an opportunity to refute it, were an interference with the right to respect for private life. In *Friedl v Austria* (1996) 21 EHRR 83 at 88–89 (paras 48–53), the Commission distinguished between the taking and keeping of photographs without identifying the subjects, and police questioning in order to establish identity and the recording of these personal data; the former was not an interference with art 8(1) but the latter was, although it was 'relatively slight' (see (1996) 21 EHRR 83 at 90–91 (para 66)). The Commission reached a different conclusion about photographs and fingerprints kept after the applicant's acquittal in *Kinnunen v Finland* App No 24950/94 (15 May 1996, unreported); but they noted that the information had been properly taken on his arrest, did not contain any surveillance or similar information or opinions which he might wish to refute, and therefore—

> 'was not of such a character that it could have adversely affected the applicant any more significantly than the publicly known fact that he had been charged with, but acquitted of, certain charges.'

The Commission was therefore concentrating on the nature of the information and the ways in which it could adversely affect the applicant. Even then it may have been somewhat optimistic. But this case is not limited to fingerprints. For the reasons given earlier, the DNA information in this case is of a very different 'character' even if the present uses to which it can lawfully be put are the same.

[77] If keeping and storing this information by the state were not an interference with the right guaranteed by art 8(1), the consequences would be surprising. First, it would not be necessary to find any justification for it under art 8(2). Of course, mere keeping of the information is a lesser interference than using it, and may be easier to justify. But it would be surprising if the state were free to do this without demonstrating a legitimate aim and that it was necessary to keep the information in this way in pursuit of that aim. Secondly, if art 8(1) is not engaged by the mere keeping of private information, then the state might be free to be thoroughly discriminatory in choosing which information to keep, without contravening art 14. It would be surprising if a decision to keep all the information obtained from, say, black suspects but not from whites did not contravene art 14. But unless the keeping falls within the ambit of art 8 it would not do so.

[78] I accept that we must interpret the convention rights in a way which keeps pace with, rather than leaps ahead of, the Strasbourg jurisprudence as it evolves over time. But it would be surprising if Strasbourg were not to consider it incumbent upon the state to justify its retention and storage of all this

information but particularly the DNA samples and profiles. For the reasons given by my noble and learned friends, Lord Steyn and Lord Brown of Eaton-under-Heywood, I agree that this is readily done. The whole community, as well as the individuals whose samples are collected, benefits from there being as large a database as it is possible to have. The present system is designed to allow the collection of as many samples as possible and to retain as much as possible of what it has. The benefit to the aims of accurate and efficient law enforcement is thereby enhanced.

[79] I therefore agree that these appeals should be dismissed.

LORD CARSWELL.

[80] My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Steyn, and I fully agree with his reasons and his conclusions. I only wish to add a short comment about one aspect of the judgments in the Court of Appeal ([2002] EWCA Civ 1275, [2003] 1 All ER 148, [2002] 1 WLR 3223) which requires mention, since I feel that it might be misunderstood and applied incorrectly in future cases.

[81] Sedley LJ (at [88], [89]) addressed the issue of selecting the pool of comparators in determining whether there had been discrimination. He expressed the view that the approach of the other members of the Court of Appeal to identifying the pool overlooked the importance of the principles to be applied in deciding if there had been indirect discrimination. He went on:

> '[90] Central to indirect discrimination is the ostensibly neutral factor which on analysis significantly and unjustifiably disadvantages a protected group. (*Griggs v Duke Power Co* (1971) 401 US 424) provides a well-known example: because of educational disadvantage, black workers did significantly worse than white workers in literacy tests which were applied to all employees but were objectively unnecessary. The discriminating factor was not facing the literacy test but failing it. But its differential impact could only be measured in a pool consisting of both white and black workers—that is, both those disadvantaged and those not disadvantaged by it. In the present appeals the discriminating factor is not the fact of having had samples lawfully taken; it is being a person who has had them taken but has not then been convicted. To confine the pool for testing its effect to other people in the identical position, as Waller LJ would do, and to conclude—inexorably—that they are all being treated alike, is the equivalent of confining the pool in *Griggs*'s case to black workers. The correct pool in such a case (that is, the pool which will test the particular complaint) is everybody in the same relevant situation: in *Griggs*'s case, all the company's workers to whom the test was given; in the present appeals, all citizens who have not been convicted of an offence.
>
> [91] To take as your pool simply the group which asserts that it is being discriminated against and to find—as you practically always will—that they are all being treated the same is to defeat the rationale of indirect discrimination. To take as your pool a larger group which does not share the *relevant* characteristic—here, for example, *everyone* who has had their fingerprints and bodily samples lawfully taken—will be to sidestep the legal issue. The legal issue is not (as in another system it might have been) the absence of discrimination between convicted and acquitted suspects: it is the

presence of discrimination between legally innocent people who respectively have and have not been investigated.'

[82] The logic of the reasoning adopted by Sedley LJ is valid in cases of indirect discrimination. In such cases, as he points out, it is necessary to include in the pool both those disadvantaged by the ostensibly neutral factor and those not so disadvantaged. If both classes are not included, then the ostensibly neutral factor which operates differently in respect of each group cannot operate to demonstrate the existence of a difference in result which amounts to discrimination. As Sedley LJ said, to do so defeats the rationale of indirect discrimination.

[83] The reasoning must, however, be confined to cases of indirect discrimination. In those of direct discrimination the comparison is simply one of comparing the situation of the complainant, and possibly others in like case, with other people in a comparable situation. The imperative created by the need to consider the ostensibly neutral factor does not apply in such a case. The present cases should in my opinion be classed as claims in respect of direct discrimination, for there is no ostensibly neutral factor which turns an apparent equality of treatment into an inequality. The identification of the group making up the pool and the comparison of the situation of each appellant and other persons in like case with that of the other members of the pool is more straightforward. I do not agree that the comparison should be between legally innocent people who respectively have and have not been investigated, as Sedley LJ suggests. Rather I consider, in agreement with Waller LJ, that the relevant pool consists of those persons from whom samples have been lawfully taken. Neither of the appellants was treated any differently from the other persons in that pool and accordingly there is no breach of art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[84] I agree that the appeals should be dismissed.

LORD BROWN OF EATON-UNDER-HEYWOOD.

[85] I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. I agree with all that he says on each of the issues raised and I wish to add only a few short paragraphs of my own. My concern is simply to indicate how very clear a case this seems to me to be. Indeed my only real problem now, following full investigation of the case with the assistance not only of the parties but from Liberty too, is in discerning any coherent basis on which the challenge can still be sustained.

[86] Given the carefully defined and limited use to which the DNA database is permitted to be put—essentially the detection and prosecution of crime—I find it difficult to understand why anyone should object to the retention of their profile (and sample) on the database once it has lawfully been placed there. The only logical basis I can think of for such an objection is that it will serve to increase the risk of the person's detection in the event of his offending in future. But that could hardly be a legitimate objection, nor, indeed, is it advanced as such. Such objections as *were* suggested, however, seem to be entirely chimerical. First, the fear of an Orwellian future in which retained samples will be reanalysed by a mischievous state in the light of scientific advances and the results improperly used against the person's interest. If, of course, this were a valid objection it would apply no less to samples taken from the convicted as from the unconvicted

and logically, therefore, it would involve the destruction of everyone's samples. But no such abuse is presently threatened and if and when it comes to be then will be the time to address it. Sufficient unto the day is the evil thereof. *a*

[87] The second suggested objection is to the retention of profiles obtained from those at one time reasonably suspected of crime but subsequently acquitted or not proceeded against, the objection being that they are thereby stigmatised as properly belonging to the same group as the convicted. This to my mind is an equally unrealistic objection. Mr Gordon QC (for the appellants) was quite unable to suggest in whose eyes they would be stigmatised. It should not be forgotten that the profiles of pure volunteers (those falling within s 64(3AC) of the Police and Criminal Evidence Act 1984 (PACE)) are also retained on the database. *b*

[88] In short, it seems to me that the benefits of the larger database brought about by the now impugned amendment to PACE (as described in Lord Steyn's judgment) are so manifest and the objections to it so threadbare that the cause of human rights generally (including the better protection of society against the scourge of crime which dreadfully afflicts the lives of so many of its victims) would inevitably be better served by the database's expansion than by its proposed contraction. The more complete the database, the better the chance of detecting criminals, both those guilty of crimes past and those whose crimes are yet to be committed. The better chance too of deterring from future crime those whose profiles are already on the database. And these, of course, are not the only benefits. The larger the database, the less call there will be to round up the usual suspects. Instead, those amongst the usual suspects who are innocent will at once be exonerated. Were these appellants to succeed in their challenge, the cause of justice would be seriously impeded. *c* *d* *e*

[89] I too would dismiss these appeals.

Appeals dismissed.

Kate O'Hanlon Barrister.

Fytche v Wincanton Logistics plc

[2004] UKHL 31

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD, LORD WALKER OF GESTINGTHORPE, BARONESS HALE OF RICHMOND

10 JUNE, 1 JULY 2004

Health and safety at work – Employer's duties – Duty to employees – Employer's duty to supply suitable personal protective equipment and maintain it in an efficient state, in efficient working order and in good repair – Nature of employer's duty to maintain and repair – Personal Protective Equipment at Work Regulations 1992, SI 1992/2966, regs 4, 7.

The claimant was employed by the defendant company to drive a milk tanker. In compliance with reg 4[a] of the Personal Protective Equipment at Work Regulations 1992 which imposed an obligation on employers to supply employees, who might be exposed to a risk to their health or safety while at work, with suitable 'personal protective equipment', the claimant was supplied by the company with boots which had steel toe caps in order to protect his toes from impact injuries from, for instance, falling milk churns. In exceptionally wintry weather the claimant's tanker became stuck on an icy country road. The company's standard instructions in such a case were for the driver to use the telephone in the cab to call for help and then wait to be rescued. The claimant, however, decided to dig himself out. One of his boots had tiny hole and the effect of the penetration of water in freezing conditions was a mild frostbite in the claimant's little toe which kept him away from work for some months and left him with a permanent sensitivity to cold in that toe. He commenced proceedings against the company. He argued: (i) that as the boots were personal protective equipment his employer had been under a duty under reg 7(1)[b] of the 1992 regulations to maintain them in an efficient state, in efficient working order and in good repair; and (ii) that the existence of the hole meant that the boots were not in good repair and that as liability under the 1992 regulations was strict, the company was liable for the damage caused. The recorder found that the boots were adequate for the claimant's ordinary conditions of work, and dismissed the claim. The High Court and the Court of Appeal dismissed the claimant's appeal and he appealed to the House of Lords.

Held – (Lord Hope of Craighead of Richmond and Baroness Hale dissenting) The concept of personal protective equipment being in an 'efficient state, in efficient working order and in good repair' in reg 7 of the 1992 regulations was not an absolute one but had to be construed in relation to what made equipment 'personal protective equipment'. It had to be efficient for the purpose of protecting against the relevant risk. Regulation 7 extended in time the duty to provide suitable personal protective equipment under reg 4; the employer had a duty to maintain personal protective equipment so that it continued to be suitable personal protective equipment, but he did not have a duty to do repairs

a Regulation 4, so far as material, is set out at [12], below
b Regulation 7, so far as material, is set out at [16], below

and maintenance which had nothing to do with its function as personal protective equipment, and reg 7 could not, by means of the repairing obligation, require the employer to provide equipment which he did not need to provide in the first place. In the instant case, the boots had been adequate for the claimant's ordinary conditions of work, and the continuing existence of the tiny hole had not, therefore, been a breach of the employer's reg 7 obligation. The appeal would therefore be dismissed (see [1], [18]–[20], [46], [56], below).

Notes

For the provision of personal protective equipment an for maintenance and replacement, see 20(1) *Halsbury's Laws* (4th edn reissue) paras 729, 732.

For the Personal Protective Equipment at Work Regulations 1992, SI 1992/2966, regs 4, 7, see 9 *Halsbury's Statutory Instruments* (2004 issue) 214, 216.

Cases referred to in opinions

Galashiels Gas Co Ltd v O'Donnell (or Millar) [1949] 1 All ER 319, [1949] AC 275, HL.

Groves v Lord Wimborne [1898] 2 QB 402, [1895–9] All ER Rep 147, CA.

Summers (John) & Sons Ltd v Frost [1955] 1 All ER 870, [1955] AC 740, [1955] 2 WLR 825, HL.

Wilsons and Clyde Coal Co Ltd v English [1937] 3 All ER 628, [1938] AC 57, HL.

Cases referred to in list of authorities

Smith v Cammell Laird & Co Ltd [1939] 4 All ER 381, [1940] AC 242, HL.

Cole v Blackstone & Co Ltd [1943] KB 615.

Stark v Post Office [2000] ICR 1013.

Gorris v Scott (1874) LR 9 Exch 125.

Close v Steel Company of Wales Ltd [1961] 2 All ER 953, [1962] AC 367, HL.

Eaves v Morris Motors Ltd [1961] 3 All ER 233, [1961] 2 QB 385, [1961] 3 WLR 657, CA.

Koonjul v Thameslink Healthcare Services [2000] PIQR P123, CA.

O'Neill v DSG Retail Ltd [2002] EWCA Civ 1139, [2003] ICR 222.

Horton v Taplin Contracts Ltd [2002] EWCA Civ 1604, [2003] ICR 179.

Cullen v North Lanarkshire Council 1998 SC 451, Ct of Sess.

Appeal

Bryan Evans Fytche appealed with permission of the Appeal Committee of the House of Lords given on 3 November 2003 from the decision of the Court of Appeal (Waller and Kay LJJ and Lindsay J) ([2003] EWCA Civ 874, [2003] ICR 1582) on 25 June 2003 dismissing his appeal from the decision of Astill J on 30 October 2002 dismissing his appeal from the decision of Mr Recorder Wilson-Smith QC on 6 June 2002 in the Portsmouth County Court refusing his claim against his employer, Wincanton Logistics plc, for damages for personal injury caused by breach of the Personal Protective Equipment at Work Regulations 1992. The facts are set out in the opinion of Lord Hoffmann.

Peter Birts QC and *Geoffrey Kelly* (instructed by *Warner Goodman & Streat*, Portsmouth) for Mr Fytche.

James Dingemans QC and *Richard Nussey* (instructed by *Plexus Law*) for the company.

Their Lordships took time for consideration.

1 July 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friends Lord Hoffmann and Lord Walker of Gestingthorpe. I agree with them. I add a brief word of my own solely because your Lordships are divided on this point of statutory interpretation. To my mind the crucial point in this case is that the existence of a very small and inconspicuous hole in one of Mr Fytche's steel-capped boots did not constitute a breach of his employer's reg 4 obligation to ensure he was provided with suitable personal protective equipment (see reg 4 of the Personal Protective Equipment at Work Regulations 1992, SI 1992/2966). The judge found that the boots were ordinarily satisfactory for Mr Fytche's work. In other words, the boots were adequate for Mr Fytche's ordinary conditions of work, tiny hole notwithstanding. That being so, the continuing existence of this hole was not a breach of the employer's reg 7 obligation to maintain the boot in good repair. Regulation 7 of the 1992 regulations should not be read as imposing, in this respect, a wider obligation than reg 4. I would dismiss this appeal.

LORD HOFFMANN.

[2] My Lords, on 19 December 1999 the weather in the south of England was exceptionally wintry. Heavy snow fell on the South Downs. A 32-ton milk tanker belonging to Wincanton Logistics plc ('the company') got stuck on an icy country road. The company's standard instructions for such a case were for the driver to use the telephone in the cab to call for help and then wait to be rescued. But the driver Mr Fytche was an experienced and self-reliant man who decided to dig himself out. He enlisted the help of a cowman from the dairy farm where he had come to collect the milk. They shovelled snow, spread grit and pulled with the farm tractor. After about three hours of spade work in sub-zero ice and snow, the tanker was freed and Mr Fytche drove off.

[3] Unfortunately one of Mr Fytche's boots leaked. Some water got in through a tiny hole next to the little toe. The boots were supplied by the company. They were made of leather and had steel toecaps to protect the toes in case something heavy like a milk churn should fall on them. But they were not meant to be waterproof or to be used outside in extreme weather conditions. Mr Fytche, an ex-Army man, described himself as fanatical about the upkeep of his boots but had not noticed the hole. He had never had wet feet before.

[4] The effect of the penetration of water in freezing conditions was that Mr Fytche suffered mild frostbite in his small toe. It kept him away from work for some months and his toe has a permanent sensitivity to cold.

[5] Mr Fytche commenced proceedings against the company. He alleged that they had been negligent in failing to supply him with boots which were adequate to protect his feet in freezing conditions. The company said that Mr Fytche's duties did not require him to walk about for long periods in snow and ice. The boots were adequate for his ordinary conditions of work. Mr Fytche had no answer to this defence and at the trial the allegation of negligence was abandoned.

[6] Instead, Mr Fytche advanced an alternative argument which was based upon the fact that the boots provided by the company had steel toecaps. That fact

had absolutely nothing to do with the existence of the hole which let the water in. The caps were to protect his toes from impact injuries. But Mr Fytche says that the toecaps made the boots 'personal protective equipment' (PPE) for the purposes of the Personal Protective Equipment at Work Regulations 1992, SI 1992/2966. By reg 7(1), an employer is under a duty to ensure that any PPE provided to his employees is 'maintained ... in an efficient state, in efficient working order and in good repair.' Mr Fytche says that the existence of the hole meant that the boots were out of repair. Liability under the regulations is strict and the company is therefore liable for damage caused by the want of repair.

[7] Before even looking at the regulations, I am bound to say that this would be a very strange and arbitrary result. Mr Fytche claims that because his boots were designed to protect him against a risk of his employment, his employers are liable in damages because they were inadequate to protect him against an injury which was not a risk of his employment. If there had been no risks from heavy objects and he had been issued with ordinary leather boots without steel toecaps, the boots would not have been PPE and the existence of the hole would not have given rise to any liability. I suppose that legislation can sometimes have these ricochet consequences but one usually expects a more rational scheme.

[8] The regulations were made to comply with Council Directive (EEC) 89/656 (on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace) (OJ 1989 L393 p 18) of 30 November 1989. It recited that compliance with 'minimum requirements designed to guarantee greater health and safety for the user of personal protective equipment' was essential to ensure the safety and health of workers and that the intention was 'the employer shall be required to provide safety equipment and take safety measures'. The general rule, as stated in art 3, was that—

> 'Personal protective equipment shall be used when the risks cannot be avoided or sufficiently limited by technical means of collective protection or by measures, methods or procedures of work organization.'

[9] The purpose of PPE is therefore, as a last resort after collective protection or methods of work organisation, to avoid or limit risks. What risks? Those which are perceived as existing at work. Article 5 requires employers to make an 'analyis and assessment' of risks which cannot be avoided by other means and then to define the characteristics which the PPE must have in order to be effective against those risks. Article 4 spells this out a bit further: PPE must be 'appropriate for the risks involved', not create its own risks, 'correspond to existing conditions at the workplace', fit the wearer and so on. Article 6 says that member states shall establish general rules for the use of PPE, indicating in particular 'the circumstances or the risk situation in which ... the use of personal protective equipment is necessary.' Article 7 requires that workers be informed about these matters. So the whole scheme of the directive is to require PPE to be used to guard against specific risks which have been perceived to exist at the workplace and which cannot be prevented or sufficiently reduced in other ways.

[10] One next looks at the regulations to see how these principles have been given effect in English law. The regulations follow the general scheme of the directive and often repeat its language. There is the same requirement for an assessment of workplace risks and the choice of appropriate equipment. But there are differences in the drafting. For example, the definition of 'personal protective equipment' is not quite the same as that used in the directive. Regulation 2(1) of the 1992 regulations defines PPE as—

a

> 'all equipment (including clothing affording protection against the weather) which is intended to be worn or held by a person at work *and which protects him against one or more risks to his health or safety* ...' (My emphasis.)

b

[11] I have put the last 14 words into italics to emphasise that there are two limbs to the definition: first, what is intended to be done with the equipment and secondly, what it actually does. The second limb is a *functional* definition. PPE does not come with a certificate or label saying 'This is PPE' It is PPE if it protects the wearer or holder against risk. If does not protect, it is not PPE. Thus the idea of a risk against which one is protected is built into the concept of PPE under the United Kingdom regulations.

c

[12] There are, however, a variety of forms of equipment which may protect one against a given risk and not all of them are sensible ways of dealing with the matter. Regulation 4(1) therefore imposes an obligation to supply employees who 'may be exposed to a risk to their health or safety while at work' not merely with PPE satisfying the basic definition but with 'suitable' PPE. And para (3) gives some guidance on what counts as suitable equipment, or at any rate, what would not be suitable equipment. It says that without prejudice to the general notion of suitability, PPE shall *not* be suitable unless:

d

e

> '(a) it is appropriate for the risk or risks involved and the conditions at the place where exposure to the risk may occur; (b) it takes account of ergonomic requirements and the state of health of the person or persons who may wear it; (c) it is capable of fitting the wearer correctly, if necessary, after adjustments within the range for which it is designed; (d) so far as is practicable, it is effective to prevent or adequately control the risk or risks involved without increasing overall risk.'

f

g

[13] This list, with some rearrangement, reflects the independent requirements of art 4(1) of the directive, which the United Kingdom regulations bring under the heading of suitability. In some cases, the items serve to spell out what would in any event have been signified by the word 'suitable', such as being appropriate for the risk and the conditions at the workplace. Some items are directed to ensuring that PPE does not have characteristics which make employees less likely to wear it: it must not be the wrong size or fail to take account of ergonomic requirements and the state of health of the wearer. And there is also concern that the equipment shall not itself create risks which did not exist before. Here some compromise may be needed between total security against the primary risk and avoiding the creation of secondary risks. And of course there is some overlap in these objectives: failing to consider ergonomic requirements may both discourage use and create secondary risks.

h

[14] All these tests of suitability are related to the basic function of PPE, which is protection against risk. An employer may be in breach of his obligation to provide suitable PPE either because it does not in fact protect against the risk and therefore is not suitable, or because, for one or other of the reasons set out in reg 4(3) or by virtue of the general concept of suitability, it is not suitable for the purpose of protecting against that risk.

j

[15] Mr Fytche was provided with steel toecaps on his boots because his employers considered that there was a sufficient risk of heavy things falling on his feet. The boots were therefore PPE and there is nothing to suggest that they failed any of the tests of suitability. They fitted, were appropriate for conditions in milk parlours and so on. Nor did the hole in one of the boots create a

secondary risk or increase overall risk. The secondary risk or overall risk must be a risk in the course of employment. As Mr Fytche was not expected to do anything which required him to have waterproof boots, the hole created no such risk. If, as my noble and learned friend Baroness Hale of Richmond suggests, there had been a weather risk against which the boots should have protected Mr Fytche, then of course he would have been able to recover. PPE includes 'clothing affording protection against the weather'. But Mr Fytche does not suggest that he should have been given PPE to protect him against the weather. He was not expected to expose himself to severe weather conditions and for ordinary purposes the boots were adequate. His case depends entirely on the irrelevant fact that he needed boots with steel toecaps.

[16] Assuming, therefore, that the hole was present when Mr Fytche was issued with his boots, there was in my opinion no breach of reg 4. And Mr Birts QC, who appeared for Mr Fytche, did not argue that there was. He took his stand on reg 7 of the 1992 regulations:

> '(1) Every employer shall ensure that any personal protective equipment provided to his employees is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair.'

[17] Mr Birts says that even though the boots complied with reg 4 and indeed because they complied with reg 4, they were PPE. Therefore the employees were under a duty to maintain them in good repair and a boot which has developed a hole, however small, is not in good repair.

[18] In my opinion, however, 'efficient state, in efficient working order and in good repair' is not an absolute concept but must be construed in relation to what makes the equipment PPE. What counts as being in an efficient state? Efficient for what purpose? In my opinion, for the purpose of protecting against the relevant risk. Regulation 7 extends in time the duty to provide suitable PPE under reg 4. By virtue of reg 7, it is not enough just to provide it and then leave the employee to his own devices. The employer has a duty to maintain it so that it continues to be suitable PPE. But he does not have a duty to do repairs and maintenance which have nothing to do with its function as PPE.

[19] Assume, for example, a noisy workshop. The risk of injury to the hearing of employees can be suitably reduced by earmuffs which leave them in comparative silence. But the employer provides muffs with radio equipment so that employees who so wish can also listen to music. The radio receivers are delicate and several break down, so that after a while the employer stops repairing them and leaves the employees in silence. Does he commit an offence under the regulations because he has failed to keep PPE in good repair? In my opinion this would be absurd. Regulation 7 cannot, by means of the repairing obligation, require the employer to provide equipment which he need not have provided in the first place. Of course if the equipment had actually created its own risk, as in the example of ear-splitting surges suggested by my noble and learned friend Baroness Hale of Richmond, that would be an entirely different matter.

[20] For these reasons, reg 7 of the 1992 regulations in my opinion takes the matter no further than reg 4. It was submitted that there ought to be a general duty to keep PPE in repair in every respect because the employee was obliged by law to wear it. He could not say that he would rather wear better quality boots of his own. But in my opinion this is equally true in many cases in which

employees are obliged under their contracts of employment to wear uniforms or equipment which is not PPE. It does not justify the imposition of a strict liability which exists for an altogether different purpose. As Waller LJ said in the Court of Appeal [2003] EWCA Civ 874 at [21], [2003] ICR 1582 at [21], the compulsory element is taken into account in the standard of care which the employer must observe to comply with his duty of care to the employees. But, even taking this into account, Mr Fytche recognised at the trial that he could not succeed in proving a breach of the duty of care. I would therefore dismiss the appeal.

LORD HOPE OF CRAIGHEAD.

[21] My Lords, Mr Fytche was employed by the respondents as a lorry driver. His job was to collect milk from farms and deliver it to the appropriate processing depot. His shift usually started at 3 pm, and he was required by the respondents to work all through the night and to drive to farms in all weather conditions: see the agreed statement of facts and issues. The incident which gave rise to his injury occurred at about 8.30 pm on 19 December 1999 when he was due to pick up milk from a farm at Slindon on the edge of the South Downs near Chichester. It had been snowing, and it was very cold. He approached the farm but found that the access to it was blocked. He decided to abandon the attempt, but his lorry became stuck. He had to spend about three hours walking on ice and snow before he secured its release. His right foot felt numb for a while when he resumed his journey. After a while it warmed up and he was not aware that anything was wrong. But some days later he began to have problems with his right little toe. It became infected, and he had to have it examined in hospital. It was found that the tissues of the toe had been damaged, and part of it had to be removed.

[22] The respondents provided Mr Fytche with a uniform which he was required to wear when he was at work. The uniform included a pair of steel-capped safety boots. These boots were 'personal protective equipment' within the meaning of reg 2(1) of the Personal Protective Equipment at Work Regulations 1992, SI 1992/2966. So Mr Fytche had no choice but to wear them when he was working. This is because reg 10(2) provides that every employee shall use any personal protective equipment provided to him by virtue of the regulations in accordance with any training in its use and the instructions respecting its use which have been given to him. Section 33(1)(c) of the Health and Safety at Work etc Act 1974 provides that it is an offence for any person to act in breach of regulations made, as these regulations were, under s 15 of that Act.

[23] The boots were designed to protect Mr Fytche's feet from the risk of crushing injuries to his feet and toes or contact with hard or sharp objects. But the injury to the Mr Fytche's right little toe was not due to any defect in the boot's steel toecap. It was the result of frostbite. This was due to the fact that there was a small hole in the boot at the point where the steel toecap met the sole of the boot. The hole was adjacent to Mr Fytche's right little toe. It was so small that Mr Fytche was not aware of it until after the incident. It could not reasonably have been discovered by the respondents. Nevertheless it was sufficiently large to allow water to enter the boot and, because of the conditions in which he was working that evening, to cause the toe to sustain frostbite.

THE ISSUE

[24] Regulation 7(1) of the 1992 regulations provides:

'Every employer shall ensure that any personal protective equipment provided to his employees is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair.'

The boot had a hole in it So the ordinary use of language tells us that it was not in good repair. It is accepted that the regulation creates an absolute and continuing obligation. But were the respondents in breach of it?

[25] The answer to this question depends on whether the defect in the boot was within the scope of the regulation. Mr Dingemans QC for the respondents submitted that it was not. He said that a safety boot is maintained in an efficient state, in efficient working order and in good repair if it has been maintained so that it still protects the employee against the risks in respect of which it is supplied. If it is, there is no breach of the regulation even if in some other respect it is not in good repair.

[26] There is nothing new in the idea that employers must provide personal protective equipment to employees who may be exposed to a risk to their health and safety. Many regulations of this kind were made under various provisions of the Mines and Quarries Act 1954 and the Factories Act 1961, for example, before the making of the directive (Council Directive (EEC) 89/656 (on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace) (OJ 1989 L393 p 18)). They covered a host of different situations, and they varied widely in their layout and their terminology. The 1992 regulations replaced this legislation with a new set of provisions which, subject to the exceptions listed in reg 3(3), were intended to be of general application. So this case is not just a case about a small hole in a safety boot. It raises an important question which is of general interest to all employers and employees in cases where personal protective equipment is provided.

THE CONTEXT

[27] Regulation 7(1) must, of course, be read in its context. So it is necessary to look at the provisions in the 1992 regulations which define the circumstances in which personal protective equipment must be provided and the steps which the employer must take before he provides the equipment to his employee. The 1992 regulations gave effect to Council Directive (EEC) 89/656 (on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace). Its guiding principle is the prevention of risks to health or safety in the workplace. Article 2 defines 'personal protective equipment' by reference to the hazards that are likely to endanger the employee's health and safety. Article 4 provides that personal protective equipment must be appropriate to the risks involved. The 1992 regulations give effect to these and all the other relevant parts of the directive. They meet its minimum requirements. How much further their requirements go must be determined by examining the terms of the 1992 regulations.

[28] The primary obligation which rests on the employer is set out in reg 4(1). It provides that every employer shall ensure that 'suitable' personal protective equipment is provided to his employees who may be exposed to a risk to their health or safety while at work except where and to the extent that such risk has been adequately controlled by other means which are equally or more effective. Regulation 4(2) imposes an equivalent general obligation on every self-employed

person. The meaning which is to be given to the word 'suitable' is explained in reg 4(3), which provides, inter alia:

> 'Without prejudice to the generality of paragraphs (1) and (2), personal protective equipment shall not be suitable unless—(a) it is appropriate for the risk or risks involved and the conditions at the place where exposure to the risk may occur.'

[29] The question whether the personal protective equipment is 'suitable' within the meaning of reg 4(3) is to be determined by reference to the risk or risks which have made it necessary for the equipment to be provided. But that is not the only criterion. The employer must also ensure that the equipment is appropriate for the conditions at the place where exposure to the risk may occur. If it is not the equipment will not be 'suitable' within the meaning of the 1992 regulations.

[30] The reference in reg 4(3)(a) to the conditions at the place where exposure to the risk may occur casts important light on the scope which is to be given to the maintenance obligation in reg 7(1). The personal protective equipment must be maintained in an efficient state, in efficient working order and in good repair. One test of whether it is being maintained in an 'efficient' state or working order and in 'good repair' is whether it is still capable of protecting the employee against exposure to the risk or risks involved—that is to say, the risk or risks which made it necessary for the equipment to be provided in the first place. It is obvious that it must satisfy this test if it is to continue to protect the employee against them.

[31] But that is not the only test which has to be satisfied if the equipment is to continue to be suitable. It has also to be maintained in a state which is appropriate for the conditions at the place where exposure to the risk may occur. Unless that requirement also is met the equipment will have ceased to satisfy one of the criteria that reg 4(3)(a) says must be used to determine its suitability. One would expect the maintenance obligation in reg 7(1) to extend to this requirement too, unless one is told otherwise.

[32] The primary obligation, as I have described it, in reg 4 is reinforced by a second obligation in reg 6. Regulation 6(1) requires the employer to make an assessment of the equipment in order to determine whether it is suitable. What this assessment involves is explained by reg 6(2), which provides:

> 'The assessment required by paragraph (1) shall include—(a) an assessment of any risk or risks to health or safety which have not been avoided by other means; (b) the definition of the characteristics which personal protective equipment must have in order to be effective against the risks referred to in sub-paragraph (a) of this paragraph, taking into account any risks which the equipment itself may create; (c) comparison of the characteristics of the personal protective equipment available with the characteristics referred to in sub-paragraph (b) of this paragraph.'

[33] The reference in reg 6(2)(b) to any risks which the equipment may itself create casts further light on the scope of the obligation in reg 7(1). Here too there is an indication that the obligation in reg 7(1) is not limited to maintaining the equipment in an efficient state or working order to protect the employee against the risk or risks involved—those that cannot be avoided by other means, as indicated in sub-para (2)(a). Account must also be taken in the initial selection of the equipment of any risks which the equipment may itself create. Here again

one would expect the maintenance obligation in reg 7(1) to extend to this requirement too, unless one is told otherwise. a

[34] The risks which the equipment may itself create may be inherent in its nature or characteristics, assuming that it is free from defects. But risks may also be created by defects in the equipment which is available. A loose strap on a piece of protective clothing, for example, may give rise to the risk of tripping. Scratches on goggles may impair the employee's ability to see where he is going. Leaks in b the equipment may allow dust or water to penetrate and become trapped between it and the employee's body and affect his skin. It is obvious that one of the characteristics that the equipment must have, if it is not itself to create risks, is that it is free from defects of that kind. The assessment which the employer must carry out under reg 6 before choosing any personal protective equipment in order to determine whether it is suitable must extend to ensuring that the c equipment which is provided by virtue of reg 4(1) is free from defects that may create risks.

[35] Regulation 7(1) states that the employer shall ensure that any personal protective equipment provided to his employees is maintained in good repair. The context indicates that this includes ensuring that it is kept free from defects d that may create risks to health or safety at the place where the exposure to the risks for the protection against which it was provided may occur, as well as those that may affect its ability to protect the employee from those risks.

[36] Regulation 11 provides that every employee who has been provided with personal protective equipment by virtue of reg 4(1) must report to the employer any obvious defect in that personal equipment. This obligation is expressed in e terms that are quite general. It is not limited to defects which may affect the ability of the equipment to protect the employee from the risks for the protection against which it was provided. It extends to any obvious defects. This regulation too casts light on the scope which is to be given to reg 7(1), which is the only regulation which tells the employer what he must do to maintain the equipment. f

[37] The obligation in reg 7(1) is to maintain the equipment in good repair. It is plain that it extends to making good defects that have been reported by the employee. But its terms too are general and unqualified. It is not limited to the making good of obvious defects. I would hold that it includes keeping the equipment free from defects which may create risks to health or safety, as well as those which may impair its ability to protect the employee against the risks for g the protection against which it was provided. The employer's obligation is an absolute and continuing obligation. It goes beyond a duty to take care to achieve this result. How the employer does what the regulation tells him to do is his concern, not that of the employee. It is not for the employee to say how the defect could have been prevented. h

FURTHER CONSIDERATIONS

[38] Different views have been expressed throughout this case about the meaning and effect of reg 7(1). The Court of Appeal [2003] EWCA Civ 874, [2003] ICR 1582 were not able to arrive at a unanimous view on this point, nor j has this been found to be possible by your Lordships. This indicates that it is not entirely free from ambiguity. It is proper then to ask what are the consequences of the two competing interpretations in order to decide which of them is preferable.

[39] If the respondents are right, there is an absolute obligation on the employer under reg 7(1) to keep the equipment free from defects that may impair

its efficiency as protection against the risks for the protection against which is was provided. But the obligation to keep the equipment free of other defects which may cause the employee to sustain injury at the place where he is exposed to those risks, such as the hole in the boot which caused Mr Fytche's injury, is left to the common law. It is not suggested, of course, that there is no obligation to deal with any defects which may occur in the equipment. But it is said that the absolute obligation does not extend to other defects which the employer did not know about and of whose existence he could not have known about if he was taking reasonable care. On this view, the risk of injury due to defects of that kind rests not with the employer but with the employee.

[40] I would have expected some words of limitation or qualification to have been written into reg 7(1) if the intention was that its scope should be limited in this awkward and rather untidy way. This would have been easy to do. All that was needed was the addition of a few words to make it clear that the obligation was to ensure that the personal protective equipment continues to be effective against the risk or risks referred to in para 6(2)(a). The absence of those words indicates that the regulation is subject to no such limitation. This is because, if the scope of the regulation is limited, the question whether or not the obligation applies will depend on the facts of each case. Some defects will be subject to the obligation to repair and some will not.

[41] This case, it may be said, is quite straightforward as the hole on the boot did not in any way impair the efficiency of the steel toecap. But other cases may not be so clear. A consequence of this lack of clarity is likely to be a lessening of the degree of protection which the regulations afford to the employee. The protection for the employee is lessened if the burden of proving that there was some particular step that the employer should have taken rests on him.

[42] But there is another consideration. The regulations leave all the choices about the provision of personal protective equipment, and how it is to be used and kept, to the employer. If he is provided with this equipment, the employee must wear or use that equipment according to the instructions which he is given. The regulations leave him no choice in the matter. He cannot substitute clothing or other equipment of his own choosing. The same result could, not doubt, have been achieved by contract. But the employee is not free to bargain with his employer about the terms on which he is to be required to wear or use personal protective equipment. The whole matter is predetermined for him by the regulations and by the choices which the employer has made under them.

[43] It does not seem unreasonable in these circumstances for the employer to be under an absolute obligation to maintain the personal protective equipment in a state of good repair so that it is appropriate to the conditions where the employee has to work and does not create any other risks to his health or safety.

CONCLUSION

[44] I consider that the respondents' absolute obligation to keep Mr Fytche's boot in good repair extended to keeping it free from defects which exposed him to risks at the places where he had to work, such as the hole which caused his injury, as well as defects which exposed him to the risk or risks against which the boot was designed to provide protection.

[45] For these reasons, and those in the speech of my noble and learned friend Baroness Hale of Richmond with which I am in full agreement, I would allow the appeal and give judgment in Mr Fytche's favour in the agreed sum of £12,000.

LORD WALKER OF GESTINGTHORPE.

[46] My Lords, the facts relevant to this appeal are set out in the speech of my noble and learned friend Lord Hoffmann, which I have had the advantage of reading in draft. I agree that this appeal should be dismissed for the reasons given by Lord Hoffmann. But since I have reached that conclusion with rather more hesitation, and in view of the division of opinion in the House, I will add some brief comments of my own.

[47] This appeal turns ultimately on the correct interpretation of reg 7 of the Personal Protective Equipment at Work Regulations 1992, SI 1992/2966. The 1992 regulations represent the transposition into domestic law of a small part of complex and far-reaching European legislation relating to health, safety and welfare at work. It is not necessary to describe the panoply of Council directives beyond noting that the identification and assessment of risk is one fundamental principle underlying the legislation. Another fundamental principle (reflected in the preamble to and in art 3 of Council Directive (EEC) 89/656 (on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace) (OJ 1989 L393 p 18) of 30 November 1989) is that where possible risk should be avoided (by organisational measures) rather than reduced (by protective measures), and that means of collective protection are to be preferred to means of individual protection (such as personal protective equipment).

[48] These principles have some bearing on the right approach to the interpretation of reg 7. They do serve as a reminder that the 1992 regulations are only a part, and a small part, of the larger legal picture and of the statutory and common law duties which the respondent employer owed to the appellant, Mr Fytche, as its employee. The general principles also add weight to the submission of Mr Dingemans QC for the respondent (concurred in by Mr Birts QC for Mr Fytche) that in understanding the general scheme of the 1992 regulations the best approach is not to read them straight through, from beginning to end. The important landmarks (or 'hoops' for the respondent, as Mr Dingemans put it) are, first, reg 6; second, regs 4 and 9; and third, reg 7.

[49] Regulation 6 is headed 'Assessment of personal protective equipment' and it requires an assessment of whether the personal protective equipment which an employer proposes to provide is 'suitable' The question whether the equipment is suitable is to be determined (in part) by the provisions of reg 4(3), which largely reproduces art 4(1) of the directive; this adds a minor detour to an orderly progress through the three hoops. But an important (and logically anterior) part of the assessment is 'an assessment of any risk or risks to health or safety which have not been avoided by other means' (reg 6(2)(a)).

[50] Regulations 4 and 9 are concerned with the actual provision of suitable personal protective equipment and the instruction of the employee in its purpose, practical use and maintenance. Both these regulations contain prominent references to the risks which the equipment is intended to protect against: see regs 4(3)(a) and 9(1)(a). The primary and evident purpose of the requirement that the equipment should be 'suitable' is that it should protect the employee who is wearing it (or using it) against the risk identified at the assessment stage.

[51] Then comes reg 7(1), which is in the following terms:

> 'Every employer shall ensure that any personal protective equipment provided to his employees is maintained (including replaced or cleaned as

appropriate) in an efficient state, in efficient working order and in good repair.'

This provision, supplemented by parts of regs 8, 10 and 11, gives effect to art 4(6) of the directive. It does so in language ('... is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair') which can be traced back at least as far as the Factories Act 1937, ss 22(1) and 152(1), considered by the House in *Galashiels Gas Co Ltd v O'Donnell (or Millar)* [1949] 1 All ER 319, [1949] AC 275. This language does not expressly refer to maintaining the equipment in such a way that it remains 'suitable' within the meaning of reg 4. Nor does it expressly restrict the maintenance obligation to ensuring that the equipment remains suitable in that sense (that is as a means of avoiding or reducing the identified risks, whether or not the equipment is in other respects wholly satisfactory). Mr Fytche does therefore derive some support from a literal interpretation of reg 7, since a pair of boots with a hole (however small and inconspicuous) which lets in water can hardly be described as being in good repair.

[52] In order to succeed the respondent must therefore establish a contextual restriction on the wide natural meaning of reg 7(1). It might be thought undesirable for the House to adopt a restrictive interpretation of a provision concerned with health and safety at work. But (as already noted) the 1992 regulations are only a small part of the complex of statutory provisions concerned with health and safety at work (and at trial Mr Fytche relied, unsuccessfully, on other statutory provisions and on alleged breaches of common law duties). Regulation 7(1) imposes an absolute duty (that is common ground) and its breach is attended by criminal sanctions. If the scheme and context of the 1992 regulations strongly suggests that a restricted meaning is appropriate, it should not be rejected merely because health and safety are in issue.

[53] In my opinion there are strong contextual arguments for a restricted reading. The clear underlying purpose of the 1992 regulations as a whole is to ensure the provision of personal protective equipment as a last line of protection against risks which are identified and assessed as not being avoidable (or controllable) by other means. Regulation 4(1) imposes an absolute duty to ensure the provision of 'suitable' equipment. Regulation 7(1) imposes an absolute duty to ensure the maintenance of that equipment. It would be an extraordinary result if the employer could discharge his duty under reg 4(1) by providing a pair of boots with proper steel toecaps, even though the boots were not completely watertight, but could not discharge his duty under reg 7(1) by maintaining the boots in exactly the same condition. That anomaly is particularly striking in this case since it was never established whether or not the tiny hole in the right boot was present when the boots were first provided to Mr Fytche. I would add that (in common, I think, with the whole House) I regard the personal protective equipment in question in this case as being a pair of boots with steel toecaps, and not just a pair of steel toecaps notionally filleted out of the boots.

[54] One argument against the conclusion reached by the Court of Appeal is that an employee is obliged to wear personal protective equipment supplied to him, and that it seems unfair if he is obliged by his employer to wear a pair of boots which are defective in that one boot is not watertight (although this fact was, for six months, unknown to either side). But in my view Waller LJ met this point when (after referring to the need to establish a breach of the common law duty of care) he observed ([2003] EWCA Civ 874 at [21], [2003] ICR 1582 at [21]):

'I stress the standard of care will be a high one. Where the employer is asking the employee to wear particular footwear or clothing in place of the employee's own, I would suggest that rightly the court would impose a high duty on an employer. But in the circumstances of this case the tiny hole was undiscoverable either by the employers or the claimant and the findings of the recorder negatived any such breach.'

[55] Another argument (which weighed heavily with Lindsay J in his dissenting judgment in the Court of Appeal) is that a purposive construction of the 1992 regulations may lead to uncertainties and prolonged and expensive litigation, whereas with an unrestricted absolute duty under reg 7 '... litigation would accordingly be simplified, be inexpensive and be comparatively speedy' (see [31]). This concern merits respectful attention but I do not foresee serious difficulties in recognising the risks in respect of which personal protective equipment is supplied. The whole business of providing the equipment is (as already noted) concerned with the identification and assessment of risks. In any properly run business the risks will be fully documented (probably by reference to official publications) in a form which can be explained (and must be clearly explained—see reg 9(1)(a) and (2)) to the employees affected by the risks. The inquiries which Lindsay J refers to (at [35]) should therefore be unnecessary, since the answers should already be on file.

[56] For these reasons, and for the fuller reasons given by Lord Hoffmann, I would dismiss this appeal. It is most unfortunate that Mr Fytche should have suffered a painful injury in trying to do his duty, and perhaps going even beyond the call of duty, in the course of his employment. But the Court of Appeal was in my view right to hold that the respondent was not under a legal liability in respect of Mr Fytche's injury.

BARONESS HALE OF RICHMOND.

[57] My Lords, the Personal Protective Equipment at Work Regulations 1992, SI 1992/2966 were part of the 'six pack' of regulations, made under s 15 of the Health and Safety at Work etc Act 1974 in response to the EU's Framework Directive (Council Directive (EEC) 89/391 (on the introduction of measures to encourage improvements in the safety and health of workers at work) (OJ 1989 L183 p 1)) and its six 'daughter' directives, including the (Council Directive (EEC) 89/656 (on the minimum health and safety requirements for the use by workers of personal protective equipment at the workplace) (OJ 1989 L393 p 18)). The object of the 1974 Act was 'to make further provision for securing the health, safety and welfare of persons at work ...' The object of the Framework Directive was to adopt 'minimum requirements for encouraging improvements, especially in the working environment, to guarantee a better level of protection of the safety and health of workers'. The overall aim, therefore, was to improve the protection of employees' health and safety.

[58] Not surprisingly, the overall strategy was that prevention is better than cure. The Management of Health and Safety at Work Regulations 1999, SI 1999/3242 (replacing the Management of Health and Safety at Work Regulations 1992, SI 1992/2051 initially made to implement the Framework Directive) (the 'management regulations') require every employer to 'make a suitable and sufficient assessment of ... the risks to the health and safety of his employees to which they are exposed whilst they are at work ... for the purpose of identifying the measures he needs to take to comply with' his obligations under

the 1974 Act and any health and safety regulations: see reg 3. Other regulations then lay down the specific measure he needs to take. These are referred to in the management regulations as 'preventive and protective measures'. When he implements any preventive and protective measures the employer must comply with the general principles of prevention (set out in Sch 1), which include avoiding risks, combating risks at source, giving collective protective measures priority over individual protective measures, but also adapting the work to the individual.

[59] Prevention may be better than cure but it is not the whole story. There is also enforcement and compensation. The directives are not specific about enforcement or about compensation for the individual worker if he is injured. These are fitted into the existing framework of national law, mainly deriving from the 1974 Act. This set up the Health and Safety Executive and the Health and Safety Commission with wide powers to develop, encourage and ultimately enforce the legal requirements. It is a criminal offence to contravene any health and safety regulations: s 33(1)(c). In addition, breach of a duty imposed by health and safety regulations is, so far as it causes damage, actionable except in so far as the regulations provide otherwise: s 47(2). 'Damage' includes the death of or injury to, any person (including any disease and any impairment of a person's physical or mental condition): s 47(6).

[60] Many of the duties imposed by the regulations are strict in the sense that they may be broken without any negligence or other fault. We have long been used to this. Indeed, the normal rule that penal statutes must be strictly construed has not been allowed to stand in the way of the protection given to the workman by the statutory language: see, for example, *John Summers & Sons Ltd v Frost* [1955] 1 All ER 870 at 872, [1955] AC 740 at 751 per Viscount Simonds.

[61] We have also long been used to the co-existence of the employer's liability for breach of his common law duty of care towards his workers with his liability for breach of the stricter and more detailed obligations laid down by the statutory provisions protecting workers. Since the landmark decision in *Groves v Lord Wimborne* [1898] 2 QB 402, [1895–9] All ER Rep 147 it has been accepted that legislation protecting safety in the workplace gives rise to an action for breach of statutory duty and the same was generally true for provisions protecting health. Indeed, because of certain well-known defects in the law of negligence until the decision in *Wilsons and Clyde Coal Co Ltd v English* [1937] 3 All ER 628, [1938] AC 57, the action for breach of statutory duty was often the only one available to an injured worker. It is not surprising that a more relaxed and purposive construction was given to provisions designed for the worker's protection even if they also created criminal offences, usually minor and rarely prosecuted. But there is nothing in the 1974 Act or the Framework Directive to suggest a change in that approach: quite the reverse.

[62] The position as to civil liability has now been put beyond doubt by s 47(2) of the 1974 Act. The major regulations are the product of the various directives. But it would be surprising if either of these were intended to introduce a stricter approach to the construction of regulations intended to protect the health and safety of people at work. There is nothing irrational in a legislative scheme which: (1) requires an employer to provide protective clothing: in certain circumstances, (2) requires the employee to wear it, and (3) compensates the employee who is injured as a result of a defect in that clothing. The reason why the employee was provided with the clothing in the first place is a separate matter

from the content of the duty. The legislation might decide to limit the employer's duty by reference to that reason or it might not. a

[63] It is against that background that I turn to the regulations themselves. It is accepted that this worker was provided with personal protective equipment by virtue of the 1992 regulations. Personal protective equipment is defined as 'all equipment (including clothing affording protection against the weather) which is intended to be worn or held by a person at work and which protects him against b one or more risks to his health or safety, and any addition or accessory designed to meet that objective': reg 2(1). It is now accepted on both sides that in this case the 'personal protective equipment' was the whole boot, not just the steel toecap. This makes sense. The toecaps cannot be used at all, let alone provide efficient protection, unless they are attached to suitable footwear.

[64] Having been provided with this equipment by virtue of the 1992 c regulations, the employee has to use it in accordance both with any training and with any instructions with which he has been provided: reg 10(2). He also has to report any loss or obvious defect in that personal protective equipment: reg 11. This is consistent with the employee's own duty to co-operate in the preventive endeavour. It would seem odd if the employee were not under a duty to report d obvious defects of any sort, but rather had to work out for himself why he had been provided with the boot and whether the defect in question impaired its efficiency in that respect. As far as the workman is concerned, he has been provided with a boot which he is required to wear and it makes sense to tell his employer of anything wrong with it, at least if this might cause him injury.

[65] Having provided the boots, 'every employer shall ensure that any e personal protective equipment provided to his employees is maintained (including replaced or cleaned as appropriate) in an efficient state, in efficient working order and in good repair': reg 7. This refers to 'any' personal protective equipment. It means the whole boot, not just the toecap. It has to be kept 'in good repair'. I agree with my noble and learned friend Lord Walker of f Gestingthorpe that a boot with a hole in it is not in good repair. It is defective. On the face of it, the regulation has been broken.

[66] For the reasons given above, I find that neither surprising nor illogical. Am I none the less compelled to read into the regulation words that are not there in order to limit the employer's liability for injuries caused by a defective boot to injuries resulting from the reason why the employer decided to supply the boot? g

[67] I am not at all impressed by the argument that I should do so because the directive and regulations put prevention before cure and collective before individual prevention. We are talking about a case in which injury has occurred because something supplied with the purpose of protecting the individual has turned out to be defective. To that extent, prevention has not worked. It may be h the first resort but it is not the last.

[68] Nor am I impressed by the argument that the whole obligation to provide this equipment assumes that the employer has conducted an assessment of risk. That is true. But it does not mean that the extent of his liability under these regulations should be limited by the results of his own risk assessment. There is j no civil liability for breach of the general obligation to assess risks: see the management regulations, reg 22. The employer may or may not have assessed the risks properly. He may or may not have identified the right risks. It would be odd indeed if an employer who had identified the wrong risks should be in a better position than an employer who had identified the right ones. As Lindsay J pointed out in the Court of Appeal [2003] EWCA Civ 874 at [25], [2003] ICR 1582

at [25], another employer might well have identified a risk of prolonged exposure to inclement weather and muddy, snowy or icy farmyards and roads, against which waterproof boots should be provided. On the construction argued by the respondents, that employer would be liable but they are not.

[69] Nor do I consider that there is any necessary anomaly or inconsistency between this interpretation of reg 7 and the obligation in reg 4 to ensure that 'suitable' personal protective equipment is provided. Although one element, perhaps the main element, in suitability is its efficiency to protect against the risks against which special protection is required, there is nothing in reg 4 to suggest that this is the only criterion. Indeed, as pointed out by my noble and learned friend, Lord Hope of Craighead, other criteria are expressly included in regs 4 and 6 themselves. The boot has to be suitable overall, not just in relation to the identified risk. A boot provided to a driver which impairs his ability to drive safely is not suitable. If this hole had been the result of attaching the toecap to the leather (as to which we have no evidence), the boot would not have been suitable. A safety helmet with a chinstrap which causes dermatitis is not suitable. There is no reason why suitability should not include being in good repair generally. Earmuffs with a sound system which is defective so that a sudden surge in volume perforates the wearers' eardrums are not suitable. A boot with a hole, however small, which lets in water is not in good repair.

[70] The issue in this case, as identified by my noble and learned friend Lord Nicholls of Birkenhead in the course of the argument, is who should bear the risk that the boots supplied for a particular reason turn out to have an incidental defect which causes the employee injury while he is at work. I have no difficulty with the conclusion that the employer rather than the employee should bear that risk. There are good policy reasons for imposing strict liability on employers for many of the injuries which their employees suffer at work. The overall object of the legislation is to protect the health and safety of workers: if this fails and they suffer injury, strict liability means that they are compensated for that injury without the need for slow and costly litigation such as this. I appreciate that we have not yet reached the point where there is strict liability for every injury suffered by a worker in the course of his employment, but I see no need to bring in limitations which are not in the statutory language and could, as illustrated above, lead to some very surprising conclusions. I venture to suggest that a non-lawyer would find it odd indeed that Mr Fytche would have recovered damages if his employer had also thought the boots should protect against a weather risk but does not do so because his employer had a different risk in mind.

[71] In agreement with my noble and learned friend, Lord Hope, I would allow this appeal.

Appeal dismissed.

Dilys Tausz Barrister.

Bolton Metropolitan Borough Council v Torkington

[2003] EWCA Civ 1634

COURT OF APPEAL, CIVIL DIVISION

PETER GIBSON, WALLER AND CARNWATH LJJ

30, 31 OCTOBER 2003

Deed – Execution – Execution by corporations – Statutory provision deeming deed to have been executed by corporation if its seal affixed – Whether provision dispensing with requirement for delivery of deed – Law of Property Act 1925, s 74(1).

The claimant local authority entered into protracted negotiations with the defendant for the grant of a lease over two plots of land owned by the authority. The correspondence between the parties was expressly made subject to contract. During the course of the negotiations, the defendant occupied the plots. After further negotiations, a senior conveyancer for the authority wrote a letter to the defendant, enclosing an engrossed counterpart lease; informing the defendant that arrangements had been made for the lease to be sealed on behalf of the authority in readiness for completion; specifying the date on which that would take place; and warning him that the matter would be referred back to the authority if he failed to complete by that date. Although the defendant did not reply to that letter, the authority's seal was affixed to the engrossed lease on the date indicated in the letter. In accordance with the authority's procedures, the seal was placed on the document in the presence of the mayor and was signed by an authorised sealing officer. The lease was retained in the authority's custody. Subsequently, an officer of the authority informed the defendant that, as he had not responded to the previous letter, the authority's instructions would be sought on the basis of his refusal to complete. A few weeks later, the authority resolved to withdraw the offer of a lease. There then followed further negotiations during which the defendant returned the counterpart which he had signed and tried to obtain the authority's acceptance of a lesser sum that that which it claimed was outstanding. After giving the defendant further opportunities to complete by complying with its terms, the authority brought proceedings against him for possession of the plots. At trial, the defendant relied, inter alia, on s 74(1)[a] of the Law of Property Act 1925 which provided that, in favour of a purchaser, a deed 'shall be deemed to have been duly executed' by a corporation aggregate if its seal were affixed thereto in the presence of and attested by a permanent officer and a member of the governing body of the corporation. The defendant contended that, by reason of s 74(1), the lease had been duly executed and delivered once it had been sealed; that it was thereafter held in escrow on the condition that he should execute and hand over the counterpart of the lease to the authority within a reasonable time; and that he had fulfilled that condition. The judge rejected the defendant's submission on the effect of s 74(1); held that delivery had not been proved and could not be inferred; and made an order for possession in the authority's favour. The defendant appealed, contending, inter alia, that the words 'shall be deemed to have been duly executed' in s 74(1) included, in what

a Section 74(1) is set out at [21], below

was to be deemed, any delivery that would otherwise be required, and that as result the common law requirement for delivery was dispensed with in the case of corporations. Alternatively, he contended that the sealing of a deed by a body corporate prima facie imported delivery of the deed, either conditionally or unconditionally, and that on the evidence delivery had been established or was to be presumed.

Held – On its true construction, s 74(1) of the 1925 Act did not dispense with the common law requirement for delivery in the case of corporations. Delivery remained a distinct requirement in all cases. The term 'execution' in s 74(1) did not include delivery. That provision did not deal with delivery at all. There were strong pragmatic reasons for such an interpretation since, in many cases, the only practical course was the affixing of the seal by a corporation prior to it being intended to bind the corporation. There was no sufficient justification for the law requiring delivery of a sealed instrument by individuals, but irrebuttably deeming delivery in the case of corporations without express statutory provisions to that effect. As regards the circumstances in which sealing by a corporate body imported delivery, the crucial matter was the intention of the corporation in sealing the document. It would be surprising if, in the course of subject to contract negotiations which the parties knew and intended would not cause them to be bound unless and until contracts were exchanged, the act of one corporate party in sealing the lease in readiness for completion was intended to bind that party. In the context of local authority practice, it would be remarkably inconvenient if an authority, which was conducting subject to contract negotiations, were to be bound when, to prepare itself for completion, it caused its seal to be affixed at a moment convenient to it. There was no reason why it should wish to be bound at that time, particularly when the other party with which it had been negotiating was not correspondingly bound. That supported the view that until completion neither party would be bound. In the instant case, the authority had not intended to be bound immediately. The subject to contract qualification imposed in negotiations was inimical to an intention to be bound forthwith prior to completion. Accordingly, the judge had been correct to find that there had been no delivery, and the appeal would therefore be dismissed (see [36], [44], [45], [47], [50], [51], [53]–[56], [58]–[60], below).

Dicta of Nourse LJ in *Longman v Viscount Chelsea* [1989] 2 EGLR 242 at 246 approved.

Dicta of Buckley J in *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 325 and *D'Silva v Lister House Development Ltd* [1970] 1 All ER 858 disapproved.

Notes

For statutory presumptions in respect of the execution of a deed by a corporation and the requirement for delivery, see 9(2) *Halsbury's Laws* (4th edn reissue) paras 1022, 1025.

For the Law of Property Act 1925, s 74, see 37 *Halsbury's Statutes* (4th edn) (2003 reissue) 205.

Cases referred to in judgments

Beesly v Hallwood Estates Ltd [1960] 2 All ER 314, [1960] 1 WLR 549; *affd* [1961] 1 All ER 90, [1961] Ch 105, [1961] 2 WLR 36, CA.

Cope v Thames Haven Dock and Rly Co (1849) 3 Ex 841.

D'Silva v Lister House Development Ltd [1970] 1 All ER 858, [1971] Ch 17, [1970] 2 WLR 563.
Derby Canal Co v Wilmot (1808) 9 East 360, 103 ER 610.
Foundling Hospital (Governors and Guardians) v Crane [1911] 2 KB 367, CA.
Longman v Viscount Chelsea [1989] 2 EGLR 242, CA.
Powell v London and Provincial Bank [1893] 2 Ch 555, CA.
Staple of England (Mayor, Constables and Co of Merchants) v Governor and Co of Bank of England (1887) 21 QBD 160, DC.
Vincent v Premo Enterprises (Voucher Sales) Ltd [1969] 2 All ER 941, [1969] 2 QB 609, CA.
Windsor Refrigerator Co Ltd v Branch Nominees Ltd [1960] 2 All ER 568, [1961] Ch 88, [1960] 3 WLR 108.
Xenos v Wickham (1866) LR 2 HL 296, HL.

Cases referred to in skeleton arguments

Kenny v Preen [1962] 3 All ER 814, [1963] 1 QB 499, [1962] 3 WLR 1233, CA.
Southwark London BC v Mills [1999] 4 All ER 449, [2001] 1 AC 1, [1999] 3 WLR 939, HL.

Appeal

The defendant, Geoffrey Ralph Torkington, appealed with permission of Aldous LJ granted on 29 April 2003 from the order of Lloyd J, sitting in Manchester as Vice-Chancellor of the County Palatine of Lancaster, on 31 January 2003 requiring Mr Torkington to (i) deliver to the claimant, Bolton Metropolitan Borough Council, possession of land at Croft Street and Back Croft Street, Bolton, and (ii) pay damages to the council for his use and occupation of that land from 1 February 1991 until delivery of possession. The facts are set out in the judgment of Peter Gibson LJ.

Ian Leeming QC (instructed by *Berg & Co*, Manchester) for Mr Torkington.
Paul Chaisty QC and *Wilson Horne* (instructed by *Peter Wilson*, Bolton) for the council.

PETER GIBSON LJ.

[1] The defendant, Geoffrey Torkington, appeals from the order made on 31 January 2003 by Lloyd J, the Vice-Chancellor of the County Palatine of Lancaster, giving the claimant, Bolton Metropolitan Borough Council (the council), possession of certain property in Bolton owned by the council but occupied by Mr Torkington. The judge required Mr Torkington to pay damages for his use and occupation of that property from 1 February 1991 until possession was given. The judge refused permission to appeal to this court. On application to this court, Aldous LJ, considering the application on paper, granted permission. I will come back later to what he said when giving permission.

[2] The history of this dispute is long and complex and is set out in detail in the judge's judgment. I will attempt to summarise the background facts relevant to the issues raised by this appeal.

THE BACKGROUND FACTS

[3] The property which was the subject of the judge's order is a site formerly consisting of houses known as 5–29 (odd numbers) Croft Street (known at the trial as plots A and B) together with parts of Back Croft Street identified on a plan

annexed to the council's reamended particulars of claim. Croft Street runs roughly east-west, meeting at its western end Manchester Road, which runs roughly north-west to south-east across the end of Croft Street. If in 1985 one came down Manchester Road in a south-easterly direction towards Croft Street, there was an open space (the 283 plot) on the east side of Manchester Road adjacent to 283 Manchester Road. The 283 plot fronts onto Manchester Road. A little further on down Manchester Road on its east side are 287 and 289 Manchester Road, which are premises owned by Mr Torkington and from which he carries on a motor car business called Park Motor Company (Bolton). Number 289 is on the corner of Manchester Road and Croft Street. Behind 287 and 289 is Back Croft Street. This runs from Croft Street, just behind the end of 287, and then takes a right-angled turn to the east, extending behind 5–29 (odd numbers) Croft Street and parallel to Croft Street. Going further south-east down Manchester Road one comes to a terrace of houses known as 301–315 Manchester Road, the site of which was known at the trial as plot C. Plot C backs onto a road, Back Manchester Road East, which, at its north-west end, joins Croft Street.

[4] In 1985 Croft Street was an adopted public highway as far as a line extending from the eastern boundary of Back Manchester Road East, itself an adopted public highway, as was Back Croft Street. The council by a compulsory purchase order acquired plots A, B and C. This acquisition prompted interest from potential purchasers who wished to acquire those plots from the council. One of them was Mr Torkington, who expressed an interest in plots A and B.

[5] The responsible officer for the council was Mr Burrows, a senior assistant to the council's chief estates surveyor, Mr Disley. Mr Burrows was authorised to negotiate with the three interested purchasers. There then followed extensive negotiations between the council and Mr Torkington, who conducted the negotiations, for the most part, without professional representation. For the council Mr Burrows, Mr Cresswell (the assistant borough solicitor), Mr Tipping (a senior conveyancer for the council) and, in the later stages, Mr Collinge (the council's chief executive) all at various times took part in the exchanges with Mr Torkington. The subject of the negotiations was a 125 year lease of (initially) plot A but later of plots A and B with an annual rent of £2,500 (later agreed to be reduced for the first year only) for the first five years and rent reviews every five years thereafter. The council was to demolish the existing buildings, which it did, and to obtain a street clearance order for that part of Back Croft Street which ran along the backs of plots A and B and there was to be an option for Mr Torkington to commute the rent after five years. The correspondence between the parties was expressly made subject to contract, though it became an important part of Mr Torkington's case at trial that he was told by Mr Burrows that the council always used that phrase on its letters, but that Mr Torkington should not worry about that because, once a committee of the council had taken a resolution, it would not go back on its word. The judge rejected that part of Mr Torkington's case.

[6] Mr Torkington's evidence was that in 1985 he went onto plot A on which he did some preliminary work, levelling areas and putting up a barrier, and that in 1987–1989 he had some drainage works done, put a new surface on plots A and B and fenced them, and that the council knew that he was on the land. The council's evidence that it did not know that Mr Torkington was on the land until February 1989 was accepted by the judge.

[7] Another factual dispute related to the status of the unadopted part of Croft Street and what was said to Mr Torkington about it. The council's position was that this part of the street was a public highway but was not maintainable at public expense and so was not adopted. Mr Torkington said that he was told by a Mr Banks of the council that it was a private road but not a highway. Mr Banks's evidence was that he told Mr Torkington that the eastern part of Croft Street was a highway but privately maintainable. The judge accepted Mr Banks's evidence.

[8] There was significant delay before the council got to work on the documentation for plots A and B, partly because the council wanted to complete the statutory processes for the closure of part of Back Croft Street first.

[9] It is unnecessary for the purposes of this appeal to go through all the detailed negotiations on the proposed lease of plots A and B before the events of June 1990. On 19 June Mr Torkington wrote to Mr Burrows about the council's position on that lease. He also raised the question of what was to happen to the 283 plot. He claimed an agreement in principle that he would take a lease of the 283 plot and said that he had planning permission to use it in conjunction with plots A and B. He proposed that the 283 plot be included in the lease of plots A and B at the same rate per square yard on the usable area as for plots A and B.

[10] Mr Burrows and Mr Torkington then met. On 5 July 1990 Mr Burrows wrote to confirm the details of what Mr Torkington proposed so that the council's approval could be sought. Mr Torkington was not happy with some of what was said, and proposed a timetable including an irrevocable commitment by the council to the terms which, he said, were agreed with Mr Burrows, and requiring completion of the lease for plots A and B by 9 August 1990 and the lease for the 283 plot by 4 September 1990.

[11] On 25 July the land sub-committee resolved that the council's solicitor was to complete the necessary legal documentation for plots A and B, but consideration of the request for a lease of the 283 plot was to be deferred until the lease for plots A and B had been completed. The sub-committee also resolved that back rent from when Mr Torkington took possession of plots A and B at the rate payable in the first year should be recovered. Mr Disley on 26 July wrote to Mr Torkington to report that decision. Mr Torkington's reply showed that he had not understood or accepted the decision, as he asked for a lease of the 283 plot to be completed by 16 August. On 2 August 1990 Mr Disley responded, reiterating that the question of the 283 plot had not been addressed by the council.

[12] On 13 August Mr Tipping sent Mr Torkington the draft lease amended to take account of what had been provisionally agreed. He was told that completion would be conditional on him paying to the council on completion the sum due for his occupation of plots A and B from 6 February 1989 until completion. On 31 August Mr Torkington wrote making further requirements, which were not accepted, and on 18 September 1990 returned to Mr Tipping a copy of the draft lease with various amendments.

[13] In that situation Mr Tipping on 25 September tried to bring matters to a conclusion. He wrote to Mr Torkington, enclosing an engrossed counterpart lease with a completion statement. He said:

> 'I have also arranged for the Lease to be sealed on behalf of the Council in readiness for completion, which should take place on or before the 1st October. If you cannot or will not complete by that date, I shall have no

alternative but to refer the matter back to the Council on the basis of your refusal to complete.'

He also repeated what Mr Torkington had already been told that the council had decided to make up Croft Street beyond the adopted part as and when funding became available and that adoption would take place after completion of all necessary work.

[14] The completion statement was prepared as at 1 October 1990. It showed £2,463·86 as due on completion, the largest part being in respect of occupation from 6 February 1989 at £1,125 pa.

[15] Mr Torkington did not reply on or before 1 October. Nevertheless, on that date the council's seal was affixed to the engrossed lease, as had been indicated by Mr Tipping in his letter of 25 September. The lease was not dated. The procedures of the council required the seal to be placed on the document in the presence of the mayor, and that an authorised sealing officer (in this case Mr Cresswell) sign the lease. Those procedures were followed. An appropriate entry was made in the sealing book of the council. The lease was retained in the council's custody and remained there at the time it was disclosed in the proceedings.

[16] On 5 October 1990 Mr Burrows wrote to Mr Torkington that, as he had not responded to the letter of 25 September, the council's instructions would be sought on the basis of his refusal to complete. On 23 October the council's management and finance committee resolved to withdraw the offer of the lease and authorised proceedings to recover possession.

[17] There then followed further lengthy and at times highly acrimonious exchanges between Mr Torkington and the council. In the course of them Mr Torkington tried to obtain completion by belatedly responding on 16 February 1991 to the letter of 25 September 1990. He sent the counterpart which he had signed. He also tried to obtain the council's acceptance of a lesser sum than that which the council claimed was outstanding. More than once the counterpart was returned by the council but resubmitted by Mr Torkington. Mr Torkington was given further opportunities to complete by complying with the council's terms, but he was not prepared to accept those terms as they stood without further stipulations, such as the completion of a lease of the 283 plot. The council lost patience with him and decided not to proceed to grant a lease to him. It also decided to take proceedings for possession.

THE PROCEEDINGS

[18] The proceedings commenced as long ago as 1992. The council disclosed the sealed lease of plots A and B. When the proceedings came on for trial before Judge Howarth, he took the point, which had not previously been taken, that there may have been a delivery of the lease in escrow. The case was adjourned and pleadings were amended. Mr Torkington by his amended defence resisted the claim for possession, alleging that the lease was agreed, that the council was estopped from denying the grant of the lease to him on the agreed terms and that the council had executed the lease. By his counterclaim Mr Torkington pleaded that the council had breached the covenant for quiet enjoyment and had derogated from its grant and he claimed damages.

[19] The resumed trial, regrettably, did not occur until the beginning of this year before Lloyd J. However, no point is taken by either side in respect of the delay. In his judgment the judge records that yet another attempt was made in March 2001 to reach a compromise enabling Mr Torkington to take a lease, but

the proposed terms were not acceptable to him. All the while Mr Torkington has remained in occupation.

[20] The judge in his judgment said that the council, as owner of the property possession of which it was seeking to recover, was entitled to possession unless Mr Torkington could show some right to be in possession. The case for Mr Torkington was put on three bases: agreement, estoppel and a concluded lease. The judge found against Mr Torkington on all three. As the first two are not the subject of appeal, I need say nothing further about them. The third way in which Mr Torkington's case was put was that the lease was sealed and that by reason of s 74(1) of the Law of Property Act 1925 it was duly executed and delivered; that the lease was held thereafter in escrow on the condition that Mr Torkington should execute and hand over to the council the counterpart of the lease within a reasonable time, and that that condition was fulfilled.

[21] The judge then considered the legal principles concerning deeds. The first question was whether the lease when sealed by the council was delivered either unconditionally or as an escrow. Mr Torkington relied on s 74(1) of the 1925 Act, which provides:

> 'In favour of a purchaser a deed shall be deemed to have been duly executed by a corporation aggregate if its seal be affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation, and where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices as aforesaid, the deed shall be deemed to have been executed in accordance with the requirements of this section, and to have taken effect accordingly.'

[22] The judge assumed in favour of Mr Torkington that he was a purchaser. But, after considering the authorities, he rejected the submission that s 74(1), where applicable, dispensed with the need for delivery in the sense of some act by which the party executing the instrument shows that it intended to be bound by the instrument. In so doing the judge followed the obiter dicta of Nourse LJ in *Longman v Viscount Chelsea* [1989] 2 EGLR 242. The judge held on the facts that what took place on 1 October 1990 was the sealing of the lease but not its delivery, which was to await completion, as Mr Tipping said in his letter of 25 September 1990. The judge said that in the present case delivery could not be inferred and had not been proved.

[23] If wrong on s 74(1), the judge said that the lease was executed in escrow subject to the conditions set out in Mr Tipping's letter, that is to say that the counterpart be executed by 1 October 1990, and that by that date £2,463·86 be paid. As neither condition was satisfied, the escrow had no continuing effect.

[24] The judge finally dealt with the counterclaim by Mr Torkington for damages if the judge was wrong on the lease. The judge found no breach of the covenant for quiet enjoyment nor derogation from grant to entitle Mr Torkington to any damages. Accordingly he dismissed the counterclaim.

THE APPEAL

[25] Six grounds of appeal are set out in the appellant's notice. They are, in summary: (1) s 74(1) deems a document complying with its requirements to have been duly delivered, or no delivery of it is required; (2) on the evidence the delivery of the lease was to be presumed or had been established; (3) the only

condition of the escrow was the execution and delivery by Mr Torkington of the counterpart or such execution and delivery within a reasonable time, and that condition was fulfilled on 16 February 1991; (4) alternatively to (3), if there was a further escrow condition as to the payment of money, the lease in escrow became binding on the council on the happening of one or more of a number of events when moneys were tendered or offered; (5) the time for performance of any escrow condition was extended by certain act by the council; (6) there was an arguable case for breach of the covenant for quiet enjoyment and of the obligation of the council not to derogate from its grant by denying the lease.

[26] The judge refused permission to appeal. On application to this court for such permission Aldous LJ, in giving permission, said only that the third and fifth grounds of appeal had sufficient merit to provide a reasonable prospect of success. It is to my mind open to question whether he intended to give permission to appeal on all the remaining grounds of appeal, but Aldous LJ did not expressly refuse permission on those grounds and Mr Chaisty QC for the council accepts that it would appear to be the case that permission was granted on all grounds. In the circumstances, I proceed on the footing that Aldous LJ must be taken to have intended to allow all the grounds of appeal to be argued on appeal.

[27] I shall consider the grounds, so far as necessary, in turn.

GROUND 1: S 74(1)

[28] Mr Leeming QC for Mr Torkington relied on the words of s 74(1) that a qualifying deed 'shall be deemed to have been duly executed'. He submitted that this must include in what is to be deemed any delivery that would otherwise be required, with the result that the common law requirement of delivery is dispensed with. He further relied on two decisions by Buckley J. In *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 325, [1960] 1 WLR 549 at 562 that judge said that he was bound to treat an instrument complying with s 74(1) as 'having been not only sealed but also delivered'. In *D'Silva v Lister House Development Ltd* [1970] 1 All ER 858 at 866, [1971] Ch 17 at 29 Buckley J described as fallacious the submission that s 74(1) does not extend to or answer the question whether the document has ever been delivered, saying:

> 'The section states that the document is to be deemed to have been duly executed and execution imports not only sealing the document, but also delivering it as an executed document ...'

[29] Mr Chaisty submits that the judge was right to follow what was said in this court in *Longman v Viscount Chelsea* [1989] 2 EGLR 242. Nourse LJ, with whom Kerr and Taylor LJJ agreed, after referring to *Beesly*'s case and *D'Silva*'s case, pointed out that in the latter case the decision of Cross J in *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1960] 2 All ER 568, [1961] Ch 88 had apparently not been cited to Buckley J and that Cross J had said ([1960] 2 All ER 568 at 573, [1961] Ch 88 at 98):

> 'A deed, whether executed by a corporation or by an individual, does not necessarily bind the grantor as soon as it is sealed. It only becomes binding when it has been "delivered" by the grantor as his deed, ie, when the grantor has indicated by words or conduct that he intends the deed which he has executed to be binding on him.'

[30] Nourse LJ reverted to s 74(1) at the end of his judgment, although he made clear that it was unnecessary for his decision on the appeal. He said ([1989] 2 EGLR 242 at 246): *a*

> 'I respectfully think that Buckley J's view of the subsection was incorrect. I prefer the view which Cross J appears to have held. The sole purpose of section 74(1) was to make it unnecessary for a purchaser to require proof of the corporation's formal compliance with the provisions of its memorandum and articles of association or its charter. I am confirmed in that view by Sir Benjamin Cherry's own note to the subsection in the 12th ed of *Wolstenholme & Cherry's Conveyancing Statutes* (1932), of which he was still the principal editor. Both the problem and the solution to it are in my opinion correctly stated by Professor Battersby [in *Williams on Title* (4th edn, 1975) pp 656–657]: "Delivery is necessary to give effect to a deed. It is a difficult question whether this applies to the case of execution by a corporation. At common law there is a rebuttable presumption that sealing by a corporation imports delivery. A difficulty, however, arises from section 74(1) of the Law of Property Act 1925 ... There is conflicting authority whether this provision dispenses, in favour of a purchaser, with the need for delivery. It is submitted that section 74, like section 73, is concerned only with the formalities of sealing, and does not dispense with delivery. It seems highly unlikely that such a radical change would have been intended, and that it would need much clearer language to bring it about; nor does there seem to be any good reason for applying to a corporation a rule so different from that applied to all other persons." I entirely agree with those observations.' *b c d e*

[31] The note to s 74(1) in both the twelfth edition (1932) (vol 1, p 344) and the thirteenth edition (1972) (vol 1, p 152) of *Wolstenholme and Cherry's Conveyancing Statutes* states: *f*

> 'The subsection removes the necessity for enquiry as to the formalities required under the memorandum, articles, charter, etc., of the corporation; independently of this section the deed would be void unless such formalities were observed: [*Cope v Thames Haven Dock and Rly Co* (1849) 3 Ex 841].'

[32] The judge gave the following reasons for following Nourse LJ's approach. (1) It was supported by the ordinary conveyancing practice of all corporate entities, in particular of local authorities. Instruments cannot always be sealed at the moment when they are intended to be effective immediately. If delivery is needed for execution by a corporation to have effect as a deed, as it is for execution by an individual, the corporation can seal the instrument at its convenience and only be bound upon delivery. The technical difficulty that prior to the enactment and coming into force of s 1(5) of the Law of Property (Miscellaneous Provisions) Act 1989 it was necessary for an agent delivering a deed to have been appointed under seal (see *Powell v London and Provincial Bank* [1893] 2 Ch 555) was surmountable by corporations giving officers authority by deed. (2) The mischief at which s 74(1) was aimed was (i) to standardise the method by which a corporation validly affixes its seal, and (ii) to render unnecessary any inquiries by a purchaser as to the seal and the office holders. That justifies a deeming provision as regards the valid sealing by a corporation of an instrument, but provides no explanation for dispensing with delivery. (3) Section 74(6) provides: *g h j*

> 'Notwithstanding anything contained in this section, any mode of execution or attestation authorised by law or by practice or by the statute, charter, memorandum or articles, deed of settlement or other instrument constituting the corporation or regulating the affairs thereof, shall (in addition to the modes authorised by this section) be as effectual as if this section had not been passed.'

Thus the use of a mode of execution or attestation by a corporation in accordance with its own constitution is an alternative to compliance with s 74(1). In such a case there could be no statutory deeming of delivery. That suggests that s 74(1) is limited to the sealing process.

[33] Subject to s 36A of the Companies Act 1985 relating to companies formed and registered under the Companies Acts (to which I will return), the formalities required for a deed under the present law, whether the maker is a corporation or an individual, are: (i) that it is in writing, (ii) that the person or parties making it make clear in the instrument that it is intended to be a deed, (iii) that the instrument is validly executed as a deed by the person or one or more of the parties making it and (iv) that it has been delivered. The crucial question is whether (iii) and (iv) are separate requirements in the case of a corporation executing an instrument in accordance with s 74(1).

[34] As the Law Commission explained in its Consultation Paper No 143 *The Execution of Deeds and Documents by or on behalf of Bodies Corporate* (1996) p 48 (para 6.4), conflicting views were long held as to whether the affixing of the seal implied delivery by the corporation. The Law Commission said that the weight of authority was that a separate act of delivery was necessary. However, it said that the sealing of a deed prima facie imported not only due execution but also delivery. In *Staple of England (Mayor, Constables and Co of Merchants) v Governor and Co of Bank of England* (1887) 21 QBD 160 at 165–166 Wills J said:

> 'The affixing the seal is not enough; there must be delivery of the deed also ... Prima facie, putting the seal imports delivery; yet, if it be intended otherwise, it is not so ...'

[35] A deed is delivered 'as soon as there are acts or words sufficient to [show] that it is intended by the party to be executed as his deed presently binding on him' (see *Xenos v Wickham* (1866) LR 2 HL 296 at 312 per Blackburn J). That is so even if the deed is delivered in escrow.

[36] The term 'execution' may or may not include delivery. Nourse LJ in *Longman*'s case [1989] 2 EGLR 242 at 245 thought a signed, sealed and delivered deed was correctly described as executed. Mr Leeming fastened on that as being the ordinary meaning of execution. But whether or not that is the ordinary meaning, we are concerned with its meaning in the 1925 Act. In my judgment, the better view is that in s 74(1) it excludes delivery. When s 74(1) came into effect, it did so as a new provision which was part of a group of provisions relating to the execution of deeds. Thus s 73(1) refers to execution of a lease by an individual, requiring for that purpose that the individual must sign or place his mark upon the deed. Nothing is said about delivery, but no one suggests that delivery is not a requirement for the instrument to be a deed. Section 74(1) similarly says nothing about delivery and only deems the execution and the taking effect accordingly of the deed if the prescribed conditions are satisfied. Similarly s 74(3) provides for execution by a corporation through an agent, and if the conditions of the subsection are satisfied, 'such execution shall take effect and

be valid in like manner as if the corporation had executed the conveyance'. I have already referred to the point made by the judge on s 74(6). Like Nourse LJ, I attach significance to the views of the chief draftsman of the 1925 Act, as indicated in the twelfth edition of *Wolstenholme and Cherry*.

[37] In *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549 the lease contained an option to renew. Both the lease and the reversion were assigned for value. The assignee of the lease exercised the option and a new lease and counterpart were engrossed. The tenant executed the counterpart. The assignee of the reversion, a company, sealed the lease, but then sought to avoid granting the lease. Buckley J held that where a deed is intended to be executed in duplicate to give effect to a transaction by which each of the two parties undertakes obligations to the other, prima facie a party executing the lease does so in escrow conditionally on the other party executing his part of the lease. He said ([1960] 2 All ER 314 at 325, [1960] 1 WLR 549 at 562) that the sealing of a deed by a corporation prima facie imported delivery of the deed either conditionally or unconditionally, and he saw no reason in the case before him to conclude that the sealing of the lease by the company 'did not import delivery so as to constitute due execution either unconditionally or in escrow'. He then expressed the view on the effect of s 74, to which I have referred. Thus, as Lloyd J pointed out, Buckley J was saying two different things: (1) delivery prima facie is inferred from sealing by a corporation; (2) the statutory presumption under s 74(1) extends to delivery.

[38] An appeal to this court was dismissed ([1961] 1 All ER 90, [1961] Ch 105). Harman LJ, giving the main judgment, referred to Buckley J's holding that the lease was delivered as an escrow. He also referred to Buckley J's further holding that, in view of s 74, he was bound prima facie to hold that there had been execution and went on to consider an argument that an escrow can be withdrawn before the condition of the escrow is performed. Harman LJ said ([1961] 1 All ER 90 at 93, [1961] Ch 105 at 116):

> 'If there had been no delivery, as was pleaded, the matter would be wholly different, but that, by the time the action came to this court, had been decided as a fact by the learned judge and accepted by the defendants.'

Lloyd J rightly observed that that comment appears not to proceed on the footing that execution in accordance with s 74(1) imports delivery and suggests that Harman LJ regarded delivery by a corporation as a separate question to be determined on the facts.

[39] *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1960] 2 All ER 568, [1961] Ch 88 was decided by Cross J a month after Buckley J decided *Beesly*'s case, and there is no reference to *Beesly*'s case in the report of *Windsor*. I need not repeat what Cross J said. It plainly indicates that delivery by a corporation is required for the instrument which it has executed to be a deed.

[40] In *Vincent v Premo Enterprises (Voucher Sales) Ltd* [1969] 2 All ER 941, [1969] 2 QB 609 a lease and counterpart were engrossed and the counterpart was sealed by the defendant tenant company. The company raised with its solicitors the question as to the date from which rent was to run. Before the point was settled, the company sought to withdraw. The trial judge held that the company had delivered the counterpart as an escrow but that it was too late for the landlords to claim that the escrow condition had been fulfilled. The court allowed the appeal by the landlords. The company argued that there was no delivery. The landlords relied on *Beesly*'s case at first instance and in this court, arguing that

'sealing by a company imports delivery'. Lord Denning MR made no reference to s 74 or to Buckley J's reasoning, holding that the trial judge was entitled to find delivery of the counterpart as an escrow. Winn LJ agreed. He said ([1969] 2 All ER 941 at 947, [1969] 2 QB 609 at 623) that '[a]part altogether from the technical point under s 74', what Harman LJ said in *Beesly*'s case in the passage I have cited was to be noted. Fenton Atkinson LJ agreed that the trial judge was entitled to find delivery of the counterpart as an escrow. I do not obtain any assistance from that case on the point in issue.

[41] In *D'Silva v Lister House Development Ltd* [1970] 1 All ER 858, [1971] Ch 17 the defendant landlord company sealed an engrossment of the lease. The tenant executed the counterpart and was already in possession and had paid the first quarter's rent when the company, on learning that its head landlord would not consent to the underletting, sought to withdraw. Buckley J referred to s 74 and to the due sealing of the lease, and said that the deed must be taken to have been duly executed by the company. He rejected an argument that s 74 does not deem delivery of the executed lease. He held that the lease was binding as an escrow, the only condition of the escrow being the execution of the counterpart, and that had been satisfied. There is no reference to the *Windsor* case in the report.

[42] In *Longman v Viscount Chelsea* [1989] 2 EGLR 242 the court was concerned with the question whether a landlord, who was an individual, was bound by signing and sealing a lease, where there had been no exchange and the negotiations for the grant of the lease had been expressed to be subject to completion of the lease. The trial judge was held to have been correct to conclude that the signing and sealing of the lease in accordance with normal conveyancing practice in anticipation of exchange did not demonstrate an intention to deliver the deed as an escrow. Nourse LJ considered *Beesly*'s case, the *Windsor* case, *Vincent*'s case and *D'Silva*'s case. He pointed out that in *D'Silva*'s case negotiations for the lease were expressed to be subject to contract, that the decision depended entirely on s 74(1), there being no evidence that the company had intended to deliver the lease and that Buckley J thought the company's deemed intention to deliver the deed as an executed document had overtaken what he called the 'subject to contract' qualification. Nourse LJ disagreed with that view. It was in that context that he went on to express his obiter opinion that Buckley J was wrong in his views on s 74(1). Mr Leeming sought to cast doubt on the correctness of the decision in *Longman*'s case because the description of the normal conveyancing practice by Nourse LJ made no mention of the need, as *Powell v London and Provincial Bank* [1893] 2 Ch 555 showed, to confer authority by deed on the solicitor or other agent of the party who was validly to deliver the deed after it had been signed and sealed. That need had been shown by *Powell*'s case. However, in the *Windsor* case, to which Nourse LJ had referred, the need for such a deed authorising the agent to deliver had featured prominently (see [1960] 2 All ER 568 at 573, [1961] Ch 88 at 98) and Nourse LJ expressly refers to the *Powell* point (see [1989] 2 EGLR 242 at 246). In any event, we are bound by the reasoning of the court in *Longman*'s case and the correctness of Nourse LJ's observation on s 74 is unaffected by Mr Leeming's point.

[43] Buckley J's views have not escaped criticism (see, for example, *Execution of Deeds by Corporation* (1973) 89 LQR 14, a case note on *D'Silva*'s case by Michael Albery QC). However, one may perhaps detect a note of disapproval of Nourse LJ's remarks in *Emmet on Title*, para 20.003.2, where the editor refers with apparent approval to *Beesly*'s case, *Vincent*'s case and *D'Silva*'s case as establishing that once a document had been sealed by a company within s 74 it would be

treated as executed either as a deed immediately binding or else as an escrow, but continues: a

> 'However, a submission to that effect was rejected virtually out-of-hand by the Court of Appeal apparently unanimously but *obiter* in *Longman* ... as with individuals, a separate act of delivery by or rather on behalf of a company must be shown.'

b

[44] Finally, I should refer to the report of the Law Commission *The Execution of Deeds and Documents by or on behalf of Bodies Corporate* Law Com No 253 (1998) (Cm 4026), in which the Law Commission refers to what it said in its consultation paper about the previous conflicting views on the subject and says (p 66 (para 6.1)):

c

> 'However, it now seems clear that delivery remains a distinct requirement in all cases, although at common law, the sealing of a deed raises a rebuttable presumption of delivery.'

The Law Commission recommended changes to make this clearer in the context of s 74(1). d

[45] Subject to one qualification, I respectfully agree with the Law Commission's view, although it is with natural diffidence that I differ from the views expressed by Buckley J. It appears to me that on the natural construction of s 74(1) in its context in the 1925 Act, that subsection was not dealing with delivery at all. There are strong pragmatic reasons for that interpretation, as in many cases the affixing of the seal by a corporation prior to it being intended to bind the corporation is the only practical course. I cannot see any sufficient justification for the law requiring delivery of a sealed instrument by individuals but irrebuttably deeming delivery in the case of corporations without express statutory provisions to that effect. I take comfort from the fact that Parliament appears to have adopted the same view by enacting s 36A(5) and (6) of the Companies Act 1985 (inserted by s 130(2) of the Companies Act 1989 as from 31 July 1990) in which express provision is made for delivery in addition to execution. Those subsections provide, so far as material: e f

> '(5) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed. g
>
> (6) In favour of a purchaser a document shall be deemed to have been duly executed by a company if it purports to be signed by a director and the secretary of the company, or by two directors of the company, and, where it makes it clear on its face that it is intended by the person or persons making it to be a deed, to have been delivered upon its being executed.' h

[46] The one qualification that I would make is that at common law to describe the sealing by a corporation as giving rise to a rebuttable presumption may go too far, implying, as that does, that the burden of proof is on the corporation affixing the seal. In *Staple of England (Mayor, Constables and Co of Merchants) v Governor and Co of Bank of England* (1887) 21 QBD 160 Wills J only says that prima facie putting the seal imports delivery and that a contrary intention by the corporation may be proved. In *Longman v Viscount Chelsea* [1989] 2 EGLR 242 at 246 Nourse LJ rejected any presumption imposing a burden of proof in the case of an individual who signed and sealed a lease, saying that the system would be j

unworkable if that were so. I will return to this point when I deal with the second ground.

[47] For these reasons, as well as those given by the judge I reject the arguments for Mr Torkington on the first ground of appeal. It is therefore unnecessary to consider a point which Mr Chaisty has taken on the correctness of the assumption made by the judge that Mr Torkington was a purchaser for the purposes of s 74(1). The council has put in no respondent's notice and it would serve no purpose to consider this point in view of the conclusion I have reached on the first ground of appeal.

GROUND 2: PRESUMPTION OF DELIVERY

[48] Mr Leeming submits that on the evidence delivery has been established or is to be presumed. He relies on the observations of Buckley J in *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 325, [1960] 1 WLR 549 at 562 that the sealing of a deed by a corporate body prima facie imports delivery of the deed either unconditionally or conditionally. Mr Leeming no longer suggests unconditional delivery took place in this case. He points out that Buckley J relied in support of his proposition on *Norton on Deeds* (2nd edn, 1928) pp 12–13 and the remarks of Wills J in the *Bank of England* case to which I have referred. He refers to the formalities which were gone through when the council sealed the lease, and said that it would be surprising if the instrument with the seal attested was nothing more than a piece of paper with no legal effect whatsoever.

[49] Mr Chaisty took a preliminary objection to this ground which, he said, raised a matter not argued below nor raised in the pleadings. If it had been, evidence might have been directed to the question. Mr Leeming accepts that it was not pleaded, but he says that it was argued and points to his opening skeleton argument in which he had said, after dealing with s 74: 'In any event in the present case delivery by Bolton should be either deemed or inferred.' He said that the judge was responding to that argument in finding that delivery could not be inferred and had not been proved.

[50] I need not go into the objection further, because it seems to me plain on the facts and in the light of the decision of this court in *Longman*'s case the council did not intend to be bound immediately. Nor, for the same reason, is it necessary to decide whether the sealing of an instrument by a corporation not affected by s 36A of the 1985 Act creates a rebuttable presumption of delivery in the sense of casting a burden of proof on the corporation. In *Norton on Deeds* (2nd edn, 1928) pp 12–13 on which Buckley J had relied, reference is made to *Derby Canal Co v Wilmot* (1808) 9 East 360 at 361, 103 ER 610 at 610 and the remarks of Lord Ellenborough CJ that—

> 'in order to give [the deed of a corporation] effect, the affixing of the seal must be done with intent to pass the estate; otherwise it operates no more than a feoffment would do without livery of seisin …'

[51] In the *Bank of England* case Wills J had referred to the *Derby Canal* case as the authority for the requirement of delivery by a corporation which has sealed an instrument, and he did so immediately before the remarks to which I have referred that prima facie sealing imports delivery. It is clear from those two cases that the intention of the corporation in sealing the document is the crucial matter.

[52] Mr Chaisty relied on the letter by Mr Tipping of 25 September 1990 as negating any intention that the council should be bound immediately. That letter, marked 'subject to contract', indicated that the council was to seal the lease

in readiness for completion on or before 1 October 1990. In fact we know that the council did seal the lease on 1 October 1990.

[53] It would be surprising, in my view, if in the course of subject to contract negotiations, which the parties know and intend will not cause them to be bound unless and until contracts are exchanged, the act of one corporate party in sealing the lease in readiness for completion was intended to bind that party. As Waller LJ pointed out in the course of the argument, if one was to infer an intention to deliver from the act of sealing and both parties were corporations one would have the bizarre situation that both, by sealing the lease and counterpart respectively, would be bound, despite having made clear by the negotiations being subject to contract that they were not to be bound until completion. In the context of local authority practice, it would be remarkably inconvenient if a local authority which was conducting subject to contract negotiations were to be bound when, to prepare itself for completion, it caused its seal to be affixed at a moment convenient to the council. I can see no reason why it should wish to be bound at that time particularly when the other party with which it has been negotiating is not correspondingly bound. In my judgment that supports the view that until completion neither party would be bound.

[54] That approach is supported by the decision of this court in *Longman's* case, that where negotiations for the grant of a lease are expressed to be subject to contract, the signing and sealing of the lease, in accordance with the normal conveyancing practice in anticipation of exchange, does not disclose an intention to deliver the deed as an escrow. Nourse LJ ([1989] 2 EGLR 242 at 245) referred to three ways in which a signed and sealed instrument may be delivered:

> 'First, it may be delivered as an unconditional deed, being irrevocable and taking immediate effect. Second, it may be delivered as an escrow, being irrevocable but not taking effect unless and until the condition or conditions of the escrow are fulfilled. Third, it may be handed to an agent of the maker with instructions to deal with it in a certain way in a certain event, being revocable and of no effect unless and until it is so dealt with, whereupon it is delivered and takes effect: as to this method, see *[Governors and Guardians of the Foundling Hospital v Crane* [1911] 2 KB 367 and *Windsor Refrigerator Co Ltd v Branch Nominees Ltd* [1960] 2 All ER 568 at 575–576, [1961] Ch 88 at 100–102 per Cross J]. It is implicit in the ordinary conveyancing practice now under consideration that it is the third method which there applies.'

[55] Mr Leeming rightly pointed out that the circumstances of *Governors and Guardians of the Foundling Hospital v Crane* [1911] 2 KB 367 were unusual, but that cannot alter the fact that the reasoning of this court in *Longman's* case is that the subject to contract qualification imposed in negotiations is inimical to an intention to be bound forthwith prior to completion. So also here.

[56] I therefore conclude that the judge was right to find that there has been no delivery and accordingly the second ground of appeal fails.

GROUNDS 3–6

[57] In the light of these conclusions, it was unnecessary for us to hear, and we did not hear, argument on the further grounds of appeal.

[58] I would dismiss this appeal.

WALLER LJ.

[59] I agree that for the reasons given by Peter Gibson LJ this appeal should be dismissed.

CARNWATH LJ.

[60] I agree. I would only add a brief comment on Bolton Metropolitan Borough Council's procedure for sealing documents, as described in the evidence of Mr Cresswell, assistant borough solicitor and the authorised sealing officer. The judge summarised his evidence as to the sealing procedure as follows:

> 'The seal has to be placed on a document in the presence of the mayor. Mayors have extensive commitments outside the town hall, so there are regular appointments, about once a week, for sealing. Documents have to be made ready for such an opportunity, which may well be in advance of the date on which they are needed. There may be lots of documents to be sealed on one occasion, although on this occasion there was only the one.'

Mr Cresswell in his evidence explained how on certain occasions there might be between 20 and 50 documents for the mayor to seal. Following that sealing process the sealing officer would cause an entry to be made in the sealing book. The judge noted that the entry in this case simply referred to the fact of sealing and said nothing about delivery or otherwise about the legal effect. He said:

> 'That was all that ever happened as regards this document. It went back into the council's custody and remained there until it was disclosed on discovery in the action.'

[61] I would make two points. First, neither we, nor apparently the judge, were referred to any standing orders or internal regulations of the council explaining this procedure or precisely what those involved thought to be its legal significance, although I am sure such a document must exist. I would emphasise how important it is for those directly involved, as well as for the public (and, where a dispute occurs, for the courts) to be able to refer to a formal document which sets out the approved procedures and their legal purpose.

[62] Secondly, I think the mayor might have been surprised to hear it suggested that in carrying out this apparently mechanistic process he was not merely doing something required by the council's internal procedures, but was taking an irrevocable step in relation to other parties. Indeed, if that were the effect, the bulk procedure described by Mr Cresswell would be difficult to support. This consideration cannot, of course, influence our interpretation of the Law of Property Act 1925. The council might have got its procedures wrong. However, it illustrates the practical significance of the issue in relation to s 74 of the 1925 Act, and the importance for authorities of knowing what is the correct legal position. I hope that our decision in this case will help to achieve that result.

Appeal dismissed. Permission to appeal refused.

Melanie Martyn Barrister.

29 March 2004. The Appeal Committee of the House of Lords refused permission to appeal.

Maresca v Motor Insurance Repair Research Centre

EMPLOYMENT APPEAL TRIBUNAL

RIMER J

12 NOVEMBER 2003, 6 FEBRUARY 2004

Employment tribunal – Procedure – Review of tribunal's decision – Application for relief from sanction – Proper approach to application for review of tribunal's decision to strike out for non-compliance with directions – CPR 1.1(1), 3.9 – Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171, reg 10, Sch 1, r 13.

The applicant was dismissed by his employer. He made an application to the employment tribunal alleging unfair dismissal. The tribunal chairman made a case management order under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. The employee changed his arrangements for legal representation and there was no compliance with the case management order within the time limit. The chairman subsequently struck out the employee's application. The employee sought a review of that decision under r 13[a] of Sch 1 to the 2001 regulations which empowered the tribunal to review any decision on the grounds, inter alia, that the interests of justice required it. Regulation 10[b] of the 2001 regulations provided, in terms which mirrored those of CPR 1.1(1)[c], that the overriding objective of the rules in the schedules to the regulations was to enable tribunals to deal with cases justly. The chairman refused the review because the order had not been complied with and no explanation for the failure had been provided, concluding that the application for review had no reasonable grounds of success. The employee appealed, inter alia, against the refusal to review, contending that his request for review had been in substance a request to be given the opportunity of arguing that he should be relieved from the sanction imposed by that order and that the chairman should therefore have had regard to the considerations set out in CPR 3.9[d] which provided that on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court would consider all the circumstances which included not only the factors which the chairman had, in effect, taken into account, namely whether the failure to comply was intentional, whether there was a good explanation, and whether the failure had been caused by the party or his legal representative, but also factors which had not been taken into account, such as whether the application for relief had been made promptly, whether the trial date could still be met, the effect which the failure to comply had had on each party and the effect which the granting of relief would have on each party.

a Rule 13, so far as material, is set out at para 18, below

b Regulation 10 is set out at para 20, below

c CPR 1.1 provides, so far as material: '(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.'

d CPR 3.9 is set out at para 30, below

Held – Although CPR 3.9 was not to be regarded as impliedly incorporated into the 2001 rules, the approach of an employment tribunal to the exercise of its jurisdiction to review a decision ought to be in line with the approach which the High Court and county court would or should adopt in a like case. CPR 3.9 spelled out how to deal 'justly' with applications for relief from sanctions imposed for failure to comply with any rule, practice direction, or court order. In dealing with a like application, an employment tribunal had to have regard to like considerations. Accordingly, in the instant case, in dealing with the application for a review, the chairman ought to have had regard to all the factors in CPR 3.9. The appeal against the refusal of a review would therefore be allowed, and the employment tribunal directed to hear the application for a review of the decision to strike out (see paras 31–33, 36–40, below).

Goldman Sachs Services Ltd v Montali [2002] ICR 1251 applied.

Notes

For the overriding objective of the CPR, and for relief from sanctions, see 37 *Halsbury's Laws* (4th edn reissue) paras 60, 458.

For the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171, reg 10, Sch 1,r 13, see 7 *Halsbury's Statutory Instruments* (2003 issue) 397, 403.

Cases referred to in judgment

Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167, CA.
De Keyser Ltd v Wilson [2001] IRLR 324, EAT.
Goldman Sachs Services Ltd v Montali [2002] ICR 1251, EAT.
Logicrose Ltd v Southend United Football Club Ltd [1988] 1 WLR 1256.
National Grid Co plc v Virdee [1992] IRLR 555, EAT.

Appeal

Antonio Maresca appealed against (i) an order made on 14 January 2003 by the chairman of an employment tribunal (Mrs J Hill) striking out his originating application dated 8 October 2002 alleging unfair dismissal by his former employer, The Motor Insurance Repair Research Centre, for failure to comply with a directions order made on 5 November 2002; and (ii) the refusal of the chairman to review the order of 14 January. The facts are set out in the judgment.

Katherine Reece of *Slater Ellison*, Bury for Mr Maresca.
Matthew Sheridan (instructed by *Olswang*, Reading) for the Centre.

Cur adv vult

6 February 2004. The following judgment was delivered.

RIMER J.

1. This is an appeal by Mr Antonio Maresca against (i) an order made on 14 January 2003 by the chairman of an employment tribunal striking out Mr Maresca's originating application on the grounds of his failure to comply with a directions order of 5 November 2002, and (ii) the chairman's refusal to review that order. The sole respondent to Mr Maresca's application, and now to this appeal, is the Motor Insurance Repair Research Centre (the Centre).

THE FACTS

2. Mr Maresca presented his originating application on 8 October 2002. He had been employed by the Centre as a research engineer from 10 June 2002 until his dismissal on 9 July 2002. He alleged that his dismissal was automatically unfair as being a consequence of a disclosure he had made to the Centre within the terms of the Public Interest Disclosure Act 1998. He alleged that he was summoned to a meeting on 9 July 2002, at which he was summarily dismissed but was refused the reasons why. He alleged that the Centre had failed to follow its disciplinary procedure when dismissing him. He asked to be reinstated in his employment.

3. The Centre served its IT3 on 1 November 2002. It denied it had dismissed Mr Maresca for the reason he had alleged, but said it had done so because of his attitude and behaviour. It said it was only obliged to give him one week's notice, but that as a gesture of goodwill had paid him until 31 July 2002. It denied that its disciplinary procedure formed part of his contract, but said that, if it did, any operation of it would have been completed by 31 July and would have made no difference to the dismissal.

4. On 5 November 2002, the chairman made a standard form interlocutory order in the proceedings. Neither party was present or represented, but the order recited that the chairman had reviewed the file. It was expressed to be made under r 4 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001, SI 2001/1171 (the regulations). Rule 4 is headed 'Case management' and is in the rules contained in Sch 1 to those regulations (the rules). Rule 4(1) confers a general power on an employment tribunal, of its own motion, to give such interlocutory directions as appear to it to be appropriate. More specifically, r 4(5)(b) empowers it to require one party to grant to another such disclosure or inspection (including the taking of copies) of documents as might be granted by a court under r 31 of the CPR.

5. By para 1 of the order, each party was required to give disclosure by the service of lists of documents within 28 days of the order date, followed by inspection within seven days. By para 2, Mr Maresca was required to serve the Centre with a schedule of his loss within the same period. By para 3(a), directions were given for the preparation of bundles, but no time limit was specified for doing so. By para 3(b), directions were given for the exchange of witness statements no later than the 14 days prior to 'the first date of hearing'. By paras 3(c) and (d), the parties were directed to agree a chronology of events, and to prepare an agreed statement of issues, but again no time limit was specified. The order concluded with the warning that—

> 'Failure to comply with this order may be regarded by the tribunal as unreasonable conduct of the proceedings. This could result in an order for costs or the originating application/notice of appearance being struck out.'

6. That warning reflected that which is empowered by r 4(8), which provides:

> 'If a requirement under paragraph (1) or (5) is not complied with, the tribunal—(a) may make an order in respect of costs under rule 14(1)(a), or (b) before or at the hearing, may strike out the whole or part of the originating application, or, as the case may be, the notice of appearance, and, where appropriate, direct that a respondent be debarred from defending altogether; but a tribunal shall not exercise its powers under this paragraph unless it has sent notice to the party who has not complied with the requirement giving him an opportunity to show cause why the tribunal

a should not do so, or the party has been given an opportunity to show cause orally why the powers conferred by this paragraph should not be exercised.'

7. Mr Maresca did not comply with those parts of the order requiring him to take steps within 28 days: he served neither a list of documents nor a schedule of his claimed loss within that period. The Centre served its list of documents on 2 b December. On 4 December, Olswang, the Centre's solicitors, wrote to Mr Maresca's solicitors, Brook Street Des Roches (BSDR). They referred to his failure to serve his list and schedule in compliance with the order of 5 November and to the warning at the end of that order. They asked for the list and schedule by return. There was no response to their letter. On 16 December, they wrote to the tribunal, referred to the order of 5 November and explained that c Mr Maresca had failed to comply with it. They said that they had written to BSDR, but had received no response. They expressed the view that this amounted to unreasonable conduct of the proceedings and asked the tribunal to strike Mr Maresca's application out.

8. On 18 December, BSDR wrote to the tribunal saying they were no longer d instructed by Mr Maresca, who would now be representing himself. They gave it his address for the purposes of future correspondence.

9. Olswang's letter of 16 December resulted in a letter of 20 December from Miss V Bly (on behalf of the Regional Secretary of Tribunals) to BSDR, who were, I presume, still on the file as being Mr Maresca's solicitors. Miss Bly wrote:

e 'The file relating to this matter has been referred to a Chairman who has requested me to inform you that under the powers conferred upon by Rule 4(8) he proposes to make an order that the Originating Application be struck out on the ground that you have failed to comply with the order dated 5 November 2002. If you wish to say anything as to why such an order f should not be made, you should write to this office giving your reasons by 8 January 2002 [sic].'

The '8 January 2002' would have been understood as a mistaken reference to '8 January 2003'. Miss Bly sent a copy of her letter to Olswang.

10. On 24 December 2002, Slater Ellison (SE), new solicitors for Mr Maresca, g wrote to the tribunal, their letter arriving on 30 December. They explained that they had 'virtually overnight' taken over the conduct of Mr Maresca's application and said:

h 'We understand that the Tribunal has indicated that it wishes representations from [Mr Maresca] with regards to a possible striking out because he has not completed the appropriate qualifying period, namely one year, for an unfair dismissal claim.'

They provided an explanation as to why the application ought not to be struck out on that ground. Of course, the threatened strike-out was nothing to do with j the point that SE sought to meet in their letter, and the inference is that they had not seen the tribunal's letter of 20 December, but had simply had it inaccurately explained to them. Miss Bly replied to SE's letter on 2 January 2003 as follows:

'Further to your letter of 24 December 2002, a Chairman (Mrs J Hill) has instructed me to advise you that the proposed strike out warning relates to a failure to comply with the Tribunals order not a jurisdictional issue. No

decision will be made as to whether the matter should be struck out until 8 January 2003 to allow you time to address the correct issue.' *a*

11. There was no response to that from anyone before 8 January and on 14 January the chairman, Mrs Hill, made an order striking Mr Maresca's originating application out for want of compliance with the order of 5 November 2002. The order was expressed to be made in exercise of the r 4(8) powers. It was accompanied by four paragraphs of extended reasons, which recited the presentation of the originating application, the order of 5 November, the letter of 20 December and the fact that no reasons had been provided in answer to that letter. *b*

12. SE learnt of that order by 15 January, and Mr Bryan Slater, a partner, wrote to the tribunal on the same day. He expressed his surprise at the order, and referred to SE's letter of 24 December, which he said had not been returned in the post. He asked the tribunal 'to urgently reconsider the order bearing in mind the hearing is fixed for 28 January 2003'. He added: 'We ask for an immediate review.' He then wrote: *c*

'We received the attached letter of 2 January 2003 referring to our letter of 24 December 2002, yet in our letter of 24 December 2002 we provide further and better particulars of the claim. We do not understand where we have gone wrong here and we are ready to exchange witness statements. May we please hear from you by the end of the day. We have no documents to exchange other than those documents which the Respondents will have themselves. There has been no offer to exchange a list of documents by Olswang or to exchange witness statements. We have copied in this letter to Olswangs. We have no note on file whether we copied in our 24th December 2002 letter to Olswangs. We took on this case late and have done our very best to comply with tribunal orders as we understood them and to prepare the case in time for 28th January 2003.' *d* *e* *f*

13. Mr Slater's expression of surprise is surprising. He admits receiving the letter of 2 January, which had made clear that the threat Mr Maresca was facing was a strike-out for non-compliance with an order. He followed his letter of 15 January with a further letter to the tribunal on the same day. He wrote:

'... we will be telephoning the tribunal this afternoon to find out exactly where we have gone wrong and in the alternative or a review of the decision to strike out perhaps that tribunal would allow a further 24 hours to correct any procedural errors that have been made. This is a very important case and is not only about compensation, it is a whistle blowing case and it is in the interest of justice and in the public interest that the events at the Respondents premises, where allegations of fraud are being made are aired publicly. This case turns on whether crash tests of motor vehicles are being conducted correctly. We do all we can to plead that consideration be given again to the striking out order.' *g* *h*

14. Miss Arnold, on behalf of the Regional Secretary, responded to SE on the same day, 15 January. She wrote: *j*

'Thank you for your letter of 15 January 2002 [sic] which has been passed to a chairman (Mrs J Hill) who directs me to reply as follows. Your request for a review is refused. The letter of 8 [sic] January 2002 [sic] made it entirely clear that the letter of 24 December 2002 did not address the concerns of the

tribunal. It referred specifically to the tribunal's order. The respondent complied with the order, albeit directed to the applicant's former solicitors, when they were still on the record. Further, the applicant was sent the "show cause" letter personally on 20 December 2002. The applicant also failed to state why the interlocutory order of 5 November 2002 was not complied with.'

The reference to the letter of 8 January 2002 would have been understood as a careless reference to that of 2 January 2003. SE made a further request for a review on 16 January, when it also sent the tribunal a seven-page witness statement from Mr Slater in support of Mr Maresca's application to set aside the decision of 14 January.

15. Mr Slater explained in his statement that Mr Maresca had been represented first by Poole & Co and then by BSDR. Mr Maresca instructed Mr Slater to act for him on 20 December 2002, told him that the hearing was on 28 January 2003 and that he would send him the paperwork. On 20 December, he faxed Mr Slater a bundle of documents, including a copy of the order of 5 November. Mr Slater noted that, on the day he received it, Mr Maresca 'was unfortunately already in breach of the order by some seventeen days'. He says he was unaware at that time of the tribunal's 'order' of 20 December requiring Mr Maresca to show cause. On 23 December, Mr Maresca sent Mr Slater an e-mail setting out the detail of his case, and asking him to 'Please advise of intended action ref letter from Tribunal regarding dismissal of case', plainly a reference to the tribunal's letter of 20 December. Mr Slater says he did not know what Mr Maresca was referring to, so he telephoned him and Mr Maresca explained that he had been required to provide details of his claim by 8 January or it would be 'dismissed'. Mr Slater understood this to mean it would be struck out. Mr Slater has no note of it but 'thinks' he telephoned the tribunal on 24 December to ascertain whether a strike-out was proposed, but as it was Christmas Eve he could not get the information. He then sent his letter of 24 December. On 6 January 2003, he received the tribunal's reply of 2 January. His explanation of his reaction to that letter is that:

'17 The letter is very brief. It does not make it explicitly clear that directions have been breached and that a show cause order has already been made. It does not specifically refer to either the order of 5 November 2002 or to the order of 20 December 2002. The tribunal presumed that I had the information at my fingertips. In reality I was working without a proper record of how the letter of 2 January had come about.

18 I thought I had complied with the striking out warning and continued to seek instructions from [Mr Maresca] with regards to his evidence, losses and disclosure. I had no idea that there was to be a strike-out for failing to comply with disclosure and saw it [sic]. I had it firmly in my mind that I had attended to the matter in so far as the 8 January 2003 deadline was concerned. I put the letter aside as requiring further consideration in conjunction with a further look at the file.'

16. Following the receipt on 15 January of the order of 14 January, Mr Slater says: 'It was still not clear to me what had happened.' If he had read the order of 14 January with care, it would have been clear, because the extended reasons in it spelt it out. He says he spoke further to Mr Maresca and 'insisted that I received the papers'. He says that Mr Maresca complied and that it was—

'not until 16 January that I realised how a breach had come about with a resulting strike-out. Had I seen the package of papers in exhibit 1 when the letter from the tribunal of 2 January had arrived I would have seen to it that compliance be effected by the due date of 8 January.'

That package included the tribunal's letter of 20 December to BSDR. It appears from para 8 of Mr Slater's statement that BSDR had sent that letter to Mr Maresca on 3 January, but Mr Slater expressed his view that his client had not appreciated its significance, otherwise he would have ensured that Mr Slater saw it before 16 January. He said:

'22 Matters are always easy with hindsight. When I received the tribunal's letter of 2 January I could have telephoned the tribunal for clarification. I did not. I took it wrongly that I had complied with the tribunal order.'

17. Mr Slater therefore asked for a review of the order of 14 January, saying that the circumstances were exceptional. The review was sought pursuant to r 13 of the rules. The exhibits to his witness statement included Mr Maresca's schedule of loss (£46,250) and his list of documents (22 items). Mr Slater said that both had been served on Olswang on 16 January, that he was in a position to exchange witness statements and that in his view, if the tribunal saw fit, the application could still be tried on 28 January. Apart from documents arising out of, and subsequent to, the application to the tribunal, the list comprised Mr Maresca's CV, two memoranda and ten letters passing between the parties' solicitors.

18. Rule 13 of the rules provides, so far as material, as follows:

'Review of tribunal's decision

(1) Subject to the provisions of this rule, a tribunal shall have power, on the application of a party or of its own motion, to review any decision on the grounds that—(a) the decision was wrongly made as a result of an error on the part of the tribunal staff; (b) a party did not receive notice of the proceedings leading to the decision; (c) the decision was made in the absence of a party; (d) new evidence has become available since the conclusion of the hearing to which the decision relates, provided that its existence could not have been reasonably known of or foreseen at the time of the hearing; or (e) the interests of justice require such a review ...

(4) An application for the purposes of paragraph (1) may be made at the hearing. If no application is made at the hearing, an application may be made to the Secretary on or after the date of the hearing, but within 14 days of the date on which the decision was sent to the parties. Such application must be in writing and must state the grounds in full.

(5) An application for the purposes of paragraph (1) may be refused by the President or by the chairman of the tribunal which decided the case or by a Regional Chairman if in his opinion it has no reasonable prospect of success.

(6) If such an application is not refused under paragraph (5) it shall be heard by the tribunal which decided the case, or—(a) where it is not practicable for it to be heard by that tribunal, or (b) where the decision was made by a chairman acting alone under rule 15(8), by a tribunal appointed by either the President or a Regional Chairman.

(7) On reviewing its decision a tribunal may confirm the decision, or vary or revoke the decision; and if it revokes the decision, the tribunal shall order a re-hearing before either the same or a differently constituted tribunal.'

19. It would appear to me that the only basis on which a review might arguably be justified would be that under r 13(1)(e), namely that the interests of justice required it. On 20 January 2003, Mrs Hill sent both parties her extended reasons for refusing to review her decision of 14 January. She set out the history of the matter and summarised her reasons as follows:

'10 ... Whatever the merits of the case might be, the issue before the tribunal in deciding whether to strike out the claim, related to the failure to comply with the tribunal's order. No explanation has ever been given as to why the orders were not complied with. No explanation is before the tribunal now. Regardless of whose fault it might be, whether the applicant's first or subsequent solicitors, the fact remains that there has been non-compliance with the tribunal's order of 5 November 2002 without any explanation. The application for review is therefore refused as it has no reasonable grounds of success.'

20. On 21 February 2003, Mr Maresca filed a notice of appeal against the tribunal's decision of 14 January, but not against the refusal to review it. The ground was that the tribunal erred in law by failing to act reasonably and fairly in its duty to consider the provisions of the CPR and its effect on the overriding objective. Reference was made to reg 10 of the regulations, which provides that the overriding objective of (inter alia) the rules is to enable tribunals to deal with cases justly. Regulation 10 is as follows:

'Overriding objective

(1) The overriding objective of the rules in Schedules 1, 2, 3, 4, 5 and 6 is to enable tribunals to deal with cases justly.

(2) Dealing with a case justly includes, so far as practicable—(a) ensuring that the parties are on an equal footing; (b) saving expense; (c) dealing with the case in ways which are proportionate to the complexity of the issues; and (d) ensuring that it is dealt with expeditiously and fairly.

(3) A tribunal shall seek to give effect to the overriding objective when it—(a) exercises any power given to it by the rules in Schedules 1, 2, 3, 4, 5 and 6; or (b) interprets any rule in Schedules 1, 2, 3, 4, 5 and 6.

(4) The parties shall assist the tribunal to further the overriding objective.'

21. Reliance was placed upon CPR Pt 3, and the power it confers on a court to extend or shorten a time for compliance with any rule, practice direction or court order; and upon r 3.9 of the CPR and the factors to which it requires the court to have regard on an application for relief from any sanction imposed in consequence of a failure to comply with any rule, practice direction or court order.

22. On 31 March, the registrar of this appeal tribunal notified SE that in her opinion the notice of appeal identified no error of law in the decision of 14 January and that therefore this appeal tribunal did not have jurisdiction to entertain the appeal. She said that, in accordance with r 3(7) of the Employment Appeal Tribunal Rules 1993, SI 1993/2854 (as amended by r 3 of the Employment Appeal Tribunal (Amendment) Rules 2001, SI 2001/1128) (the EAT rules), no

further action would be taken on it. She drew attention to r 3(8) and (10) of the EAT rules.

23. That led to the filing by Mr Maresca on 11 April 2003 of an amended notice of appeal. Its purpose was to challenge not just the order of 14 January, but also the refusal to review it. The amended notice alleged that the tribunal's decision on the review application was perverse in the light of Mr Slater's statement, the contention being that no tribunal properly directed in law could have made the decision on the review which was made. It led to the setting down of the appeal before a judge under r 3(10) of the EAT rules. The outcome was that Judge McMullen QC directed that the appeal should be set down for a full hearing before a judge sitting alone. The Centre served its answer to the appeal on 10 October 2003.

THE ISSUES

24. Miss Katherine Reece appeared for Mr Maresca and Mr Matthew Sheridan for the Centre. Miss Reece submitted that the chairman was in error both in making the order of 14 January 2003 and in refusing to review that decision. I will deal separately with each head of complaint.

(a) The order of 14 January 2003

25. I cannot see any basis on which this order can be criticised. The order of 5 November 2002 had been properly made, and required Mr Maresca to serve a list of documents and a schedule of loss within 28 days. Those orders were made because compliance with them was regarded as necessary for the fair disposal of Mr Maresca's application. If he did not consider that they were properly made, it was open to him to apply under r 4(7) of the rules for their variation or discharge. He made no such application, nor has he ever otherwise questioned their propriety, and so it was his duty to comply with them. Orders of tribunals are required to be complied with, and any failure to do so is likely to frustrate the intention behind them. If it is the applicant who fails to comply and who, so far as the tribunal is aware, is otherwise doing nothing to progress his application, the tribunal is also entitled to presume (although such presumption will be rebuttable) that he has no wish to progress the matter further. Whatever explanation may be available, an unexplained failure to comply with orders such as those made on 5 November is, on the face of it, unreasonable conduct which will or may deserve the visiting of an appropriate sanction on the defaulting party. Rule 4(8) empowers the tribunal to impose appropriate sanctions for a failure to comply with orders made under r 4, including a power to strike out an applicant's application. There may, however, be a good explanation for the non-compliance, which might show that, if the tribunal had originally been minded to strike the application out, it would in fact be inappropriate to do so. For that reason, r 4(8) provides that the tribunal shall not exercise its powers under that rule without first giving the defaulting party an opportunity to show cause why it should not.

26. Having learnt from Olswang of Mr Maresca's default in complying with the order of 5 November, the tribunal was minded, subject to any explanation Mr Maresca might offer, to strike his application out under r 4(8). Paying proper regard to the proviso to r 4(8), by the letter of 20 December 2002 the chairman gave notice to Mr Maresca of the intention to do so, and gave him until 8 January 2003 to show cause why he should not do so. That letter was sent to BSDR, who had written to the tribunal on 18 December saying that they were no longer

instructed for Mr Maresca, and one inference is that the tribunal had not received that letter by the time of its own letter. But this does not require further consideration, because there is no doubt that Mr Maresca himself promptly learnt of the tribunal's letter, since he purported to explain it to Mr Slater on 23 December by e-mail and telephone. For whatever reason, Mr Slater misunderstood the problem, which may have been his fault, Mr Maresca's fault, BSDR's fault or a combination of these: but it was not the tribunal's fault.

27. The result was that Mr Slater wrote his letter of 24 December, which sought to defend an attack that was not being made. On about 3 January, Mr Maresca received from BSDR the tribunal's letter of 20 December, but did not promptly provide a copy to SE. Having received SE's letter of 24 December, the tribunal wrote its letter of 2 January in reply, making it clear (i) that the threatened strike-out related to a failure to comply with an order of the tribunal, (ii) that it had nothing to do with the point argued in SE's letter, and (iii) that SE had until 8 January to address the real point. Mr Slater received that letter on 6 January. Having read it, he should have appreciated each of points (i)–(iii), and should immediately have contacted Mr Maresca and/or the tribunal for clarification of the precise nature of the relevant non-compliance, although in fact he ought to have been able to work it out for himself. He ought by then to have acquired a proper grasp of the history of the case, which was not extensive; he had had the order of 5 November since 20 December; and I interpret his witness statement as recognising that he appreciated at that stage that Mr Maresca had not complied with it. Again, the tribunal was not at fault in the way it handled the matter. It had derived from SE's letter of 24 December that SE had misunderstood the basis of the threatened strike-out, it had put SE right and had given them a second chance to show cause. It was entitled to expect SE to read its letter and to understand its simple message. It was not the tribunal's fault that Mr Slater misunderstood and/or ignored it. Had Mr Slater read it properly, and understood it, I infer that he would have had sufficient time before 8 January to prepare Mr Maresca's list of documents and schedule of loss and to make his representations to the tribunal as to why it should not strike out the application. His statement shows how quickly he was able to deal with matters once he had learnt of the order of 14 January.

28. In the event, SE and their client did nothing to avert the strike-out. In those circumstances, the tribunal's jurisdiction under r 4(8) to make its order of 14 January was clear. Mr Maresca was in breach of the orders of 5 November, and the tribunal had gone through the procedure specified in the proviso to r 4(8) but had received no response to its second warning letter. Miss Reece was unable to identify any basis for any criticism of the order of 14 January, and I consider there is none. I dismiss Mr Maresca's appeal against that order.

(b) The tribunal's refusal to review the decision

29. The bulk of the argument centred on this limb of Mr Maresca's appeal—one added by amendment. It was not in dispute that the tribunal's power in r 13(1) to review a 'decision' extended to reviewing a strike-out order under r 4(8) such as that made on 14 January (see reg 2(2) of the regulations). Nor, despite the fact that the chairman had a discretion to refuse a review 'if in his opinion it has no reasonable prospect of success' (r 13(5) of the rules), was it suggested that the subjective exercise of judgment which that involves was not open to challenge on appeal. I understood it to be accepted that, if it could be shown that the chairman erred in law in arriving at the conclusion she did, then

her decision could be the subject of an appeal to this appeal tribunal. I understood it also to be agreed that if the chairman had acceded to the request for a review of the decision, it would not have been within her jurisdiction there and then simply to have upheld, revoked, discharged or varied the order of 14 January. What she should in that event have done was to direct a hearing at which both parties could be heard. I understood both parties also to agree that any such hearing would be before the same chairman, although I heard no argument on whether that is in fact a correct reflection of the combined effect of the provisions of rr 13(6) and 15(8) of the rules.

30. Miss Reece's submission was that Mr Maresca's request for a review of the order of 14 January was in substance a request to be given the opportunity of arguing that he should be relieved from the sanction imposed by that order. She submitted that, in dealing with the request, the chairman should therefore have had regard to the considerations set out in paras (a)–(i) of r 3.9 of the CPR. Rule 3.9 reads:

> 'Relief from sanctions
>
> (1) On an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order the court will consider all the circumstances including—(a) the interests of the administration of justice; (b) whether the application for relief has been made promptly; (c) whether the failure to comply was intentional; (d) whether there is a good explanation for the failure; (e) the extent to which the party in default has complied with other rules, practice directions, court orders and any relevant pre-action protocol; (f) whether the failure to comply was caused by the party or his legal representative; (g) whether the trial date or the likely trial date can still be met if relief is granted; (h) the effect which the failure to comply had on each party; and (i) the effect which the granting of relief would have on each party.
>
> (2) An application for relief must be supported by evidence.'

31. Miss Reece submitted that the extended reasons for the decision give no indication that the chairman went through this exercise. Paragraph 10 shows that the chairman refused the application for a review because (i) there had been a failure to comply with the order of 5 November, and (ii) no explanation for the failure had been provided. Those two points are unanswerable, since although Mr Slater provided an explanation of what had happened since SE was instructed on 20 December, he made no attempt to explain why the order was not complied with in the first place, or whose fault that was, omissions which go to three of the matters identified in r 3.9, namely those in paras (c), (d) and (f). But Miss Reece submitted that, even so, there is no basis for a conclusion that the chairman also took into account the other matters referred to in r 3.9, in particular: (i) that the application had been made promptly (para (a)); (ii) that (as Mr Sheridan was disposed to concede) it was at least probable that, as at 16 January, the trial date of 28 January could still be kept if relief were to be granted with promptness (para (g)); (iii) that, given the point in (ii), the failure to comply timeously with the order of 5 November had probably not materially disadvantaged the Centre (para (h)); and (iv) the effect on each party according to whether or not Mr Maresca was granted the relief he wanted (para (i)).

32. Miss Reece's submission was, therefore, that the inference from the extended reasons is that, in dealing with Mr Maresca's application, the chairman had focused on what was (in substance) merely one of the r 3.9 factors, which she

regarded as by itself fatal to any hope of success on a review. There is no indication that she took account of any of the other r 3.9 factors, and the correct inference is that she failed to consider whether, once a proper balancing of all of them had been carried out, Mr Maresca might have had at least an arguable case for being granted relief against the order of 14 January. That being so, Miss Reece submitted that the chairman misdirected herself: she arrived at her opinion without taking all relevant considerations into account, which was an error of law. Had the chairman correctly directed herself, she could only have concluded that the type of balancing exercise required by Mr Maresca's application was one which could at least arguably have led to the grant of relief against the striking-out order. She submitted that this appeal tribunal should allow the appeal and direct the holding of a review hearing at which both parties could make representations as to the grant or refusal of relief.

33. Of course, Miss Reece's submission depends on the proposition that, in dealing with Mr Maresca's application, the chairman ought to have regarded the r 3.9 factors as material to the exercise she was performing. She recognised that r 3.9 is not expressly incorporated into the rules, but said that the tribunal's duty to have regard to the overriding objective in reg 10 necessarily required it to treat the approach identified in r 3.9 of the CPR as analogously applicable to the way an employment tribunal should approach a like question.

34. Mr Sheridan, for the Centre, acknowledged that the principles which apply to the rules of civil procedure applicable in the High Court and county court at least inform the principles which are to be applied in employment tribunals. He recognised that that found support in the decision of this appeal tribunal in *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251. After setting out the 'overriding objective' provisions in reg 10 of the regulations, Judge Peter Clark said (at 1256 (para 26)):

> 'That, it seems to us, is the clearest possible indication that when exercising any power under the Rules, as here, the employment tribunal will follow the same principles as those spelt out in the Civil Procedure Rules.'

35. Mr Sheridan submitted, however, that there is still no basis on which it can be said that the specific provisions of r 3.9 have been impliedly imported into the rules, and therefore no basis for a criticism of the chairman that she did not methodically consider each of the r 3.9 matters. His submission was that this was a case in which there had been an unexplained failure to comply with the order of 5 November, the order of 14 January was one which was empowered by r 4(8) of the rules, the application for a review involved an appeal to the exercise of the chairman's discretion and there is no basis on which its exercise can be criticised. He said that it can only be criticised if it was perverse, or an error of law can be identified, and that Mr Maresca shows neither. He said that it was relevant to have regard to the fact that cases in the employment tribunal were expected to be brought within a short period after the events complained of, and the whole system was geared towards dealing with cases expeditiously and relatively informally. In this case, the trial date had been fixed for 28 January, which was in line with the expedition to be expected in employment tribunal applications, and the chairman's response to Mr Maresca's application on 15/16 January—against the background of a failure to explain his non-compliance with the order of 5 November—was incapable of being subjected to criticism. He said that the key point, which rightly carried the day, was the failure to provide an explanation for

the default, which entitled the chairman to assume that the original default was contumacious.

36. I have come to the conclusion that, in principle, Miss Reece is correct that, in dealing with the application before her, the chairman ought to have had regard to the r 3.9 factors. She should have asked herself whether, taking them all into account, Mr Maresca had a reasonable prospect of persuading the tribunal on an inter partes hearing that he should be relieved from the finality of the striking-out order.

37. I do not arrive at that conclusion on the basis that r 3.9 is to be regarded as impliedly incorporated into the rules, which it is not. But I derive assistance for this conclusion not just from the decision in the *Goldman Sachs* case (to which I shall come) but also from the earlier judgment delivered by Wood J (the President) on behalf of this appeal tribunal in *National Grid Co plc v Virdee* [1992] IRLR 555. The *National Grid* case was not cited to me, but as it is in line with what I anyway derive from the *Goldman Sachs* case, I did not consider it necessary to invite counsel to address me on it. The issue in the case was as to the correct approach to be adopted by an employment tribunal in exercising the jurisdiction conferred by a predecessor of r 4(8) of the rules, which was in similar, although not identical, terms. It was held that the jurisdiction should be exercised in accordance with the principles followed by the county court and the High Court.

38. The decision does not require any closer consideration, because it was decided in 1992, during the currency of the Rules of the Supreme Court and County Court Rules, whereas now the practice of the High Court and county court is governed by the CPR. In particular, it had regard to authorities on questions of practice and procedure which, since the CPR, cannot be regarded as providing safe guidance as to the disposition of similar questions. Whilst, therefore, the closer reasoning of that decision provides no direct help to the disposition of this one, I do regard it as supporting Miss Reece's proposition that an employment tribunal's approach to the exercise of the jurisdiction the chairman was asked to exercise by Mr Maresca should be in line with the approach which the High Court and county court would or should adopt in a like case. I cannot think that the introduction of the CPR has resulted in the employment tribunals being left to develop their own separate set of principles. I prefer the view that, as Judge Clark said in the *Goldman Sachs* case, employment tribunals must now exercise their powers under the rules in accordance with the same principles which apply under the CPR. As he said, that is solidly supported by the express incorporation into reg 10 of an 'overriding objective' in terms which, in all material respects, mirror those of r 1 of the CPR. Rule 3.9 is a provision in the CPR which spells out in full the particular considerations to which a court must have regard when dealing with a particular type of application—in other words it is spelling out how to deal with such applications 'justly' (see r 1.1(1) of the CPR). In my view, it follows that, in dealing with a like application, an employment tribunal must have regard to like considerations.

39. Accordingly, I accept Miss Reece's submission that the chairman misdirected herself in the manner in which she disposed of the request for a review. Her extended reasons show she had regard to (in effect) just one aspect of the r 3.9 factors, but not the others. The factor to which she did have regard is a very important one, but it does not follow that, by itself, it was inevitably fatal to the success of a review application. Another important consideration was that, by 16 January, Mr Maresca had provided both the discovery and the loss schedule, and that as at that date, if relief were to be granted promptly (which

would involve a review hearing being held within a matter of days), the trial date of 28 January could probably still be kept. That is also a very important consideration, as Lindsay J (the President) made clear in the judgment he delivered on behalf of this appeal tribunal *De Keyser Ltd v Wilson* [2001] IRLR 324. Lindsay J cited (at 328 (para 24)) from the judgment of Chadwick LJ in *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 at 193 (para 54). Part of the citation reads:

> '... I would allow that appeal on a second, and additional, ground. I adopt, as a general principle, the observations of Millett J in (*Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256), that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the court; and that, accordingly, a party is not to be deprived of his right to a proper trial as a penalty for disobedience of those rules, even if such disobedience amounts to contempt for or defiance of the court, if that object is ultimately secured, by (for example) the late production of a document which has been withheld.'

As at 16 January, Mr Maresca had provided, albeit very belatedly, what had been required of him by the order of 5 November, and the considerations that Chadwick LJ there explained were ones which would, in my view, be of high relevance in considering whether the order of 14 January ought to be reviewed.

40. For these reasons, I have concluded that the chairman erred in law in arriving at her decision to refuse to allow Mr Maresca the opportunity of arguing for a review of the order of 14 January. Her error was to fail to take account of all the matters she should have taken into account, which is an error of law when it comes to the exercise of a discretion. Lindsay J explained the position in the *De Keyser* case [2001] IRLR 324 at 328 (para 21):

> 'Firstly, it is in our view an error of law for an employment tribunal, when exercising a discretion, to leave out of account material which should have been taken into account or to take into account matter which should have been left out. That is common ground. Secondly, if that can be shown to have occurred, then the Employment Appeal Tribunal is at liberty to set aside the exercise of the discretion as being in error in law. Thirdly, if the discretion is thus set aside, the Employment Appeal Tribunal can either remit the matter for fresh or further consideration by the employment tribunal or, if the case is plain enough on the material before the Employment Appeal Tribunal, the Employment Appeal Tribunal can itself exercise the discretion that would otherwise have fallen for exercise by the tribunal below.'

41. Having so concluded, I could, having allowed the appeal, simply remit to the same chairman for reconsideration by her Mr Maresca's application for the opportunity to argue at a hearing that the order of 14 January should be reviewed. I do not propose to do that, since I consider that I am in as good a position to deal with that aspect of the matter here and now. I have come to the view that it can at least be said on Mr Maresca's behalf that the carrying out of the balancing exercise required by a due consideration of the r 3.9 factors is one on which different minds might well come to different conclusions, being conclusions which could not be said to be wrong. That being so, I consider that Mr Maresca can at least be said to have a reasonable, or realistic—meaning a better than fanciful—chance of success on a review hearing. I propose therefore to allow the

appeal against the refusal of a review and to direct that there shall be a hearing by the employment tribunal of Mr Maresca's application for a review of the decision of 14 January 2003. I have recorded my understanding that the parties are agreed that such hearing should be by the same chairman, but have also indicated that there may perhaps be an issue under the rules as to whether that (or any) chairman could in fact conduct the review alone. In the circumstances I will say no more on the subject: I will leave it to the parties to make such applications to that end in the employment tribunal as may be necessary.

Appeal allowed.

Aaron Turpin Barrister.

B and others v Auckland District Law Society and another

[2003] UKPC 38

PRIVY COUNCIL

LORD HOPE OF CRAIGHEAD, LORD HOBHOUSE OF WOODBOROUGH, LORD MILLETT, LORD SCOTT OF FOSCOTE AND LORD WALKER OF GESTINGTHORPE

4–6 FEBRUARY, 19 MAY 2003

New Zealand – Legal professional privilege – Documents – Law society investigating complaint against law firm – Whether statutory power to requisition documents overriding legal professional privilege – Law Practitioners Act 1982 (New Zealand), s 101(3)(d).

Legal professional privilege – Documents – Law society investigating complaint against law firm – Law firm voluntarily providing privileged documents to law society for limited purpose on express basis that privilege not waived – Whether privilege lost or waived by limited disclosure.

A complaint was made to the defendant law society against the second claimant law firm and the first claimants, who were partners and former partners in the firm. The law society established a complaints committee and sought disclosure of documents in the firm's possession which were subject to legal professional privilege. The firm agreed to the disclosure of the documents to counsel appointed by the law society, subject to their use being restricted and privilege not being waived. Subsequently, the law society appointed a new counsel, but he was not informed of the arrangements relating to the privileged documents, and some of them were disclosed to the law society. The firm called for the return of the documents but the law society refused and served notices requisitioning the documents in its possession and other documents under s 101(3)[a] of the Law Practitioners Act (New Zealand) 1982 which provided that in the investigation of a complaint the complaints committee could require the production for inspection of any books, documents, papers, accounts, or records in the possession or control of the person complained against that related to the subject matter of the inquiry. The firm refused to comply on the basis that the documents were privileged and the claimants commenced proceedings, seeking an order for their return. The law society counterclaimed for a declaration that the firm was obliged to comply with the requisitions. In the High Court the judge held that the 1982 Act did not abrogate legal professional privilege and dismissed the law society's counterclaim. However, he held that counsel for the law society was entitled to retain the documents for the limited purpose for which they had been supplied and on the terms originally agreed. On appeal the Court of Appeal of New Zealand held that privilege was not a good answer to a requisition under s 101 of the 1982 Act. They accepted the high importance of privilege but considered that it was overridden by the even higher public interest in maintaining the integrity of the legal profession. The claimants appealed to the Privy Council. The law society contended, inter alia, that once disclosure had

a Section 101, so far as material, is set out at [25], below

been made the question of privilege was no longer relevant, that it could only be restrained from making use of the information disclosed on the ground that it was confidential, and that the claimants' equitable right to the protection of confidential information was outweighed by the countervailing public interest in having the information made available.

Held – (1) Legal professional privilege was a fundamental condition on which the administration of justice as a whole rested. At common law it was not to be balanced against competing public interests. In the instant case the right to compel production of documents was statutory and therefore the balance between the public interest in the maintenance of the integrity of the legal profession and the public interest in the administration of justice had been struck by Parliament. Section 101(3)(d) of the 1982 Act did not expressly exclude legal professional privilege, nor did it do so by necessary implication, and accordingly, legal professional privilege was a good answer to a requisition under the 1982 Act (see [46], [47], [54], [56], [58], [65], below); *R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526 and *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] 3 All ER 1 applied.

(2) Legal professional privilege was not waived generally because a privileged document was disclosed for a limited purpose only. In the instant case the claim to recover the documents was made on equitable grounds but that did not mean that it had to yield to an overriding countervailing public interest. The documents were both confidential and privileged. Whether a claim to the return of such documents was based on a common law right or an equitable one, the policy considerations which gave rise to the privilege precluded the court from conducting a balancing exercise. A lawyer had to be able to give his client an unqualified assurance, not only that what passed between them would never be revealed without his consent in any circumstances, but that should he consent in future to disclosure for a limited purpose those limits would be respected. In the instant case, save in respect of the agreed use of the documents, privilege had been expressly reserved. Accordingly, the appeal would be allowed (see [68]–[71], [73], [75], below).

Notes

For communications subject to legal professional privilege, see 3(1) *Halsbury's Laws* (4th edn reissue) para 526 and 44(1) *Halsbury's Laws* (4th edn reissue) para 90.

Cases referred to in judgment

A-G for the Northern Territory of Australia v Kearney (1985) 158 CLR 500, Aus HC.
Anderson v Bank of British Columbia (1876) 2 Ch D 644, CA.
Black & Decker Inc v Flymo Ltd [1991] 3 All ER 158, [1991] 1 WLR 753.
Bolton v Corp of Liverpool (1833) 1 My & K 88, 39 ER 614.
Bourns Inc v Raychem Corp [1999] 3 All ER 154, CA.
British Coal Corp v Dennis Rye Ltd (No 2) [1988] 3 All ER 816, [1988] 1 WLR 1113, CA.
Bullivant v A-G for Victoria [1901] AC 196, [1900–3] All ER Rep 812, HL.
Carter v Northmore Hale Davy & Leake (1995) 183 CLR 121, Aus HC.
Goddard v Nationwide Building Society [1986] 3 All ER 264, [1987] QB 670, [1986] 3 WLR 734, CA.
Goldman v Hesper [1988] 3 All ER 97, [1988] 1 WLR 1238, CA.

Holmes v Baddeley (1844) 1 Ph 476, 41 ER 713, LC.
IRC v West-Walker [1954] NZLR 191, NZ CA.
Pearce v Foster (1885) 15 QBD 114, CA.
R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax [2002] UKHL 21, [2002] 3 All ER 1, [2003] 1 AC 563, [2002] 2 WLR 1299.
R v Ataou [1988] 2 All ER 321, [1988] QB 798, [1988] 2 WLR 1147, CA.
R v Bell, ex p Lees (1980) 146 CLR 141, Aus HC.
R v Derby Magistrates' Court, ex p B [1995] 4 All ER 526, [1996] AC 487, [1995] 3 WLR 681, HL.
R v Uljee [1982] 1 NZLR 561, NZ CA.
Southwark and Vauxhall Water Co v Quick (1878) 3 QBD 315, CA.
Waterford v Commonwealth of Australia (1987) 163 CLR 54, Aus HC.
Wilson v Rastall (1792) 4 Term Rep 753, 100 ER 1283, [1775–1802] All ER Rep 597.

Cases referred to in skeleton arguments

Beecroft v Auckland District Court [1999] 3 NZLR 672, NZ HC.
Butler v Board of Trade [1970] 3 All ER 593, [1971] Ch 680, [1970] 3 WLR 822.
Calcraft v Guest [1898] 1 QB 759, [1895–9] All ER Rep 346, CA.
Comfort Hotels Ltd v Wembley Stadium Ltd (Silkin and ors, third parties) [1988] 3 All ER 53, [1988] 1 WLR 872.
Crisford v Haszard [2000] 5 LRC 556, NZ CA.
Daniels Corp International Pty Ltd v Australian Competition and Consumer Commission [2002] 192 ALR 561, Aus HC.
Derby & Co Ltd v Weldon (No 8) [1990] 3 All ER 762, [1991] 1 WLR 73, CA.
Dubai Aluminium Co Ltd v Al Alawi [1999] 1 All ER 703, [1999] 1 WLR 1964.
Guinness Peat Properties Ltd v Fitzroy Robinson Partnership (a firm) [1987] 2 All ER 716, [1987] 1 WLR 1027, CA.
Harley v McDonald, Glasgow Harley (a firm) v McDonald [2001] UKPC 18, [2001] 5 LRC 82, [2001] 2 AC 678, [2001] 2 WLR 1749.
L (a minor) (police investigation: privilege), Re [1996] 2 All ER 78, [1997] AC 16, [1996] 2 WLR 395, HL.
Mann v Carnell (1999) 201 CLR 1, Aus HC.
Marcel v Comr of Police of the Metropolis [1992] 1 All ER 72, [1992] Ch 225, [1992] 2 WLR 50, CA.
Medcalf v Mardell [2002] UKHL 27, [2002] 3 All ER 721, [2003] 1 AC 120, [2002] 3 WLR 172.
R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
R v Chief Constable of the North Wales Police, ex p AB [1997] 4 All ER 691, [1997] 3 WLR 724, DC; *affd* [1998] 3 All ER 310, [1999] QB 396, [1998] 3 WLR 57, CA.
R v Cox (1884) 14 QBD 153, [1881–5] All ER Rep 68, CCR.
R v McClure [2001] 4 LRC 632, Can SC.
Robertson Stromberg, Re (1995) 122 DLR (4th) 433, Sask CA.
Rogerson v Law Society of the Northern Territory (1993) 112 FLR 96, NT CA.
Smith v Jones (1999) 169 DLR (4th) 385, Can SC.
TSB Bank plc v Robert Irving & Burns (a firm) (Colonia Baltica Insurance Ltd, third party) [2000] 2 All ER 826, CA.
Ventouris v Mountain, The Italia Express [1991] 3 All ER 472, [1991] 1 WLR 607, CA.
Webster v James Chapman & Co (a firm) [1989] 3 All ER 939.
Woolgar v Chief Constable of Sussex Police [1999] 3 All ER 604, [2000] 1 WLR 25, CA.

Appeal

The claimants, B and others, being partners and former partners of the law firm, Russell McVeagh McKenzie Bartleet & Co (the firm), and the firm appealed from the decision of the Court of Appeal of New Zealand (Gault, Keith and McGrath JJ, Elias CJ and Tipping J dissenting) on 16 October 2001 ([2002] 1 NZLR 721) allowing the appeal of the Auckland District Law Society and Gary J Judd QC from the decision of Paterson J on 6 July 2000 in proceedings in which the claimants sought the return of documents provided to the Society and its counsel, Mr Judd, in relation to a complaint against the firm, and the Society counterclaimed for a declaration that the firm was obliged to comply with document requisitions made under s 101(3) of the Law Practitioners Act 1982 (New Zealand). Written submissions were made on behalf of the intervener, Frederick William Monteith McElrea. The facts are set out in the judgment of the Board.

Jonathan Sumption QC with *Richard Craddock QC* and *Brian Latimour* (both of the New Zealand Bar) (instructed by *DLA* as agents for *Bell Gully*, Auckland) for the appellants.

Dr Rodney Harrison QC and *Grant Illingworth* (both of the New Zealand Bar) (instructed by *Cruickshanks* as agents for *Glaister Ennor*, Auckland) for the Society.

The Board took time for consideration.

19 May 2003. The following judgment of the Board was delivered.

LORD MILLETT.

[1] This appeal is brought by Russell McVeagh McKenzie Bartleet & Co, an Auckland law firm (the firm), and a number of its present and former partners. They appeal from a judgment of the Court of Appeal of New Zealand given on 16 October 2001 which reversed a judgment of the High Court of New Zealand (Paterson J) dated 6 July 2000. The present appeal is largely a contest between the firm and the Auckland District Law Society (the Society). Partners in the firm are members of the Society.

[2] The main issue is whether the society is entitled under s 101(3)(d) of the Law Practitioners Act 1982 to require the firm to produce privileged documents for the purpose of an inquiry into allegations of professional misconduct. This turns on whether the 1982 Act, which gives the Society power to call for documents from practitioners under investigation, overrides any claim to legal professional privilege which may subsist in them. The judge held that it does not. By a majority (Gault, Keith and McGrath JJ) the Court of Appeal held that it does. Elias CJ and Tipping J dissented ([2002] 1 NZLR 721).

THE FACTS

[3] The facts are fully set out in the judgments below and it is unnecessary for their Lordships to rehearse them at length. The material facts may be summarised as follows.

[4] The individual appellants are legal practitioners who are or have been the subject of complaints to the Society. They include not only present and former partners in the firm but also the solicitor and senior counsel who acted for the firm in defending proceedings brought against it. These arose out of the failure

of partnerships formed by the firm for clients for the purpose of investment in bloodstock. The partner in the firm who had acted in the formation and promotion of the partnerships was a Mr Carran. Following the demise of the partnerships, proceedings against the promoters and their professional advisers were brought in the High Court of New Zealand by many of the investors. All the proceedings were ultimately settled out of court.

[5] Between 1996 and 1998 the Society received nearly 180 complaints against the firm and individual practitioners. They concerned not only formation of the partnerships but also the conduct of the firm's defence of the proceedings which followed their failure. Their Lordships should say at once that the Society has since disposed of most of the complaints without bringing charges. Nevertheless, at the end of 2001 some 39 complaints against 13 practitioners were still outstanding.

[6] The earliest of the complaints was made by Mr McElrea, a former partner who had retired from the firm to become a District Court judge. He had been asked to contribute a substantial sum towards the settlement of the proceedings against the firm and was concerned at the prospect that its professional indemnity insurance might be invalidated by Mr Carran's wrongdoing. He made a confidential report to the Society under the New Zealand Law Society Code of Ethics. In it he alleged that Mr Carran, who by then had ceased to be a partner in the firm, had been guilty of serious professional misconduct. He made no complaint against the firm itself or any other person. He invited the Society to ask the firm for copies of all relevant documents, including privileged material relating to its professional indemnity insurance. Mr McElrea has been given leave to intervene (by written submissions only) in the present appeal in order to support the Society.

[7] The Society duly established a complaints committee to investigate the matters complained of and appointed Mr Stuart Ennor QC as counsel to assist the committee. He was a highly respected and trusted member of the Bar of New Zealand. He has unfortunately since died.

[8] In March 1997 the Society wrote to the firm about the complaint which it had received from Mr McElrea. The Society's letter referred only to his complaint; it did not mention others which the Society had since received. For its part the firm was not then or for some time thereafter aware of any other complaints against the firm or its partners. By its letter the society requested the firm to provide it on a voluntary basis with copies of the documents mentioned by Mr McElrea. Their Lordships note that the Society was not yet seeking to exercise its statutory powers.

[9] The firm replied to the Society's request by letter dated 7 April 1997. The letter is of central importance in this case and their Lordships consider that the material parts of the letter should be set out in full. They read as follows:

> 'May we assure you of the firm's willingness to assist and co-operate in the Society's investigation in respect of Mr Carran. There are, however, preliminary issues which need to be dealt with, which we outline in this letter ... there is still litigation on foot against the firm in respect of the bloodstock partnerships. For this reason, the confidentiality of all of the information held by the firm is very important. A number of the documents which the firm can produce are privileged in this litigation. We understand that the Society has appointed Mr Ennor to investigate the complaint. We propose that we should make the privileged documents available to

Mr Ennor on the express basis that, in doing so, privilege is not waived, and that the documents will not be further copied by Mr Ennor. Could you please advise whether the Society is prepared to deal with the privileged documents in that way.' a

[10] Mr Ennor replied on 14 April 1997 stating that he was happy to proceed 'in the first instance' as suggested in the firm's letter. b

[11] In its letter the firm had indicated that it wished to involve Mr Anthony Lusk QC in the process of providing the material. He was the senior counsel who had appeared for the firm and its partners in the proceedings brought against them. At the time of the exchange of letters he was overseas, but on his return he and Mr Ennor reached an agreement which supplemented the terms of the letter of 7 April. c

[12] The documents were handed over to Mr Ennor on 14 May 1997. It is common ground for the purpose of this appeal that they were all covered by legal professional privilege. In some cases the privilege was that of the firm itself or its partners; in others it was that of its clients.

[13] In September 1997 the Society provided the firm with copies of other complaints which had been made against it. Paterson J found that until then the firm was unaware of any complaint against the firm itself or any of its partners other than Mr Carran. d

[14] Subsequently, in response to a request from Mr Ennor for further assistance, Mr Lusk wrote on 1 April 1998 that he would have difficulty in providing it without disclosing information which he had received from Mr Carran when interviewing him in his capacity as counsel both for the firm and for Mr Carran personally. He pointed out that such information was subject to legal professional privilege and that neither he nor the firm could waive Mr Carran's personal privilege. He said that he had no doubt that Mr Carran would never have agreed to the interviews at all or to have them recorded if there were any suggestion that the information could later be made available to the Society or become evidence against him in a disciplinary hearing conducted in public. e f

[15] The second respondent, Mr Gary Judd QC, was appointed counsel for the Society in May 1998. He took over the investigations into the complaints, though Mr Ennor continued to play a part for a while. Mr Judd was given possession of Mr Ennor's files, though he was not at this stage advised of the arrangements between Mr Ennor and Mr Lusk regarding the documents which the firm had supplied. g

[16] The firm did not become aware of Mr Judd's involvement until June 1998. Mr Lusk was concerned to learn that the documents had been passed to Mr Judd and wrote on 15 July 1998 to Mr Ennor to say that the privilege which the firm had been at pains to protect had become a significant issue. He asked for an assurance that the Society would observe the terms on which the documents had been provided. h

[17] Mr Lusk's letter was passed to Mr Judd, who replied on 27 July 1998 that he had until then been unaware that the firm had 'attempted to impose' any constraints in relation to the documents. As it happened, however, he had made no copies of any of them since they had come into his possession, although he had referred to them and quoted from them in his reports to the Society. He said that he considered that he 'stood in the shoes of' Mr Ennor and that like him he was j

happy 'in the first instance' to hold the documents on the terms of the firm's letter of 7 April 1997, that is to say that he had—

> 'received these documents on the express basis that, in doing so, privilege (in respect of the bloodstock partnership litigation) is not waived, and that the documents will not be further copied.'

[18] Mr Lusk did not accept that Mr Judd stood in Mr Ennor's shoes. The arrangements, he said, were personal to Mr Ennor. Mr Judd replied that if they were personal to Mr Ennor then they did not bind him. This brought matters to a head. The firm called for the return of the documents. The Society refused to return them and served formal notices under s 101(3) of the 1982 Act, one requisitioning some of the documents already in its possession and the other requisitioning further documents to which legal professional privilege also attached.

[19] The present proceedings followed. The firm sought an order for the return of the documents already delivered. The Society resisted the claim and counterclaimed for a declaration that the firm was obliged to comply with the requisitions.

THE CONTENTS OF THE DOCUMENTS

[20] Although the documents supplied to Mr Ennor were in evidence before the High Court and the Court of Appeal, they were not inspected and their contents were not considered by either court. During the trial at first instance counsel for the Society invited the court to examine the documents or some of them in order to establish their potential relevance and evidential significance in relation to the Society's public interest defence. The judge acknowledged that the allegations were of professional misconduct and were particularly serious. But in a mid-trial ruling he refused to inspect the documents or to permit the Society to refer to their contents.

[21] The Society's invitation was not repeated before the Court of Appeal but was renewed before their Lordships. For the purpose of the appeal the Society accepted that the documents are prima facie privileged, but reserved the right to challenge their status in any future application for production of particular documents. For its part the firm acknowledged that the allegations which the Society is investigating are extremely serious and that the documents are relevant to its inquiries. The principal allegations are in any case summarised in an affidavit of Mr Lusk which is with the papers. In those circumstances their Lordships were unable to discern any advantage in examining the documents themselves or in permitting counsel for the Society to refer to them in open court, and they declined to do so.

THE STATUTORY SCHEME

[22] Before 1935 the jurisdiction to remove the names of practitioners from the rolls and to impose lesser sanctions for professional misconduct was vested exclusively in the Supreme Court. The investigation of complaints and the bringing of disciplinary proceedings before the Supreme Court were undertaken by the New Zealand Law Society and (after 1913) district law societies. Under the Law Practitioners Acts of 1935 and 1955 the disciplinary committee of the New Zealand Law Society was given power to impose sanctions which included striking off. Although the High Court continued to retain a concurrent disciplinary role until it was abolished by the 1982 Act, in practice it was largely

replaced by the statutory regime of professional self-regulation as the means of exercising disciplinary powers over practitioners.

[23] Part VII of the 1982 Act establishes an elaborate scheme for disciplinary process against legal practitioners. Like the legislation which it replaced, it distinguishes between the investigation of complaints of the conduct of practitioners or their employees (ss 98–102) and the disciplinary proceedings which may follow (ss 103–138). A complaint by a member of the public of the conduct of a practitioner or his employee must be referred to the district law society of which the practitioner was a member at the relevant time (s 98). In some circumstances the council of a district law society has power to initiate an inquiry of its own motion (s 99). Every complaint must be inquired into as soon as practicable by the district law society (s 101(1)), which may refer it to a complaints committee established for the purpose (s 100). If the council of the district law society or the complaints committee concludes that the case is of sufficient gravity to warrant the making of a charge then it must bring a charge against him, in the case of a practitioner before the district disciplinary tribunal or the New Zealand Disciplinary Tribunal, and in the case of a person employed by a practitioner before the New Zealand Disciplinary Tribunal (s 101(2)).

[24] A district disciplinary tribunal may hear and determine the charge itself and impose sanctions (which do not include striking off) or in a case of sufficient gravity may refer it to the New Zealand Disciplinary Tribunal (s 106). The New Zealand Disciplinary Tribunal hears charges brought before it by the council of a district law society or a district complaints committee or referred to it by a district disciplinary tribunal and appeals by way of rehearing from decisions of district disciplinary tribunals (ss 107 and 110). It has a wider range of sanctions available to it, which include striking off (s 112). Unlike a district complaints committee or district disciplinary tribunal, the New Zealand Disciplinary Tribunal sits in public (s 111).

[25] The provisions of direct relevance to the present appeal are those in s 101 (which is concerned with the investigatory stage) and ss 126 and 127 (which are concerned with the disciplinary hearing). The critical provisions are contained in s 101(3)(d) and (e) and (6). These are in the following terms:

> '(3) In the investigation of the complaint the District Council or, as the case may be, the complaints committee ... (d) May require the production for inspection by the District Council or committee or any person so employed by it of any books, documents, papers, accounts, or records that are in the possession or under the control of the person complained against or, as the case may require, his employer and that relate to the subject-matter of the inquiry: (e) May require the person complained against and, if the case so requires, his employer to give all information in relation to any such books, documents, papers, accounts, or records that may be reasonably necessary for the purposes of the inquiry ...
>
> (6) Every practitioner shall be guilty of misconduct in his professional capacity who, without lawful justification or excuse, refuses or fails to comply with any lawful requirement of a District Council or committee under this section.'

[26] Section 126(1) authorises a disciplinary tribunal to require any person to attend and give evidence before it at the hearing of disciplinary proceedings and to produce all books, documents, papers, and records in that person's custody or under his control relating to the subject matter of the proceedings. Section 126(5)

makes it an offence for a person, without lawful justification or excuse, to refuse or fail to attend and give evidence when required to do so by a tribunal, to answer truly and fully any question put to him by a member of the tribunal, or to produce to the tribunal any book, document, paper or record required of him.

[27] Section 127 reads as follows:

> '*Immunity of witness and counsel.*—Witnesses and counsel shall have the same privileges and immunities in relation to proceedings under this Part of this Act as if they were proceedings in a Court of law.'

THE DECISIONS BELOW

Paterson J

[28] The judge held that the 1982 Act did not abrogate legal professional privilege and accordingly the firm was not obliged to produce privileged documents in response to the Society's requisitions. He accordingly dismissed the Society's counterclaim. As regards the documents which the firm had voluntarily supplied to Mr Ennor he held as follows: (1) the firm had waived privilege only for the particular and limited purpose of investigating the complaint against Mr Carran and not for any other purpose; (2) under the terms on which he had received the documents Mr Ennor was not entitled to copy them to the committee or the Society; (3) as counsel for the Society Mr Judd was entitled to the benefit of the arrangements which Mr Ennor had made with the firm and held the documents on the same terms; and (4) if the documents delivered had not been privileged, the public interest in the proper investigation of complaints against legal practitioners would have entitled the Society to retain the documents for the purposes of its investigation into all the complaints. In that event the public interest would have prevailed over the firm's rights to the protection of information which it had supplied in confidence.

[29] The judge, however, refused to make an order for the immediate return of the documents to the firm. He held that counsel for the committee was entitled to retain them for the limited purpose for which they had been supplied and on the terms originally agreed with Mr Ennor.

[30] With respect their Lordships find this part of the judge's ruling difficult to follow. It proceeded from his conclusion that the arrangements under which the documents were supplied to Mr Ennor were not contractual, a conclusion which their Lordships find it easy to accept. This would not, of course, prevent the terms on which they were supplied from being enforceable in equity, for it is well established that a person cannot in good conscience retain possession of property which has been made available to him and disregard the terms on which he received it. But in the absence of any contractual entitlement to retain the documents the Society's right to do so must depend on the firm's continuing consent. Their Lordships would have been inclined to regard the Society as holding the documents to the firm's order with power, revocable at any time by the firm, to use them in the meantime for the purpose for which they were supplied.

[31] On this footing, the Society's consensual right to retain the documents was determined when the firm demanded their return, and the judge should have ordered that they be returned forthwith. But there has been no appeal from his refusal to do so, and their Lordships need say no more about it.

The Court of Appeal

[32] The Court of Appeal ([2002] 1 NZLR 721) recognised that it would be necessary to consider whether the arrangements with Mr Ennor amounted to a general waiver of privilege in the documents which had been provided to him only if privilege was a good answer to a statutory requisition. Accordingly it treated this as raising the real issue in the case.

[33] The majority held that privilege was not a good answer to a statutory requisition, and that accordingly it was unnecessary to consider whether and to what extent privilege had been waived. However, they expressed a firm view on this issue without formally deciding it. They held that there had been a general waiver of privilege in the documents in relation to the investigation by the complaints committee, but not in relation to any disciplinary proceedings which might subsequently be brought before a disciplinary tribunal.

[34] On the main issue the majority held that the duty to comply with a requirement under s 101 during the investigative stage overrides legal professional privilege, but that s 127 preserves the privilege in relation to subsequent proceedings before a disciplinary tribunal. They accepted the high importance of the privilege, but considered that it was overridden by the even higher public interest in maintaining the integrity of the legal profession. As the majority put it (at 748–749):

> '[119] At times very important principles and values must accommodate other important principles and values, which are in tension with them. It seems that is what has happened under the 1982 Act. This in our view would explain why Parliament excluded the privilege during the investigation stage of the complaint process, while preserving it at the stage of adjudication of whether or not a practitioner is guilty of unprofessional conduct. It would also explain why privilege remains fully available to a law practitioner who is subject to a criminal investigation and later a prosecution. Parliament in such situations recognises the need to strike a point of compromise and balance between competing public and private interests.'

They summed up their conclusions as follows:

> '[122] The consistent theme in the legislation is that the public interest requires ascertainment of the factual position expeditiously ... That can only be achieved by recognising that the scheme and purpose of the disciplinary provisions of the 1982 Act preclude general application of legal privilege. It meets the high test for exclusion by necessary implication.'

[35] On the issue of waiver the majority acknowledged that privileged material may be disclosed for a limited purpose, with the result that it can be used for that purpose but no other. They observed (at [127]) that Mr Lusk was plainly concerned to maintain privilege in connection with the subsisting bloodstock litigation, and that he appreciated that he was not able to waive any privilege which Mr Carran enjoyed. Despite this he supplied the documents to the Society without seeking Mr Carran's consent. They concluded that this showed that Mr Lusk did not consider that Mr Carran was able to claim privilege in relation to the Society's investigation of the complaint. If Mr Carran could not do so, nor could the other partners in the firm. The 'compelling inference' in these circumstances was that Mr Lusk's mind was not directed at all to confining the use of the documents by the Society under its statutory powers beyond protecting rights to privilege in the bloodstock litigation.

[36] The minority dissented. They held that privilege was a good answer to a statutory requisition and had not been waived in respect of the documents supplied to Mr Ennor for any purpose save the limited purpose of enabling him to familiarise himself with the background to the complaint by Mr McElrea against Mr Carran.

LEGAL PROFESSIONAL PRIVILEGE

[37] An authoritative exposition of the rationale of legal professional privilege is to be found in the speech of Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526, [1996] AC 487 with whom the rest of the House of Lords agreed. Lord Taylor of Gosforth CJ described it in these words ([1995] 4 All ER 526 at 540–541, 542, [1996] AC 487 at 507, 508):

> 'The principle which runs through all these cases, and the many other cases which were cited, is that a man must be able to consult his lawyer in confidence, since otherwise he might hold back half the truth. The client must be sure that what he tells his lawyer in confidence will never be revealed without his consent. Legal professional privilege is thus much more than an ordinary rule of evidence, limited in its application to the facts of a particular case. It is a fundamental condition on which the administration of justice as a whole rests ... [It] is not for the sake of the appellant alone that the privilege must be upheld. It is in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors.'

[38] In explaining the rationale which underpins the doctrine and its consequences, Lord Taylor of Gosforth CJ drew on a long and consistent line of English authority. In *Bolton v Corp of Liverpool* (1833) 1 My & K 88, 39 ER 614 the defendant sought inspection of the plaintiff's instructions to counsel, though not of the advice which counsel gave. Refusing the application Lord Brougham LC said ((1833) 1 My & K 88 at 94, 39 ER 614 at 617):

> 'It seems plain, that the course of justice must stop if such a right exists. No man will dare to consult a professional adviser with a view to his defence or to the enforcement of his rights.'

[39] In *Holmes v Baddeley* (1844) 1 Ph 476 at 480, 481, 41 ER 713 at 715 Lord Lyndhurst LC said:

> 'The principle upon which this rule is established is that communications between a party and his professional advisers, with a view to legal proceedings, should be unfettered; and they should not be restrained by any apprehension of such communications being afterwards divulged and made use of to his prejudice. To give full effect to this principle it is obvious that they ought to be privileged, not merely in the cause then contemplated or depending, but that the privilege ought to extend to any subsequent litigation with the same or any other party or parties ... *The necessary confidence will be destroyed if it be known that the communication can be revealed at any time.*' (My emphasis.)

[40] In *Anderson v Bank of British Columbia* (1876) 2 Ch D 644 at 649, Jessel MR said:

> 'The object and meaning of the rule is this: that as, by reason of the complexity and difficulty of our law, litigation can only be properly

conducted by professional men, it is absolutely necessary that a man, in order to prosecute his rights or to defend himself from an improper claim, should have recourse to the assistance of professional lawyers, and it being so absolutely necessary, it is equally necessary, to use a vulgar phrase, that he should be able to make a clean breast of it to the gentleman whom he consults with a view to the prosecution of his claim, or the substantiating his defence against the claim of others; that he should be able to place unrestricted and unbounded confidence in the professional agent, and that the communications he so makes to him should be kept secret, unless with his consent ... that he should be enabled properly to conduct his litigation.'

[41] In *Southwark and Vauxhall Water Co v Quick* (1878) 3 QBD 315 at 317–318 Cockburn CJ said:

'The relation between the client and his professional legal adviser is a confidential relation of such a nature that to my mind the maintenance of the privilege with regard to it is essential to the interests of justice and the well-being of society. *Though it might occasionally happen that the removal of the privilege would assist in the elucidation of matters in dispute, I do not think that this occasional benefit justifies us in incurring the attendant risk.*' (My emphasis.)

[42] In *Pearce v Foster* (1885) 15 QBD 114 at 119–120 Brett MR said:

'The privilege with regard to confidential communications between solicitor and client for professional purposes ought to be preserved, and not frittered away. The reason of the privilege is that there may be that free and confident communication between solicitor and client which lies at the foundation of the use and service of the solicitor to the client; *but, if at any time or under any circumstances such communications are subject to discovery, it is obvious that this freedom of communication will be impaired.* The liability of such communications to discovery in a subsequent action would have this effect as well as their liability to discovery in the original action.' (My emphasis.)

[43] The same rationale is seen as underlying the doctrine in New Zealand today. In *R v Uljee* [1982] 1 NZLR 561 at 572 Richardson J said:

'For the focus of the solicitor and client privilege is not on the conduct of third parties at all. It is on the freedom of communication between lawyer and client. So it is on the effect on solicitor and client if that confidentiality is not assured.'

[44] Some principles are well established and were confirmed by Lord Taylor of Gosforth CJ in *R v Derby Magistrates' Court, ex p B* [1995] 4 All ER 526 at 537, [1996] AC 487 at 503. First, the privilege remains after the occasion for it has passed: unless waived 'once privileged, always privileged'. Secondly, the privilege is the same whether the documents are sought for the purpose of civil or criminal proceedings and whether by the prosecution or the defence. Thirdly, the refusal of the claimant to waive his privilege for any reason or none cannot be questioned or investigated by the court. Fourthly, save in cases where the privileged communication is itself the means of carrying out a fraud, the privilege is absolute. Once the privilege is established, the lawyer's mouth is 'shut for ever' (see *Wilson v Rastall* (1792) 4 Term Rep 753 at 759, 100 ER 1283 at 1287 per Buller J). The Society has not alleged that any of the documents fall within the

excepted category, but if any of them does it retains the right to make such a claim hereafter.

[45] It is, of course, well established that the privilege belongs to the client and not to his lawyer, and that it may not be waived by the lawyer without his client's consent. But the privilege is available to the client whether he is a layman or a lawyer; even a lawyer—perhaps especially a lawyer—has need of the services of another lawyer if he becomes personally embroiled in legal proceedings.

COMPETING PUBLIC INTEREST: THE BALANCING EXERCISE

[46] The majority of the Court of Appeal of New Zealand described the present case as one which required the court to strike a balance between competing private and public interests. That is undoubtedly the position where the claimant invokes the equitable doctrine of confidence. But it is not at all the same where he claims to withhold information on the ground of legal professional privilege. As Lord Taylor of Gosforth CJ observed in the passage cited from *Ex p B* [1995] 4 All ER 526 at 540–541, [1996] AC 487 at 507, the privilege does not exist for his sake alone. It is 'a fundamental condition on which the administration of justice as a whole rests' and exists 'in the wider interests of all those hereafter who might otherwise be deterred from telling the whole truth to their solicitors'.

[47] The present case does not, with respect, involve a contest between competing private and public interests, but between two competing public interests of high importance: the public interest in the maintenance of the integrity of the legal profession and the public interest in the administration of justice. The former interest may be said to require that all relevant information be made available to those charged with the investigation and determination of complaints against legal practitioners. The latter requires that a lawyer must be able to give his client an absolute and unqualified assurance that whatever the client tells him in confidence will never be disclosed without his consent.

[48] The public interest in overriding the privilege could scarcely have been higher than it was in *Ex p B*. B (the applicant) was charged with the murder of a young girl. He made a confession to the police, but afterwards he changed his story and said that his stepfather had killed the girl. B was tried and acquitted. The stepfather was then charged with the murder. At his committal for trial, B was called as a prosecution witness. In cross-examination he was asked by the defence about the instructions he had given his solicitors in relation to his original account of what had taken place. He declined to waive privilege. The stepfather then obtained from the stipendiary magistrate the issue of a witness summons requiring B's solicitor to produce all attendance notes and proofs of evidence disclosing B's factual instructions in defence to the charge of murder but not the advice given to him by solicitors and counsel. B applied for judicial review.

[49] Following the Court of Appeal's decision in *R v Ataou* [1988] 2 All ER 321, [1988] QB 798 the magistrate (whose decision was upheld by the Divisional Court) held that the question was whether B's interest in asserting the privilege outweighed the public interest in avoiding a miscarriage of justice by ensuring that relevant and admissible evidence should be made available to the defence in criminal proceedings. To this question there could be only one answer. Since B had been acquitted and could not be tried again, it was unlikely that disclosure could cause him significant harm. Non-disclosure, on the other hand, ran the risk of an innocent man being convicted of murder.

[50] The House of Lords overruled *R v Ataou* and upheld B's claim to privilege. It expressly rejected the argument that legal professional privilege is an interest which falls to be balanced against competing public interests. Lord Taylor of Gosforth CJ said in *Ex p B* [1995] 4 All ER 526 at 540, [1996] AC 487 at 508:

> '[The] drawback to that approach is that once any exception to the general rule is allowed, the client's confidence is necessarily lost. The solicitor, instead of being able to tell his client that anything which the client might say would never in any circumstances be revealed without his consent, would have to qualify his assurance. He would have to tell the client that his confidence might be broken if in some future case the court were to hold that he no longer had "any recognisable interest" in asserting his privilege. One can see at once that the purpose of the privilege would thereby be undermined.'

[51] This was to the same effect as the many passages in the authorities to which their Lordships have already drawn particular attention. To the argument that the balance between competing public interests should not be struck once and for all on a generalised basis, but should be examined individually on the particular facts of each case, Lord Taylor of Gosforth CJ said ([1995] 4 All ER 526 at 540–541, [1996] AC 487 at 508):

> '... if a balancing exercise was ever required in the case of legal professional privilege, it was performed once for all in the sixteenth century, and since then has applied across the board in every case, irrespective of the client's individual merits.'

Lord Lloyd of Berwick also rejected the idea that a balancing exercise was required. He explained ([1995] 4 All ER 526 at 542, [1996] AC 487 at 509):

> '... the courts have for very many years regarded legal professional privilege as the predominant public interest. A balancing exercise is not required in individual cases, because the balance must always come down in favour of upholding the privilege ...'

[52] There is authority to the same effect in New Zealand. In *R v Uljee* [1982] 1 NZLR 561 at 576 McMullin J observed:

> 'It is not now a question of weighing the public interest in each case to see whether the rule [of legal professional privilege] should be applied. Whether the principle operates as a bar to the emergence of the truth and to the overall public detriment is not now a relevant legal consideration.'

[53] The same conclusion now appears to have been reached in Australia (though as in England not until after some earlier decisions to the contrary). In *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 the High Court held that the defendant on a criminal charge cannot compel the production of privileged documents even though they may establish his innocence or materially assist his defence. In the course of his judgment Brennan J (at 128) cited with approval the observations of Mason and Wilson JJ in *Waterford v Commonwealth of Australia* (1987) 163 CLR 54 at 64–65:

> 'Legal professional privilege is itself the product of a balancing exercise between competing public interests whereby, subject to the well-recognized crime or fraud exception (cf *R v Bell, ex p Lees* (1980) 146 CLR 141), the public

interest in "the perfect administration of justice" (per Earl of Halsbury L.C. in (*Bullivant v A-G for Victoria* [1901] AC 196 at 200, [1900–3] All ER Rep 812 at 813)) is accorded paramountcy over the public interest that requires, in the interests of a fair trial, the admission in evidence of all relevant documentary evidence. Given its application, no further balancing exercise is required.'

Brennan J in *Carter's* case (1995) 183 CLR 121 at 128 also approved the observations of Dawson J in his dissenting judgment in *A-G for the Northern Territory of Australia v Kearney* (1985) 158 CLR 500 at 532:

> 'The policy which lies behind the doctrine views unrestricted communication between lawyer and client upon professional matters as being necessary for the proper functioning of our legal system. If inroads could be made upon the privilege in individual cases by involving a "higher public interest", its application would become uncertain and the policy behind it would be effectively undermined.'

[54] Their Lordships consider that the rationale of the doctrine compels this conclusion. If the lawyer is to be able to give his client an absolute and unqualified assurance that what he tells him will not be disclosed without his consent in any circumstances, the assurance must follow and not precede the undertaking of any balancing exercise.

[55] Their Lordships do not overlook the fact that a different approach has been adopted in Canada, where the courts do conduct a balancing exercise by reference to the facts of the particular case. The common law is no longer monolithic, and it was open to the New Zealand Court of Appeal to make a deliberate policy decision to depart from the English approach on the ground that it is not appropriate to conditions in New Zealand. Had it done so, their Lordships would have respected its decision. But it did not. All the members of the Court of Appeal considered that they were applying established principles of English law. Their Lordships respectfully consider that the majority misunderstood them.

[56] In saying that the balance was struck once for all in the sixteenth century, Lord Taylor of Gosforth CJ had in mind the case where the right to compel production of documents is a common law right. Where the right is statutory, as in the present case, the balance is struck by Parliament when enacting the statute in question. In such a case the task of the court is not to decide where the balance should be struck in the particular case, but where Parliament has struck it.

[57] The question, therefore, is whether the 1982 Act excludes legal professional privilege either expressly or by necessary implication.

SECTION 101(3)(D)

[58] Section 101(3)(d) does not expressly exclude legal professional privilege. The majority of the Court of Appeal held that it did so by necessary implication. Their Lordships are unable to agree. The meaning of the expression 'by necessary implication' was authoritatively stated by Lord Hobhouse of Woodborough in *R (on the application of Morgan Grenfell & Co Ltd) v Special Comr of Income Tax* [2002] UKHL 21 at [45], [2002] 3 All ER 1 at [45], [2003] 1 AC 563, which is the most recent English decision on legal professional privilege. He said:

> 'A necessary implication is not the same as a reasonable implication ... A *necessary* implication is one which necessarily follows from the express provisions of the statute construed in their context. It distinguishes between

what it would have been sensible or reasonable for Parliament to have included or what Parliament would, if it had thought about it, probably have included and what it is clear that the express language of the statute shows that the statute must have included. A necessary implication is a matter of express language and logic not interpretation.' (Emphasis in original.)

[59] It has been accepted in New Zealand that, if the section is capable of being interpreted on the supposition that the privilege is not abrogated by it, it should be so interpreted: see *IRC v West-Walker* [1954] NZLR 191 at 213 per Gresson J. A useful test is to write in the words 'not being privileged documents' and ask, not 'Does that produce a reasonable result?' or 'Does it impede the statutory purpose for which production may be required?' but 'Does that produce an inconsistency?' or 'Does it stultify the statutory purpose?' The circumstances in which such a question would receive an affirmative answer would be rare. But a statutory right to require production of correspondence between a person and his solicitor for the purpose of obtaining legal advice, for example, would obviously be inconsistent with the existence of a right to withhold documents on the ground of legal professional privilege. And unless a taxing master could require the production of privileged documents it would be impossible for him to perform his function of taxing a solicitor's bill of costs: see *Goldman v Hesper* [1988] 3 All ER 97, [1988] 1 WLR 1238.

SECTION 101(6) OF THE 1982 ACT

[60] Their Lordships agree with the Court of Appeal that s 101(6) is neutral on the effect of s 101(3). If s 101(3) overrides privilege, then a claim to privilege is not a lawful justification or excuse for withholding production: and if it does not, then it is.

[61] But s 101(6) is not without significance. It supplies the sanction for the obligation to comply with the requirement for production. It has two consequences. The first is that failure or refusal to comply without lawful justification or excuse constitutes professional misconduct. The second is that failure or refusal to comply with a requirement does not constitute professional misconduct if it has a lawful justification or excuse. This makes it impossible to argue that a practitioner's membership of his district law society makes it incumbent on him to do everything in his power to assist it in its inquiries and to waive privilege where necessary.

SECTION 127

[62] The majority of the Court of Appeal considered that, while s 101(3) overrides legal professional privilege at the investigative stage, s 127 preserves it for the hearing before a disciplinary tribunal. They relied (inter alia) on the word 'proceedings' to confine the operation of the section to the hearing.

[63] Their Lordships agree that s 127 applies to the hearing and not at the investigative stage. But they do not agree that it has anything to do with the privilege now under consideration. They observe that the section is concerned only with the privileges and immunities of witnesses and counsel, and that it provides that they are to have the same immunities and privileges as if the proceedings (meaning the proceedings before a disciplinary tribunal) were proceedings in a court of law. A question immediately arises: what immunities and privileges are enjoyed by witnesses qua witnesses and counsel qua counsel in proceedings in a court of law which they would not enjoy in proceedings before a tribunal? The answer is: absolute privilege in defamation and immunity from

suit in respect of anything they may say in the course of the proceedings. Legal professional privilege, on the other hand, is not confined to witnesses and counsel and is not conferred on them *as such*; and even in the absence of statutory provision to that effect it is available in every kind of proceedings whether before a tribunal or a court of law.

[64] Their Lordships note that the genesis of s 127 is to be found in the 1935 Act, which for the first time conferred disciplinary powers on a tribunal. Before that Act the Supreme Court had exclusive jurisdiction to hear disciplinary proceedings against practitioners, and witnesses and counsel in such hearings enjoyed the normal immunities and privileges available to them in proceedings in a court of law. But in the absence of special provision to the contrary, they would cease to enjoy those privileges and immunities if the proceedings took place before a tribunal. Section 127 and its predecessors became necessary when disciplinary jurisdiction was conferred on tribunals.

LEGAL PROFESSIONAL PRIVILEGE: CONCLUSION

[65] Their Lordships conclude that legal professional privilege is a good answer to a requisition under the 1982 Act whether at the investigative stage or in proceedings before a disciplinary tribunal. This is sufficient to dispose of the Society's counterclaim, and it becomes necessary to consider the issue of waiver in relation to the documents supplied to Mr Ennor.

LIMITED WAIVER

[66] The Court of Appeal rejected the Society's contention that privilege could not be waived for a limited purpose and continue to be maintained as an objection to any wider use. The Society renewed its argument before the Board. Privilege, the society submitted, is merely a right to resist compulsory disclosure. Once disclosure has occurred, it is no longer a question of privilege. Ex hypothesi a right to resist disclosure cannot be invoked against the person to whom disclosure has already been made. If he is to be restrained from making use of the information, it must be on the ground that the information is confidential. But the equitable right to the protection of confidential information may be outweighed by a countervailing public interest in having the information made available. In the present case the judge held that the public interest would have prevailed over the firm's rights to preserve confidentiality.

[67] Their Lordships agree that privilege is a right to resist the compulsory disclosure of information. It has been so characterised in numerous authorities. It is sufficient to cite a passage from the judgment of Hoffmann J in *Black & Decker Inc v Flymo Ltd* [1991] 3 All ER 158 at 159, [1991] 1 WLR 753 at 755:

> 'It is not possible to assert a right to refuse to disclose in respect of a document which has already been disclosed. Once the document has passed into the hands of the other party the question is no longer one of privilege but of admissibility.'

[68] The Society's argument, put colloquially, is that privilege entitles one to refuse to let the cat out of the bag; once it is out of the bag, however, privilege cannot help to put it back. Their Lordships observe that this arises from the nature of privilege; it has nothing to do with waiver. It does not follow that privilege is waived generally because a privileged document has been disclosed for a limited purpose only: see *British Coal Corp v Dennis Rye Ltd (No 2)* [1988] 3 All ER 816, [1988] 1 WLR 1113 and *Bourns Inc v Raychem Corp* [1999] 3 All ER 154.

The question is not whether privilege has been waived, but whether it has been lost. It would be unfortunate if it were. It must often be in the interests of the administration of justice that a partial or limited waiver of privilege should be made by a party who would not contemplate anything which might cause privilege to be lost, and it would be most undesirable if the law could not accommodate it.

[69] The Society argued that, once the documents were produced to Mr Ennor, they ceased to be privileged. Their Lordships consider that this is playing with words. It confuses the nature of the documents with the rights to which the arrangements with Mr Ennor gave rise. The documents are privileged because they were created for the purpose of giving or receiving legal advice. If they are not produced voluntarily, production cannot be compelled. If they are produced voluntarily, the right to withhold production no longer attaches to them. In that sense the privilege may be said to be lost. But they are the same documents, and it is not inappropriate to describe them as privileged. Their inherent characteristics are the same. The policy which protected them from unauthorised disclosure is the same. The cat is still a cat. It can be put back in the bag.

[70] There is another confusion also. The appellants want to recover the documents because they are privileged. But they do not rely on privilege to found their cause of action. A party who has parted with possession of documents may have a right to recover possession on any one of a number of grounds. He may reclaim them because they belong to him, because he has a contractual right to recover them, because they are confidential, or because he has parted with them for a limited purpose and equity will not permit the recipient to retain them once that purpose is fulfilled. In the present case the documents are both privileged and confidential, but the appellants do not rely on privilege or confidentiality to found their claim to recover them. They rely on the terms of the arrangements under which they were supplied and the limited purpose for which they permitted use to be made of them. Their case is that there is no legal basis on which the Society can retain and make use of the documents free from the limitations which Mr Lusk imposed and Mr Ennor accepted.

[71] The fact that the claim to recover the documents is made on equitable grounds does not mean that it must yield to an overriding countervailing public interest. The documents are both confidential and privileged. Whether a claim to the return of such documents is based on a common law right or an equitable one, the policy considerations which give rise to the privilege preclude the court from conducting a balancing exercise. A lawyer must be able to give his client an unqualified assurance, not only that what passes between them shall never be revealed without his consent in any circumstances, but that should he consent in future to disclosure for a limited purpose those limits will be respected: see *Goddard v Nationwide Building Society* [1986] 3 All ER 264 at 271–272, [1987] QB 670 at 685.

THE ARRANGEMENTS WITH MR ENNOR

[72] The majority of the Court of Appeal accepted that it was possible to waive privilege for a limited purpose only, but held that Mr Lusk had not done so. They considered that he had waived the privilege for all the purposes of the complaints committee's investigations. They reasoned that, when reaching his agreement with Mr Ennor, Mr Lusk could not have believed that privilege

applied in an investigation by a complaints committee or he would not have disclosed the documents to Mr Ennor at all. He must therefore have intended to preserve privilege for a quite different reason connected with the bloodstock litigation.

[73] Their Lordships cannot accept this reasoning. It is inconsistent with the primary facts found on unchallenged evidence by Paterson J and with the express terms of Mr Lusk's letter, which offered to make the documents available 'on the express basis that, in doing so, privilege is not waived'. The limitations which Mr Lusk imposed were limitations on the use which Mr Ennor might make of the documents, not on the extent of the waiver. Save in respect of the agreed use, privilege was expressly reserved. It is true that a reason for maintaining the claim to privilege was that not all the litigation relating to the bloodstock partnerships had been resolved when the letter was written. But this was not necessarily the only reason, nor would it make any difference if it were. If on the true construction of Mr Lusk's letter, objectively ascertained, privilege was not waived, that is the end of the matter. It does not matter what his reasons were, nor whether they were wholly logical.

CONCLUSION

[74] Their Lordships are not disposed to leave this case without expressing their dismay that a professional body representing solicitors, who have the most solemn professional obligation to honour their undertakings, should have seen fit to argue that it was free to disregard the obligations which Mr Ennor undertook on its behalf. The Society may wish to consider whether the most honourable course would be for it to return the documents without an order requiring it to do so.

[75] Their Lordships will humbly advise Her Majesty that the appeal should be allowed, the order of the Court of Appeal set aside, and the orders of Paterson J restored. The appellants should have their costs in the Court of Appeal and before the Board.

[76] The parties have agreed that, in the event of the appeal succeeding, certain documents should be removed from the record and returned to the firm and that the identity of the first appellants should not be disclosed. Their Lordships order accordingly. The documents to be removed from the record should be listed in a minute to be agreed between the parties; failing agreement either party may seek a further order from the Board.

Appeal allowed.

Neneh Munu Barrister.

Sweet and another v Sommer and another Note

[2004] EWHC 1504 (Ch)

CHANCERY DIVISION

HART J

9, 10 FEBRUARY, 21, 22 APRIL, 25 JUNE 2004

Easement – Implied grant – Necessity – Doctrine of implied reservation of easement of necessity – Whether land retained by transferor to be regarded as landlocked for purposes of doctrine when theoretically possible at time of transfer for transferor to gain access to it by demolishing building on adjacent plot owned by him.

In the trial of a dispute concerning rights of way, the issue arose as to whether a plot of land, which had been retained by the transferor on the transfer by him of an adjacent plot, was to be regarded as landlocked for the purposes of the doctrine of implied reservation of an easement of necessity when it had been theoretically possible, at the time of transfer, for the transferor to have gained access to the retained land by demolishing part of a workshop which formed the physical boundary between the retained land and a third plot of land owned by the transferor. In the course of his judgment, **HART J** said (at [24]):

> '… There is no direct authority on the point of which I am aware. That doctrine however, while it may not rest at all firmly on the presumed intentions of the parties, or on their actual intentions, must be sensitive to physical as well as legal facts existing at the date of the relevant grant. Where access to the property retained is only available either over the property granted or by destruction of a physical barrier the continued existence of which was obviously contemplated by the parties, it is consistent with the doctrine (and not contradicted by authority) to say that a way over the property is impliedly reserved as a matter of necessity.'

The full text of the judgment in this case, in which *Jeffrey Littman* (instructed by *Charles Blacklock & Co*, Monmouth) represented the claimants and *John Sharples* (instructed by *Darwin Gray*, Cardiff) represented the defendants, can be found on our online service, All England Direct, at [2004] All ER (D) 312 (Jun).

Victoria Parkin Barrister.

Government of the United States of America v Montgomery (No 2)

[2004] UKHL 37

HOUSE OF LORDS

LORD STEYN, LORD SLYNN OF HADLEY, LORD HOFFMANN, LORD CLYDE AND LORD CARSWELL

26 MAY, 22 JULY 2004

Conflict of laws – Foreign order – Enforcement – Registration in England – United States court applying fugitive disentitlement doctrine and making external confiscation order – Whether registration in England and Wales contrary to interests of justice – Whether contrary to right to fair trial – Criminal Justice Act 1988, s 97 – Human Rights Act 1998, Sch 1, Pt I, art 6.

Following lengthy litigation a district court in the United States made an order in 1995 for forfeiture of a substantial sum in proceedings brought by the government of the United States against the defendant and her former husband. The defendant had renounced her American citizenship in 1992 and moved to London with the intention of taking up residence. She had failed to comply with an order for discovery made against her while she was out of the United States jurisdiction. In 1994 she had become a citizen of another country and had lost her American nationality later that year. The defendant and her former husband appealed to the United States Court of Appeals against the order of the district court. In 1997 the Court of Appeals dismissed the defendant's appeal on the basis of the fugitive disentitlement doctrine, under which the court had a discretion to refuse to hear or decide the appeal, on the ground that the defendant was a fugitive from justice. The United States government wished to enforce the confiscation order against the defendant's assets in the United Kingdom and applied to register it under s 97[a] of the Criminal Justice Act 1988, which allowed such registration where, inter alia, the court was of the opinion that enforcing the order in England and Wales would not be contrary to the interests of justice. The judge allowed the application and the defendant's appeal was dismissed by the Court of Appeal. She appealed, contending, inter alia, that the High Court, by registering the confiscation order, had exposed her to the consequences of the American proceedings in the Court of Appeals which, in applying the fugitive disentitlement doctrine, had been conducted in breach of her right to a fair trial contained in art 6[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

Held – Article 6 of the convention was capable of being applied to the enforcement in a convention state of a judgment obtained in another state, whether or not the latter was an adherent to the convention, but as in the context of extradition or expulsion, an extreme degree of unfairness would have to be established, amounting to a virtually complete denial or nullification of art 6

a Section 97 is set out at [11], below

b Article 6 is set out at [12], below

rights. The fugitive disentitlement doctrine was not an arbitrary deprivation of a party's right to a hearing but was intended to be a means of securing proper obedience to the orders of the court. Although the application of the doctrine could be regarded as failing to secure all of the protection required by art 6, it was a rational approach which had commended itself to the federal jurisdiction in the United States. As such it could not be described as a flagrant denial of the defendant's art 6 rights or a fundamental breach of the requirements of that article. Moreover, as the judge and the Court of Appeal had concluded, it would not be contrary to the interests of justice to register the judgment of the United States district court. The appeal would therefore be dismissed (see [1]–[4], [24], [26], [29], [31], below).

R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] 3 All ER 785 and *R (on the application of Razgar) v Secretary of State for the Home Dept* [2001] 3 All ER 821 applied.

Pellegrini v Italy (2002) 35 EHRR 44 considered.

Notes

For the registration of external confiscation orders, see 11(2) *Halsbury's Laws* (4th edn reissue) para 1288.

For the right to a fair trial and for what constitutes a fair hearing, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 134, 137.

Section 97 of the Criminal Justice Act 1988 was repealed by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, para 17(1), (2)(a), Sch 12, as from a day to be appointed under s 458(1) of the 2002 Act.

For the Criminal Justice Act 1988, s 97, see 12 *Halsbury's Laws* (4th edn) (2002 reissue) 1000.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

Cases referred to in opinions

Abdulaziz v UK (1985) 7 EHRR 471, [1985] ECHR 9214/80, ECt HR.
Ashingdane v UK (1985) 7 EHRR 528, [1985] ECHR 8225/78, ECt HR.
Bensaid v UK (2001) 11 BHRC 297, ECt HR.
Drozd v France (1992) 14 EHRR 745, ECt HR.
Einhorn v France App no 71555/01 (16 October 2001, unreported), ECt HR.
Pellegrini v Italy (2002) 35 EHRR 44, ECt HR.
Poitrimol v France (1994) 18 EHRR 130, ECt HR.
R (on the application of Razgar) v Secretary of State for the Home Dept [2004] UKHL 27, [2001] 3 All ER 821, [2004] 3 WLR 58.
R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23.
Soering v UK (1989) 11 EHRR 439, [1989] ECHR 14038/88, ECt HR.
Tomic v UK App no 17837/03 (14 October 2003, unreported), ECt HR.
United States Government v Montgomery (Montgomery, third party) [2001] UKHL 3, [2001] 1 All ER 815, [2001] 1 WLR 196.

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Al-Adsani v UK (2001) 12 BHRC 88, ECt HR

Bankovic v Belgium (2001) 11 BHRC 435 ECt HR.
Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.
Chahal v UK (1996) 1 BHRC 405, ECt HR.
Colozza v Italy (1985) 7 EHRR 516, ECt HR.
Degen v US (1996) 517 US 820, US SC.
Fayed v Lord Advocate 2004 SC(D) 23/3, Ct of Sess (OH).
Golder v UK (1975) 1 EHRR 524, [1975] ECHR 4451/70, ECt HR.
Hadkinson v Hadkinson [1952] 2 All ER 567, [1952] P 285, CA.
R v Lord Advocate [2002] UKPC D3, [2003] 2 LRC 51, [2004] 1 AC 462, [2003] 1 WLR 317.
Hunter v Chief Constable of the West Midlands [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.
Johnson v Gore Wood & Co (a firm) [2001] 1 All ER 481, [2002] 2 AC 1, [2001] 2 WLR 72, HL.
Kozlov v Finland App no 16832/90 (28 May 1991, unreported), E Com HR.
Krombach v Bamberski Case C-7/98 [2001] All ER (EC) 584, [2001] QB 709, [2001] 3 WLR 488, [2000] ECR I-1935, ECJ.
Krombach v France App no 29731/96 (13 February 2001, unreported), ECt HR.
Lala v Netherlands (1994) 18 EHRR 586, ECt HR.
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Monnell v UK (1987) 10 EHRR 205, [1987] ECHR 9562/81, ECt HR.
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R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs [2002] EWCA Civ 1598, [2003] 3 LRC 297.
R (on the application of Quark Fishing Ltd) v Secretary of State for Foreign and Commonwealth Affairs [2003] EWHC 1743 (Admin), [2003] ACD 96; *affd* [2004] EWCA Civ 527, [2004] 3 WLR 1.
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Waite v Germany (1999) 6 BHRC 499, ECt HR.
Zapata-Salaza v Sweden App no 28987/95 (7 March 1996, unreported), E Com HR.

Appeal

Kathleen Conway Montgomery appealed with permission of the Appeal Committee of the House of Lords given on 5 November 2003 from the decision of the Court of Appeal (Lord Woolf CJ, Kennedy and Scott Baker LJJ) on 24 March 2003 ([2003 EWCA Civ 392, [2003] 1 WLR 1916) dismissing her appeal

from the decision of Stanley Burnton J on 12 June 2002 ([2002] EWHC 1113 (Admin) to allow the application of the government of the United States of America to register an external confiscation order made by the United States District Court, Middle District Florida, Jacksonville Division on 15 November 1995 against Larry David Barnette and the appellant under s 97 of the Criminal Justice Act 1988. The Secretary of State for the Home Department appeared as an interested party. The facts are set out in the opinion of Lord Carswell.

James Lewis QC and *Clair Dobbin* (instructed by *Tarlo Lyons*) for the appellant.

Andrew Mitchell QC and *Kennedy Talbot* (instructed by the *Crown Prosecution Service*) for the United States government.

Khawar Qureshi (instructed by the *Treasury Solicitor*) for the Secretary of State.

Their Lordships took time for consideration.

22 July 2004. The following opinions were delivered.

LORD STEYN.

[1] My Lords, I have had the privilege of reading the opinion of my noble and learned friend Lord Carswell. I agree with it. I would also dismiss the appeal.

LORD SLYNN OF HADLEY.

[2] My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend Lord Carswell. For the reasons he gives I agree that the appeal should be dismissed.

LORD HOFFMANN.

[3] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Carswell. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD CLYDE.

[4] My Lords, I have had the opportunity of reading in draft the speech to be given by my noble and learned friend Lord Carswell and I agree that the appeal should be dismissed for the reasons set out in that speech. I expressly reserve my opinion on the question whether the operation of the fugitive disentitlement doctrine would if it had taken place in a convention state have constituted a breach of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969).

LORD CARSWELL.

[5] My Lords, the appellant's former husband Larry Barnette was charged with defrauding the United States government of sums of money totalling some $US 15m, and was convicted in 1984 on a number of counts of fraud and related offences, including offences under the Racketeer Influenced and Corrupt Organizations Act (RICO). He was sentenced to a term of imprisonment and also ordered to pay $US 7m to the United States by way of restitution and to forfeit his 900 shares in Old Dominion SA (ODSA), a Panamanian company controlled by him through which he had passed proceeds of his fraudulent activity.

[6] In August 1983, shortly before he was indicted for fraud, Mr Barnette transferred 800 of his 900 shares in ODSA to the appellant, who was at that time still married to him. The United States court ruled that under RICO the United States government's title to the 800 shares antedated the transfer to the appellant, with the consequence that they were forfeited and had to be surrendered, or their value accounted for, notwithstanding the transfer to the appellant.

[7] Mr Barnette and the appellant fought a vigorous rearguard action in an attempt to avoid confiscation of the shares or their value, details of which are set out in the opinion of my noble and learned friend Lord Hoffmann in *United States Government v Montgomery (Montgomery, third party)* [2001] UKHL 3 at [4]–[11], [2001] 1 All ER 815 at [4]–[11], [2001] 1 WLR 196, to which I would refer. After lengthy and complex litigation the United States district court made an order on 18 August 1995, whereby it held both the appellant and Mr Barnette in contempt and ordered them to pay by way of forfeiture the sum of $US4,217,833·01, representing the value of the ODSA shares as at 15 October 1984 (the date of the order for forfeiture of the shares) after setting off the $US7m already paid. Following this order Mr Barnette brought a motion on 24 August 1995 seeking credit for a sum seized from accounts in the name of ODSA in Liechtenstein. The United States government brought a motion on 28 August 1995 to revise the sum ordered to be paid by the addition of substantial interest and a sum for reimbursement of costs and expenses incurred. The order of 18 August 1995 was revised by a further order of 15 November 1995, which gave effect to the credit sought by Mr Barnette and ordered payment of interest at United States Treasury rates from January 1985–June 1995. The final effect of these orders was an increase in the total sum payable by the appellant and Mr Barnette to $11,767,754, plus a further sum for costs and expenses.

[8] In August 1983 the appellant left Mr Barnette and subsequently remarried, being now Mrs Montgomery. She renounced her United States citizenship in April 1992 and moved to London in May 1992, with the intention of taking up residence there. She became a citizen of St Kitts and Nevis in June 1994 and lost her United States nationality in November 1994. On 15 December 1992, when she was out of the jurisdiction, the United States court made an order for discovery against her, but she failed to comply with it. When the United States government brought a motion to increase the liability of the appellant and Mr Barnette as assessed on 18 August 1995, the appellant did not file any brief in opposition. The judge in the Administrative Court in the present confiscation proceedings found that the appellant had sufficient notice of the government motion of 28 August 1995 to be able to oppose it if she chose (see [2002] EWHC 1113 (Admin)). She did, however, take part in the proceedings to the extent that she supported an application by Mr Barnette claiming credit for certain sums and a motion by him seeking further time to respond to the United States government's motion. The order of 15 November 1995 was made by the district court after consideration of the documents without an oral hearing.

[9] The appellant and Mr Barnette filed appeals to the United States Court of Appeals ((1997) 129 F 3d 1179) against the order of the district court. The appellant filed a substantial brief and was represented by counsel. At the end of the hearing the court invited further submissions on the issue whether in view of the 'fugitive status' of the appellant and Mr Barnette it should not entertain their appeal at all. The appellant submitted a brief on this issue, but the court on 20 November 1997 dismissed both appeals on the basis of the fugitive disentitlement doctrine. Under this doctrine the court had a discretion to refuse

to hear or decide the appeal, on the ground that the appellant was a fugitive from justice.

[10] The doctrinal basis for the discretion was described by the United States Court of Appeals in the following passage from its judgment (at 1183):

> 'The rationales [sic] for this doctrine include the difficulty of enforcement against one not willing to subject himself to the court's authority, the inequity of allowing that "fugitive" to use the resources of the courts only if the outcome is an aid to him, the need to avoid prejudice to the nonfugitive party, and the discouragement of flights from justice ... That any judgment rendered by this court can be viewed by the Barnettes as merely advisory (and their compliance therewith optional) is our main concern in deciding the government's motion to dismiss this appeal. Impossibility of enforcement was the initial reason for the establishment of the fugitive disentitlement doctrine ... The Supreme Court has refused to allow application of disentitlement when enforcement is possible despite the appellant's absence ... Here, however, possession of the forfeited property, Old Dominion stock, lies with Kathleen Barnette—outside the reach of the government ... In this appeal, we seriously doubt any decision rendered against the Barnettes could be enforced against them.'

The court went on to say (at 1182) that the basis for the district court's decision to hold the appellant in contempt—

> 'was not the conviction of her husband, but instead her refusal to comply with clear orders from the court regarding property she claimed to own that was the subject of the forfeiture judgment. Nonparties that actively aid and abet a party in violating a court order may be held in contempt of court.'

The court found on the facts that the appellant was not a clearly innocent party in the government's effort to collect the shares of stock owned by her. It stated that she acted in concert with him to hide assets and transfer funds, resulting in inaccessibility to these moneys by the government. She admitted in a sworn statement that she moved the assets of ODSA to avoid the criminal forfeiture judgment. She had fought the forfeiture every step of the way and her continuing failure to furnish discovery was regarded by the district court as part of the Barnettes' overall scheme to evade the forfeiture judgment. It went on (at 1185):

> 'Based upon her past conduct—including leaving the country—and continued noncompliance with court orders, Kathleen Barnette seems to intend not to submit herself to the authority of United States courts, including this one. Therefore, we have no confidence that, should we decide this case on the merits and hold that the district court properly entered the contempt order against her, Kathleen Barnette would recognize that court's authority and forfeit the stock at issue or present herself for incarceration. Kathleen Barnette is a fugitive from the contempt order and the ensuing bench warrants. Her status as a fugitive, like her husband's, flouts this court's authority by effecting the very stay that was prohibited by this court's denial of her motion to stay the contempt judgment pending appeal. Applying the principle of disentitlement, Kathleen Barnette should not be entitled to an appeal in this court when she has repeatedly refused to abide by prior court orders, removed herself to the United Kingdom (beyond our reach), and renounced her United States citizenship.'

[11] The respondent government seeks in these proceedings to register the confiscation order under s 97 of the Criminal Justice Act 1988, with a view to enforcing it by process against assets of the appellant in the United Kingdom. In aid of the confiscation process it obtained a restraint order in September 1997, whose validity was finally upheld by your Lordships' House in the appeal of *United States Government v Montgomery (Montgomery, third party)* [2001] 1 All ER 815, [2001] 1 WLR 196. Section 97 provides:

> '(1) On an application made by or on behalf of the government of a designated country, the High Court may register an external confiscation order made there if—(a) it is satisfied that at the time of registration the order is in force and not subject to appeal; (b) it is satisfied, where the person against whom the order is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and (c) it is of the opinion that enforcing the order in England and Wales would not be contrary to the interests of justice.
>
> (2) In subsection (1) above "appeal" includes—(a) any proceedings by way of discharging or setting aside a judgment; and (b) an application for a new trial or a stay of execution.
>
> (3) The High Court shall cancel the registration of an external confiscation order if it appears to the court that the order has been satisfied by payment of the amount due under it or by the person against whom it was made serving imprisonment in default of payment or by any other means.'

It is common case that the United States is a designated country, by virtue of the Criminal Justice Act 1988 (Designated Countries and Territories) Order 1991, SI 1991/2873, as amended by an amendment order of 1994 (SI 1994/1639), and that the confiscation order made by the United States district court is an external confiscation order, which is in force and not subject to appeal. Nor has the judge's ruling been challenged that the appellant had due notice of the proceedings. The issue between the parties is whether it would be contrary to the interests of justice to register the order.

[12] The appellant has based her case upon the proposition that if a court in a state which is a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) were to shut her out from pursuing an appeal, as the United States Court of Appeals did, it would constitute a breach of art 6 of the convention, which provides:

> '1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> 2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> 3 Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and

in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.'

It was argued on her behalf that for a court in this jurisdiction to register the confiscation order and so enforce the order of the United States Court of Appeals would be to act in a way which was incompatible with a convention right, which is made unlawful by s 6 of the Human Rights Act 1998.

[13] In the Administrative Court ([2002] EWHC 1113 (Admin)) Stanley Burnton J held that the United States proceedings would be classed as criminal if they took place in a country that was a party to the convention, which made art 6(3)(c) applicable. On the Strasbourg authorities stemming from *Ashingdane v UK* (1985) 7 EHRR 528 and *Poitrimol v France* (1994) 18 EHRR 130 the judge held that if the United States had been a party to the convention art 6 would have required the Court of Appeal to consider the appellant's appeal on the merits. Neither of these conclusions was the subject of argument before your Lordships, though Lord Woolf CJ in the Court of Appeal ([2003] EWCA Civ 392, [2003] 1 WLR 1916) reserved his opinion on whether the United States proceedings constituted 'the determination of ... [a] criminal charge' within the meaning of the phrase in art 6(1). For the purposes of this appeal I am content to assume that the operation of the fugitive disentitlement doctrine by the United States Court of Appeals would, if it had taken place in a convention state, have constituted a breach of art 6.

[14] In the Court of Appeal the appellant's case relied heavily on the decision of the European Court of Human Rights in *Soering v UK* (1989) 11 EHRR 439, to which I shall refer in more detail later. The same argument was founded upon this authority as that which had been advanced before Stanley Burnton J, that to enforce the order of the United States court would be acting incompatibly with the appellant's convention rights under art 6 of the convention and art 1 of the First Protocol. Lord Woolf CJ, with whose judgment Kennedy and Scott Baker LJJ agreed, did not base his approach to the case on the provisions of the convention. In his judgment (at [25]), he set out his reasons for distinguishing the decision in *Soering*'s case:

'The *Soering* case is dealing with a very different situation from that which we have to consider on this appeal. In the *Soering* case the action of the court in this jurisdiction would be the direct cause of the breach of the prohibition in article 3 which is one of the most fundamental provisions of the Convention. Here it cannot be said even if the conduct of the district court and the Court of Appeals in the United States has been inconsistent with the standards of conduct required by article 6 or article 1 of the First Protocol, that the decision to register under the 1988 Act gives rise to any breach of article 6 of the Convention. This is for the simple reason that any conduct which could be a breach of the Convention in the United States had already taken place prior to the English proceedings. In any event, the reference in paragraph 113 of the judgment in the *Soering* case to a future flagrant breach

of article 6 was no more than a dicta which should not be applied to the enforcement of a court order of a non-contracting state. Furthermore, if there was any breach by the United States courts of article 6 (which I do not accept) that breach was certainly not flagrant.'

He pointed out that there are difficulties in seeking to judge the procedures of a court in a jurisdiction to which the convention does not apply by applying art 6. The standards required by the convention might be a guide to the court in determining for the purposes of s 97 of the 1988 Act what was in the interests of justice, but it was preferable not to become too closely engaged with the jurisprudence relating to art 6, which could be somewhat technical. The Court of Appeal held on examination of the facts of the case that it would not be contrary to the interests of justice to register the order.

[15] Notwithstanding the views of Lord Woolf CJ which I have quoted, it is in my opinion necessary to consider whether registration of the order would constitute a breach of art 6 of the convention. In doing so I would observe that in my judgment the case belongs to the category classified by Lord Bingham of Cornhill in *R (on the application of Ullah) v Special Adjudicator, Do v Secretary of State for the Home Dept* [2004] UKHL 26, [2004] 3 All ER 785, [2004] 3 WLR 23 as 'foreign cases' rather than 'domestic cases'. In the latter category, exemplified by *Abdulaziz v UK* (1985) 7 EHRR 471 and *Bensaid v UK* (2001) 11 BHRC 297, the treatment by a state within its jurisdiction of a person resident there is such that that treatment may constitute a breach of one of the articles of the convention. Conversely, in a 'foreign' case, such as those concerning the expulsion of aliens seeking entry, the complaint is that the act or omission of the state may expose the applicant to treatment in another state which, if committed by a convention state would constitute a breach of one or more of the provisions of the convention.

[16] The gravamen of the appellant's complaint is that she was treated unfairly by the United States Court of Appeals and that registration of the confiscation order, by giving effect to its terms and exposing her to its consequences, engages the responsibility of the English court. Mr Lewis QC argued on behalf of the appellant, first, that art 6 was directly engaged, because it was incumbent on the English court to satisfy itself that the American proceedings satisfied the guarantees enshrined in art 6 and, secondly and in the alternative, that art 6 was indirectly engaged, in that the English court by registering the confiscation order has exposed the appellant to the consequences of the American proceedings which were conducted in breach of the requirements of art 6.

[17] In considering these arguments it is necessary to have regard to the territoriality principle, governing the territorial reach of the convention and its limitations, aptly described in the judgment of the Court of Human Rights in *Soering v UK* (1989) 11 EHRR 439 at 466 (para 86):

> 'Article 1 of the Convention, which provides that "the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1," sets a limit, notably territorial, on the reach of the Convention. In particular, the engagement undertaken by a Contracting State is confined to "securing" ("*reconnaître*" in the French text) the listed rights and freedoms to persons within its own "jurisdiction". Further, the Convention does not govern the actions of States not Parties to it, nor does it purport to be a means of requiring the Contracting States to impose Convention standards on other States.'

[18] Given this territorial limitation, it is difficult to see how registration of the United States court's order could constitute a direct breach of its terms, for there can be no suggestion that the hearing afforded to the appellant in the registration proceedings failed to meet any of the requirements of the article. It was argued on behalf of the appellant, however, that the decision of the Court of Human Rights in *Pellegrini v Italy* (2002) 35 EHRR 44 was an authority in her favour which was indistinguishable from the present case.

[19] *Pellegrini*'s case turns on the relationship between the Italian civil courts and the Ecclesiastical Court of the Rome Vicariat, a church court classed by the Court of Human Rights as a court of the Vatican (properly the Holy See), a state which is not a party to the convention. The applicant Ms Pellegrini was married to Mr A Gigliozzi in 1962 in a religious marriage, which had legal effect in Italy. In 1987 she sought a decree of judicial separation from the civil court in Rome and in 1990 she was granted a decree and an order for maintenance was made in her favour. Meanwhile Mr Gigliozzi brought proceedings in the ecclesiastical court for annulment of the marriage on the grounds of consanguinity. By a judgment given in December 1987 the ecclesiastical court annulled the marriage. The applicant forthwith brought an appeal to the Roman Rota, an Italian civil court, complaining that the procedure adopted in the ecclesiastical court had deprived her of her right to a fair hearing under art 6 of the convention. Under the terms of a Concordat made between Italy and the Vatican a judgment of the ecclesiastical courts annulling a marriage may be made operative in Italy at the request of one of the parties through a judgment of the competent appeal court. The Rota upheld the annulment and its decision was affirmed on appeal to the Florence Court of Appeal and the Court of Cassation, both of which were of opinion that the procedure adopted by the ecclesiastical court did not amount to a violation of the applicant's rights.

[20] The Court of Human Rights allowed Ms Pellegrini's application, finding that the procedure in the ecclesiastical court was insufficient to satisfy the requirements of art 6. In considering the application of art 6 to the issue the court stated ((2002) 35 EHRR 44 at 51–52 (para 40)):

> 'The Court notes first of all that the declaration of nullity of the applicant's marriage was issued by the Vatican courts and then made operative by the Italian courts. The Vatican has not ratified the Convention, and the application is moreover directed against Italy: the task of the court is therefore to enquire not into whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but into whether the Italian courts, before granting confirmation and execution of the said annulment, duly checked that the proceedings relating thereto satisfied the guarantees contained in Article 6; such a check is required, in fact, where the judgment for which confirmation and execution is sought emanates from the courts of a country which does not apply the Convention. Such a check is all the more necessary where execution would have serious implications for the parties.'

[21] Mr Lewis placed this decision at the forefront of his argument whereby he submitted that art 6 was directly engaged in the present case. The relationship between the Italian courts and the Vatican courts depends, however, on the terms of the Concordat, a special legal relationship between states. Article 8(2) of the Concordat provides, in an English translation, so far as material:

> 'The judgments of nullity of marriage pronounced by ecclesiastical tribunals, together with the decree of execution issued by the superior controlling ecclesiastical authority, shall be declared, at the request of the parties or of one of them, effective within the Italian Republic by judgment of the competent Court of Appeal, upon verifying: (a) that the ecclesiastical judge was the competent judge to adjudicate the action, the marriage having been celebrated in accordance with the present article; (b) that in the proceedings before the ecclesiastical tribunals the right to sue and to defend in court has been assured to the parties in a way not dissimilar from what is required by the fundamental principles of the Italian legal system; (c) that the other conditions required by the Italian legislation for the declaration of efficacy of foreign judgments are present.'

Article 6 of the convention, to which Italy is a party, has been 'enacted in the Italian legal order', according to Professor Roberto Baratta and Professor Andrea Giardina. Moreover, art 111 of the Italian Constitution provides that jurisdiction is exercised through fair trial (giusto processo) as regulated by the law. The Italian courts were accordingly specifically obliged to ensure that the procedure was sufficient to satisfy the terms of art 6 of the convention, as well as art 111 of the Italian Constitution. The decision in *Pellegrini*'s case is therefore in my opinion dependent on the particular effect of the Concordat, and is not authority for the conclusion which the appellant's counsel sought to draw from it. I therefore do not consider that the appellant's argument based on direct engagement of art 6 is well founded.

[22] The Strasbourg jurisprudence has, however, developed an exception to the principle of territoriality, which may conveniently be described as giving indirect effect to provisions of the convention. The fons et origo of this doctrine is to be found in the decision of the Court of Human Rights in *Soering v UK* (1989) 11 EHRR 439. The applicant sought to resist his extradition to the United States to face trial on a charge of capital murder. The United Kingdom government contended that the risk of a capital sentence being either imposed or carried out was low, especially in light of the assurances which it had obtained, and that that risk was insufficient to make the applicant's extradition a breach of art 3 of the convention. The court rejected this contention and also held that the risk of the applicant's having to endure the 'death row phenomenon' exposed him to a real risk of treatment going beyond the threshold set by art 3. It emphasised the high degree of importance to be attached to the observance of the obligations of art 3, which it described (at 467 (para 88)) as 'one of the fundamental values of the democratic societies making up the Council of Europe'. In this regard it stated (at 467 (para 87)):

> 'In interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms. Thus, the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective. In addition, any interpretation of the rights and freedoms guaranteed has to be consistent with "the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society."'

The court concluded accordingly that a risk that the applicant might be subjected to torture, inhuman or degrading treatment or punishment was sufficient to engage the responsibility of a contracting state under art 3 when considering extradition.

[23] The applicant in *Soering*'s case (1989) 11 EHRR 439 also submitted that the procedure in Virginia, which did not afford legal aid for collateral challenges in the federal courts, was such that extradition would involve a breach of art 6 of the convention. On this issue the court stated (at 479 (para 113)):

> 'The right to a fair trial in criminal proceedings, as embodied in Article 6, holds a prominent place in a democratic society. The Court does not exclude that an issue might exceptionally be raised under Article 6 by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of a fair trial in the requesting country. However, the facts of the present case do not disclose such a risk.'

[24] The Court of Human Rights has affirmed on a number of occasions the existence in principle of the possibility in a suitable case of invoking art 6. The context has generally been that of extradition or expulsion of aliens seeking admission to the country concerned, but in my opinion it is capable of being applied to the enforcement in a convention state of a judgment obtained in another state, whether or not the latter is an adherent to the convention. No decision was cited to your Lordships in which the court went so far as to hold that an act of extradition or expulsion amounted to a breach of art 6, and in all of the reported cases the court has strongly emphasised the exceptional nature of such a jurisdiction and the flagrant nature of the deprivation of an applicant's rights which would be required to trigger it.

[25] These authorities were discussed in detail in the recent decisions of the House in *R (on the application of Ullah) v Special Adjudicator* [2004] 3 All ER 785, [2004] 3 WLR 23, and *R (on the application of Razgar) v Secretary of State for the Home Dept* [2004] UKHL 27, [2001] 3 All ER 821, [2004] 3 WLR 58 and it is unnecessary to set them out in detail again in this judgment. It is sufficient to refer only to two of these cases. In *Einhorn v France* App no 71555/01 (16 October 2001, unreported), an extradition case, the court stated at para 32 of its judgment that—

> 'it cannot be ruled out that an issue might exceptionally be raised under art 6 of the convention by an extradition decision in circumstances where the fugitive has suffered or risks suffering a flagrant denial of justice in the requesting country ...'

In *Tomic v UK* App no 17837/03 (14 October 2003, unreported), an expulsion case, the court reaffirmed the principle in very similar language at para 3 of its judgment:

> 'The court does not exclude that an issue might exceptionally be raised under art 6 by an expulsion decision in circumstances where the person being expelled has suffered or risks suffering a flagrant denial of a fair trial in the receiving country ...'

[26] In *Ullah*'s case and *Razgar*'s case the House accepted the validity of these propositions, but also underlined the extreme degree of unfairness which would have to be established for an applicant to make out a case of indirect effect. It was of opinion that it would have to amount to a virtually complete denial or nullification of his art 6 rights, which might be expressed in terms familiar to

lawyers in this jurisdiction as a fundamental breach of the obligations contained in the article.

[27] Counsel for the appellant referred to a passage in the concurring opinion of Judge Matscher in *Drozd v France* (1992) 14 EHRR 745 at 795, in which he said:

> 'According to the Court's case law, certain provisions of the Convention do have what one might call an indirect effect, even where they are not directly applicable. Thus, for example, a State may violate Articles 3 and/or 6 of the Convention by ordering a person to be extradited or deported to a country, whether or not a member state of the Convention, where he runs a real risk of suffering treatment contrary to those provisions of the Convention (*Soering v UK* (1989) 11 EHRR 439); other hypothetical cases of an indirect effect of certain provisions of the Convention are also quite conceivable. The same argument applies in reverse, so to speak, a contracting state may incur responsibility by reason of assisting in the enforcement of a foreign judgment, originating from a contracting or a non-contracting state, which has been obtained in conditions which constitute a breach of Article 6, whether it is a civil or criminal judgment, and in the latter case whether it imposes a fine or a sentence of imprisonment.'

In so far as this dictum suggests that enforcement of a foreign judgment might in principle give rise to responsibility on the part of a convention state, I have no difficulty in accepting its correctness. It is to be observed, however, that in the following sentence Judge Matscher went on to say (at 795): 'This must clearly be a flagrant breach of Article 6', so recognising the exceptional nature of the circumstances which could give rise to such responsibility. I therefore do not understand him to have meant to lay down any wider proposition than that which the House has accepted in *Ullah*'s case and *Razgar*'s case.

[28] I should mention also that the distinguished scholar Judge Jean-Paul Costa of the Court of Human Rights has taken a different view of the effect of *Pellegrini v Italy* (2002) 35 EHRR 44. He expressed the opinion extra-judicially (see (2002) *Rivista internazionale dei diritti dell'uomo* 435 pp 437–439) that *Pellegrini*'s case goes beyond *Soering*'s case and *Drozd*'s case, so that it may be said to have overtaken those decisions. With all respect due to an authority of Judge Costa's eminence and to the opinions of the eminent academic commentators adduced on behalf of the appellant, I adhere to the view that the decision in *Pellegrini*'s case turned upon the particular requirements in Italian law of the Concordat and that the flagrant denial test is still applicable, as is recognised by recent decisions of the Court of Human Rights such as *Einhorn v France* App no 71555/01 (16 October 2001, unreported) and *Tomic v UK* App no 17837/03 (14 October 2003, unreported). The observation at the end of the penultimate sentence of the passage which I have quoted from *Pellegrini*'s case (see [20], above) is too frail a peg on which to hang the contrary theory.

[29] When one comes to apply these principles to the present case, the conclusion is in my opinion quite clear. The fugitive disentitlement doctrine is not an arbitrary deprivation of a party's right to a hearing, but is intended to be a means of securing proper obedience to the orders of the court. As Lord Woolf CJ said ([2003] 1 WLR 1916 at [35]):

> 'Where a party is guilty of contempt there may be no other sanction available if he is outside the jurisdiction of the court. The reason for the doctrine being applied by the United States Court of Appeals in

Mrs Montgomery's case was not to vindicate the dignity of the court, but because the court thought that it was the only available sanction which could achieve obedience to the order of the court.' a

Although the application of the fugitive disentitlement doctrine may be regarded as failing to secure all of the protection required by art 6 of the convention, it is a rational approach which has commended itself to the federal jurisdiction in the United States. As such it could not in my opinion be described by any stretch as b a flagrant denial of the appellant's art 6 rights or a fundamental breach of the requirements of that article. It follows that the appellant's argument based on the indirect engagement of the responsibility of the United Kingdom must fail.

[30] The same reasons are relevant in considering the issue whether it was contrary to the interests of justice to enforce the confiscation order by registering c the judgment of the United States district court. As Stanley Burnton J and the Court of Appeal have pointed out in their judgments, the appellant was by no means shut out from taking part in the proceedings. The merits of her contentions had been fully considered at first instance and on appeal she filed a brief and was represented by counsel. When the issue of fugitive disentitlement was raised by the court she was able to file a brief relating to this issue. Moreover, d it seems to me a material consideration that the United States Court of Appeals found that she had been taking active steps to hide assets and transfer funds in an effort to evade the forfeiture judgment. I accordingly agree with the conclusion of Stanley Burnton J and the Court of Appeal that it would not be contrary to the interests of justice to register the judgment.

[31] I would therefore dismiss the appeal. e

Appeal dismissed.

Kate O'Hanlon Barrister.

Archibald v Fife Council

[2004] UKHL 32

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD HOPE OF CRAIGHEAD, LORD RODGER OF EARLSFERRY, BARONESS HALE OF RICHMOND AND LORD BROWN OF EATON-UNDER-HEYWOOD

26, 27 MAY, 1 JULY 2004

Employment – Disability – Discrimination – Employee dismissed from employment following injury – Employee making complaint of unlawful disability discrimination – Employer owing duty to take reasonable steps to prevent employee being at a disadvantage in comparison to persons who were not disabled – Whether duty arising where employee so disabled as to be unable to meet requirements of job description – Disability Discrimination Act 1995, s 6(1), (3)(c), (7).

The employee was employed by the defendant council as a road sweeper, which was a post graded as manual worker grade 1. As a result of a complication during minor surgery, she became virtually unable to walk and could no longer carry out the job of a road sweeper. However she could do sedentary work and was keen so to do. The council arranged for her to undertake a number of courses to equip her with appropriate skills, and she was assessed as more than capable of carrying out work in an office environment. However, office posts within the council were all on a slightly higher grade than manual worker grade 1. Under the Local Government and Housing Act 1989 all staff engaged by a local authority had to be appointed on merit and in accordance with that provision the council had a policy whereby those seeking redeployment at a higher grade had to undertake competitive interviews. The employee applied for over 100 posts at a higher grade but failed to obtain any of them. Eventually she was dismissed on grounds of incapacity. Under s 6(1)[a] of the Disability Discrimination Act 1995, where, inter alia, any arrangements made by or on behalf of an employer placed a disabled person at a substantial disadvantage in comparison with persons who were not disabled, it was the duty of the employer to take such steps as it was reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements having that effect. Section 6(3) gave examples of steps which an employer might have to take in order to comply with s 6(1), and included, at s 6(3)(c), 'transferring him to fill an existing vacancy'. The employee complained to the employment tribunal of disability discrimination. She argued that she had been discriminated against by the council in the way that they sought redeployment opportunities for her. The tribunal relied on s 6(7) of the 1995 Act, which provided that subject to the provisions of s 6, nothing in that part of the 1995 Act was to be taken to require an employer to treat a disabled person more favourably than he treated or would treat others, and held that as the council's policy was that competitive interviews were required if applying for a job at a higher grade, there was nothing that the authority could have done. They accordingly concluded that the council was not in breach of its s 6 duty. The employee's appeals to the Employment Appeal Tribunal and the Extra Division of the Court of Session were dismissed. She appealed to the House of Lords.

a Section 6, so far as material, is set out at [52], below

Their Lordships considered the definition and scope of an employer's duty to make adjustments under s 6 of the 1995 Act. The council contended that the duty in s 6 could not arise when the disability meant that the employee could not do the job at all and there was no adjustment to the arrangements for that job which could make any difference.

Held – The duty of an employer under s 6(1) of the 1995 Act to take such steps as it was reasonable, in all the circumstances of the case, for him to have to take in order to prevent any arrangements made by or on his behalf placing a disabled person at a substantial disadvantage was triggered where an employee became so disabled that she could no longer meet the requirements of her job description. Transferring an employee to fill an existing vacancy within s 6(3)(c) included an upwards transfer, as well as sideways or downwards transfers and was clearly more than allowing an employee to apply, short-listing or considering her for an existing vacancy. In the instant case, where there had been no equal or lower grade job to which the employee could be transferred, transferring her to a sedentary position which she was qualified to fill was among the steps which it might have been reasonable in all the circumstances for the council to have to take once she could no longer walk and sweep. To the extent that the duty to make reasonable adjustments required it, an employer was not only permitted but obliged to treat a disabled person more favourably than others; the part of s 6(7) of the 1995 Act which provided that nothing in that part of the 1995 Act was to be taken to require an employer to treat a disabled person more favourably than he treated others was prefaced by the words, 'subject to the provisions of this section'. Accordingly, the appeal would be allowed and the case remitted to the employment tribunal so that it could consider whether the council had fulfilled its s 6(1) duty to take such steps as it was reasonable in all the circumstances for it to have to take (see [1], [2], [14], [19], [22], [30], [41]–[43], [62]–[72], [74], below).

Notes

For discrimination by failure to make reasonable adjustments and for the duty of an employer to make adjustments, see 13 *Halsbury's Laws* (4th edn reissue) paras 480, 489.

For the Disability Discrimination Act 1995, s 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 298.

Cases referred to in opinions

Clark v Novacold Ltd [1999] 2 All ER 977, [1999] ICR 951, CA.

Collins v Royal National Theatre Board Ltd [2004] EWCA Civ 144, [2004] 2 All ER 851.

Hall v Woolston Hall Leisure Ltd [2000] 4 All ER 787, [2001] ICR 99, [2001] 1 WLR 225, CA.

Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd [2003] UKHL 33, [2003] 4 All ER 1113, [2003] ICR 867.

Cases referred to in list of authorities

Addison v Denholm Ship Management (UK) Ltd [1997] IRLR 389, [1997] ICR 770, EAT.

Anyanwu v South Bank Student Union (Commission for Racial Equality, interveners) [2001] UKHL 14, [2001] 2 All ER 353, [2001] ICR 391, [2001] 1 WLR 638.

Beart v HM Prison Service [2003] EWCA Civ 119, [2003] IRLR 238, [2003] ICR 1068.

Cave v Goodwin [2001] EWCA Civ 391, [2001] All ER (D) 163 (Mar).

Coker v Lord Chancellor [2001] EWCA Civ 1756, [2002] IRLR 80, [2002] ICR 321.

Goodwin v Patent Office [1999] IRLR 4, [1999] ICR 302, EAT.

Jones v Tower Boot Co Ltd [1997] 2 All ER 406, [1997] ICR 254, CA.

Kent CC v Mingo [2000] IRLR 90, EAT.

Kirton v Tetrosyl Ltd [2003] EWCA Civ 619, [2003] IRLR 353, [2002] ICR 1237.

McDonnell v Congregation of Christian Brothers Trustees (formerly Irish Christian Brothers) [2003] UKHL 63, [2004] 1 All ER 641, [2004] 1 AC 1101, [2003] 3 WLR 1627.

Morse v Wiltshire CC [1998] IRLR 352, [1998] ICR 1023, EAT.

Post Office v Jones [2001] EWCA Civ 558, [2001] IRLR 384, [2001] ICR 805.

R v Secretary of State for Health, ex p Imperial Tobacco Ltd [2001] 1 All ER 850, [2001] 1 WLR 127, HL.

R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.

Seymour v British Airways Board [1983] IRLR 55, [1983] ICR 148, EAT.

Vento v Chief Constable of West Yorkshire Police [2002] EWCA Civ 1871, [2003] IRLR 102, [2003] ICR 318.

Wilson v First County Trust Ltd [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568.

Appeal

Susan Archibald appealed from the Interlocutor of the Lords of the Extra Division of the Court of Session (Lord Hamilton, Lord Macfadyen and Lord McCluskey) on 9 December 2003 ([2004] IRLR 197) dismissing Mrs Archibald's appeal from the decision of the Employment Appeal Tribunal at Edinburgh (Lord Johnston, AJ Ramsden and A Martin) given on December 2002 dismissing her appeal from the decision of the Dundee Employment Tribunal (A Worthington, H Terrell and W Tait) given on 25 April 2002 dismissing her application alleging disability discrimination by her former employer, Fife Council. The facts are set out in the opinion of Baroness Hale of Richmond.

Robin Allen QC and *Brian Napier QC* (instructed by the *Lynn Welsh*, Edinburgh) for Mrs Archibald.

Aidan O'Neill QC, Ian Sharpe and *Simon Collins* (all of the Scottish Bar) (instructed by *Balfour & Manson*, Edinburgh) for the council.

Their Lordships took time for consideration.

1 July 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. I agree that for the reasons they give, which in all essential respects are to the same effect, this appeal should be allowed.

LORD HOPE OF CRAIGHEAD.

[2] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Baroness Hale of Richmond. Subject to the following observations, I agree with it. I too would allow the appeal and remit the case to the employment tribunal.

[3] Mrs Archibald's complaint of unfair dismissal and of discrimination under the Disability Discrimination Act 1995 was presented in her application to the employment tribunal ([2003] All ER (D) 13 (Jan)) in these terms:

> 'I feel that I was unfairly dismissed by Fife Council with effect from 12 March 2001 on the grounds of capability. As I am a disabled person in accordance with the terms of the Disability Discrimination Act 1995, I am of the opinion that I have been discriminated against by the council in the way that they sought redeployment opportunities for me.'

[4] I agree with my noble and learned friend Lord Rodger of Earlsferry that it is important, before examining the discrimination issue and to put it into its correct context, to identify the correct starting point. Section 8(1)(a) of the 1995 Act provides that there may be presented to an employment tribunal a complaint by any person that another person has discriminated against him in a way that is unlawful under Pt II of the Act. Section 8(2) sets out the remedies that the tribunal may grant to the complainant if it finds that a complaint presented to it under the section is well founded.

[5] The circumstances in which it is unlawful for an employer to discriminate against an employed person are set out in s 4(1) and (2) of the Act. Section 4(1) deals with discrimination by an employer against a disabled person in regard to offers of employment. Section 4(2) deals with discrimination by an employer against a disabled person whom he employs. The appellant was already in the employment of the council when she became disabled. So the basis for her complaint of discrimination must be found in s 4(2). Section 4(2)(d) provides that it is unlawful for a person to discriminate against a disabled person whom he employs by dismissing him.

[6] The tribunal's approach to the complaint under the 1995 Act is indicated by the following passage which appears at p 8 of the extended reasons for their decision:

> 'As we understood the applicant's position, she did not seek to maintain that the dismissal itself amounted to unlawful discrimination in terms of s 4 of the 1995 Act but rather that in terms of s 5 of that Act discrimination had occurred here which was not justified and that, more particularly, the respondents had failed in their duty to make reasonable adjustments in terms of s 6 of the 1995 Act.'

[7] It is important however to appreciate that the only function of s 5 is to define what is meant by the word 'discriminate' where it appears in s 4 of the Act. Section 5 is not, of course, unimportant. But it is to s 4 that one must go first in order to discover whether the employer's act was an unlawful act which entitled the complainant to apply to the employment tribunal for a remedy. The first step, then, is to identify the act which is said to have been unlawful. As I understand Mrs Archibald's case, it is the act which the council took on 12 March 2001 when it dismissed her from its employment because she was physically unable to do her job as a road sweeper.

[8] An act of dismissal is only unlawful for the purposes of the 1995 Act if the employer discriminates against the disabled person by doing so. This proposition directs attention to ss 5 and 6 of the Act which Lady Hale has analysed. The steps by which the heart of the complaint in this case is reached are to be found in sub-ss (1), (3) and (5) of s 5.

[9] At first sight, since the heart of the complaint lies in s 6, this appears to be a case of discrimination under s 5(2) which provides that an employer 'also' discriminates against a disabled person if he fails to comply with a s 6 duty imposed on him in relation to the disabled person and he cannot show that his failure to comply with that duty is justified. But this was not a case about any physical features of premises occupied by the employer (see s 6(1)(b)). And s 6(2) provides that s 6(1)(a), which refers to any arrangements made by or on behalf of an employer, applies only in relation to (a) arrangements for determining to whom employment should be offered—which is not this case—and '(b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.'

[10] So the question is, in terms of s 5(1) read with s 5(3), whether the council can show that they were justified in dismissing Mrs Archibald for a reason related to her disability. The result of their dismissal of her on this ground was that, because of her disability, they treated her less favourably than they would have treated others in their employment who were not disabled from doing the job they were employed to do. They will not be able to show that their treatment of her was justified if they would not have been justified in dismissing her if they had complied with their duty under s 6 to make adjustments to prevent her disability having that effect (see s 5(3)).

[11] Mrs Archibald was employed by the council as a manual worker. It was an implied 'condition' or an 'arrangement' of her employment within the meaning of s 6(2)(b) that she should at all times be physically fit to do her job as a road sweeper. She met this requirement when she entered the council's employment on 6 May 1997. She underwent minor surgery in April 1999 as a result of which she became disabled. As a result she was no longer physically fit to do this job. This exposed her to another implied 'condition' or 'arrangement' of her employment, which was that if she was physically unable do the job she was employed to do she was liable to be dismissed.

[12] Her disability placed her at a substantial disadvantage in comparison with others in the same employment who were not at risk of being dismissed on the ground that, because of disability, they were unable to do the job they were employed to do. These persons, a limited class, were her 'comparators'. There was nothing that the council could have done by way of adjustment to the manual labour job to cure that fact that she was unable to do that job due to her disability. But she was not so disadvantaged that she could not conceivably have been employed by them at all. If she had been given a job to do which she was physically able to do, the disadvantage which she was under in comparison with others in the same employment who were not at risk of being dismissed on the ground of disability would have been removed.

[13] So the question comes to be whether there were steps which the council could have taken by way of adjustment to the conditions of her employment to remove the disadvantage which she was under because she was at risk of dismissal because she was unable to do the job she was employed to do because of her disability.

[14] The council, very commendably, went to considerable lengths to help her find an alternative position within their own organisation for which she was suited which did not involve the use of manual labour. Section 6(3)(c) shows that this kind of adjustment was within the scope of the duty which the council were under in these circumstances. This paragraph includes, as an example of the steps that may be taken by way of adjustment, 'transferring' the disabled person to fill another vacancy. A purposive meaning is to be given to the word 'transferring' in this context. It is to be borne in mind that it is, after all, only an example. It is not be read as restricting the adjustment which is contemplated to a post on the same pay grade or at the same level of seniority.

[15] The duty which rested on the council under s 6(1) is described in the sidenote to s 6 as a duty to make adjustments. But it is not simply a duty to make adjustments. The making of adjustments is not an end in itself. The end is reached when the disabled person is no longer at a substantial disadvantage, in comparison with persons who are not disabled, by reason of any arrangements made by or on behalf of the employer or any physical features of premises which the employer occupies.

[16] As the determination of the employment tribunal makes clear, a substantial number of adjustments to the normal procedures were made in Mrs Archibald's case. Some of them involved positive discrimination in her favour, such as her automatic short listing for the available posts. This was within the scope of the duty, as it was necessary for the council to redress the position of disadvantage that she was in due to her disability. The crucial question is whether the council should have taken one more step and simply transferred her to a sedentary job for which she was suitable, or at least dispensed in her case with the need for competitive interviews.

[17] The requirement for competitive interviews seems to have had its origin in s 7(1)(b) of the Local Government and Housing Act 1989, which provides that every appointment of a person to a paid office or employment under a local authority in Scotland shall be made on merit. It is to be found in section 10 of the council's attendance management guidelines for managers, which deals with cases of long-term or short-term sickness absence, including those due to disability. It requires all other options to be considered before dismissal is resorted to. Paragraph 10.5 sets out the procedure which is to be followed where the person is being redeployed to another service. Where the post is of the same or a lower grade, there is no requirement for competitive interviews to determine the employee's suitability for the post which is on offer. Applicants are to be considered in competition with other applicants, but all that is needed for this purpose is a meeting between the employee and an appropriate manager. But where the post is of a higher grade, 'this should be advertised and competitive interviews held'.

[18] The employment tribunal did not explore the question whether it would have been reasonable for the council simply to have transferred Mrs Archibald to a sedentary job for which she was suitable or whether the council's policy requirement for a competitive interview should have been dispensed with in her case. This was because the tribunal overlooked the opening words of s 6(7) of the 1995 Act, which qualify the proposition that nothing in Pt II of the Act is to be taken to require the employer to treat a disabled person more favourably that he treats or would treat others. These words provide that the subsection is subject to the provisions of s 6 itself.

[19] This means that s 6(7) is subject to the duty to make adjustments in relation to people who are at a substantial disadvantage because they are disabled in comparison with persons who are not disabled (s 6(1)). The performance of this duty may require the employer, when making adjustments, to treat a disabled person who is in this position more favourably to remove the disadvantage which is attributable to the disability. Section 7(1) of the 1989 Act, in its turn, is qualified by s 7(2)(f) of that Act, to which the opening words of s 7(2) make it subject. In terms of s 7(2)(f), s 7(1)(b) is subject to ss 5 and 6 of the 1995 Act. The result is that a disabled person can lawfully be transferred to a post which she is physically able to do without being at risk of dismissal due to her disability, provided the taking of this step is a reasonable thing for the employer to do in all the circumstances.

[20] The tribunal did not consider whether the policy requirement ought to have been adjusted in Mrs Archibald's case to remove the disadvantage which she faced due to the fact that she was at risk of being dismissed because she was not longer able to do her job as a road sweeper. That disadvantage could have been removed by transferring her to a sedentary post for which she was suitable from her previous post as a manual labourer. If that had been done, her disability would no longer have exposed her to the risk of dismissal on the ground that she was not physically able to do the job that she was employed to do.

[21] This is the point which lies at the centre of the issues that the tribunal will need to consider when the case is remitted to them and they are examining the steps that the council could reasonably have taken in all the circumstances by way of adjustment to the arrangements which exposed Mrs Archibald to the risk of dismissal on the ground of her disability.

LORD RODGER OF EARLSFERRY.

[22] My Lords, I have had the privilege of considering the speech of my noble and learned friend, Baroness Hale of Richmond, in draft. I agree with her that the appeal should be allowed, for substantially the same reasons as she gives. Since the issues are of considerable importance for the working of the legislation, it may be helpful, however, if I explain those reasons in my own words.

[23] The appellant, Mrs Archibald, made a complaint to the employment tribunal against her employers, Fife Council. She complained of unfair dismissal and discrimination under the Disability Discrimination Act 1995. Since the council admitted that she had been dismissed, the onus lay on them to establish the alleged reason for the dismissal, viz capability. This meant that the proceedings began with evidence from the council's witnesses who dealt largely with the steps taken to help Mrs Archibald to obtain another post with the council after she became unfit to carry out her duties as a road sweeper manual worker grade 1. In the event the tribunal found that Mrs Archibald had indeed been dismissed because she had not been capable, on medical grounds, of carrying out her job. The tribunal also considered that the council's decision to dismiss her fell within the band of responses open to a reasonable employer. The tribunal therefore dismissed her complaint of unfair dismissal. Mrs Archibald did not appeal against this aspect of the tribunal's decision. That left her complaint of disability discrimination.

[24] The 1995 Act does not make it unlawful to discriminate against a disabled person in all circumstances. Rather, it outlaws that kind of

discrimination in various fields, including employment, which is covered in Pt II. Even within that field, however, the 1995 Act outlaws only those kinds of discrimination that are set out in s 4. Section 4(1) makes it unlawful for an employer to discriminate in certain ways against a disabled person who applies for a job; similarly, s 4(2) makes it unlawful for him to discriminate in various ways against a disabled person whom he employs or has employed (see *Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd* [2003] UKHL 33, [2003] 4 All ER 1113, [2003] ICR 867). As I emphasised in the *Relaxion Group* case (at [210]), under reference to Court of Appeal authority, disabled persons invoke the Act not to enforce their contractual rights against their employers but to enforce their statutory rights under s 4(1) and (2) not to suffer discrimination in the field of employment. The words of Peter Gibson LJ in *Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787 at 799, [2001] ICR 99 at 113 (para 46), apply as much to the Act as to the other anti-discrimination statutes: it is the discrimination that is the core of the complaint, the fact of employment and the dismissal being the particular factual circumstances which Parliament has prescribed for the disability discrimination complaint to be capable of being made.

[25] When can an employer be said to 'discriminate' against a disabled person in terms of s 4(1) and (2)? The answer is to be found in s 5(1) and (2). So the reason for considering whether an employer has 'discriminate[d] against a disabled person' in terms of s 5(1) and (2) is simply to discover whether he has unlawfully 'discriminated' against that disabled person in terms of either s 4(1) or (2). Only unlawful discrimination under s 4(1) or (2) entitles the disabled person to a remedy from the employment tribunal under s 8(2).

[26] In the present proceedings Mrs Archibald complains that the council 'discriminated' against her unlawfully in terms of s 4(2)(d) by dismissing her. Before the employment tribunal she said that, by dismissing her, the council had discriminated against her, for the purposes of that provision, in two ways. She alleged, firstly, in terms of s 5(1), that in dismissing her because she was unable to do her work as a road sweeper, due to her disability, the council had treated her less favourably than they would have treated others who could do their work. Secondly, under reference to s 5(2) she alleged that, in dismissing her, the council had failed to comply with a s 6 duty imposed on them to transfer her to a vacant post within their organisation without requiring her to undertake a competitive interview for the post.

[27] It was common ground that Mrs Archibald was a disabled person in terms of the 1995 Act and that the council had dismissed her because her disability meant that she could not do her job as a road sweeper. Therefore, for the purposes of s 4(2)(d), what the tribunal had to decide was whether, by dismissing her, the council had 'discriminate[d]' against her in either of the two ways set out in s 5(1) or 5(2).

[28] So far as s 5(1) is concerned, again it was accepted that, in dismissing Mrs Archibald because she could not do her job as a road sweeper by virtue of her disability, the council had treated her less favourably than they treated or would have treated employees who were fit and could do their jobs. The tribunal held that, at the time when the council dismissed her, some two years after she became unfit, it was not clear when, if ever, Mrs Archibald would be fit to resume her duties as a road sweeper. Moreover, her absence from work was causing operational difficulties for the council. The tribunal therefore held that the less favourable treatment, viz the dismissal, of Mrs Archibald had been justified in

terms of s 5(1)(b). Accordingly, it did not amount to discrimination in terms of s 5(1). In this respect the council had not 'discriminate[d]' against her unlawfully in terms of s 4(2)(d) of the Act.

[29] The tribunal went on to consider Mrs Archibald's alternative allegation, that the council had discriminated against her in terms of s 5(2) of the Act by failing to comply with a s 6 duty in relation to her. The contention was that it would have been reasonable for the council to transfer her to fill a vacancy in their organisation without requiring her to undertake a competitive interview for the post. The tribunal held that this would have amounted to giving Mrs Archibald preferential treatment and that s 6(7) made it clear that there was no duty to do that. The council had therefore not failed to comply with s 6 and so had not discriminated against Mrs Archibald in terms of s 5(2). In this respect too the council had not 'discriminate[d]' against Mrs Archibald unlawfully in terms of s 4(2)(d).

[30] I agree with your Lordships that the tribunal misconstrued s 6(7): the opening words of the subsection, 'Subject to the provisions of this section', show that there may indeed be a duty on the employer under s 6 to take steps even if those steps involve treating the disabled person more favourably than others. I also agree that s 7 of the Local Government and Housing Act 1989 permits a local authority to transfer a disabled person to another post in this way if that is done to fulfil a duty under s 6 of the Act. It follows that, if your Lordships conclude that the council were indeed under a s 6 duty to Mrs Archibald to take steps, the tribunal's decision that the council had complied with that duty was vitiated by their misunderstanding of its potential scope. In that event, the tribunal's decision on s 6 and s 5(2) would require to be set aside.

[31] From her grounds of appeal to the Employment Appeal Tribunal ([2003] All ER (D) 13 (Jan)) it appears that Mrs Archibald did not challenge the employment tribunal's decision to reject her complaint so far as it was based on less favourable treatment discrimination under s 5(1). The same goes for her appeal to the Court of Session ([2004] IRLR 197). In both courts the emphasis was on her complaint that the council had failed to comply with their duty to make adjustments under s 6(1), had therefore discriminated against her in terms of s 5(2) and so had, in that way, 'discriminated' against her unlawfully in terms of s 4(2)(d) by dismissing her. This was also the thrust of the submissions on her behalf before the House. In my view, however, in a case like the present, where the alleged failure of duty relates to the procedures leading up to the disabled person's dismissal, it is not possible to divorce the alleged discrimination in terms of s 5(1) from the duty to take steps under s 6 and hence from the alleged discrimination in terms of s 5(2).

[32] Section 6(1) prescribes a duty that is incumbent on an employer at any relevant time, before, during or after any period of employment. For that reason, in considering, for the purposes of s 5(1), whether an employer has treated a disabled person less favourably than he would treat others, the tribunal must proceed on the premise that the employer will have complied with this duty. Hence, in terms of s 5(5), the employer's less favourable treatment of his employee will not be justified under s 5(1) and (3) unless it would also have been justified if the employer had complied with his s 6 duty by making any adjustments required by s 6(1). So, in the present case, before a tribunal can decide whether the council's less favourable treatment of Mrs Archibald was 'justified' in terms of s 5(1) and (3), they must first determine whether the council owed her a duty to make adjustments, what the content of any such duty was in the circumstances and what the position would have been if the council had

fulfilled any such duty that was incumbent on them. If, for instance, fulfilment of their duty under s 6 would have required the council to transfer Mrs Archibald to a vacant position within their organisation, they would not have been justified in dismissing her from her job as a road sweeper unless, for some reason, they would also have been justified in dismissing her from that other position. It follows that, in a case like the present, it is not possible to decide whether the employer discriminated against a disabled person under s 5(1) without first deciding any issue regarding a duty under s 6. Therefore, if your Lordships hold that there was a duty on the council under s 6, which might have required them to transfer Mrs Archibald to another position within their organisation, the tribunal's finding, for the purposes of s 5(1), that the council did not discriminate against her by treating her less favourably will be flawed and must, if necessary, be reconsidered by the tribunal.

[33] The critical questions therefore relate to the duty of an employer under s 6(1) to take reasonable steps to prevent any arrangements made by him placing the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled. If the employer fails to carry out that duty, he discriminates against the disabled person under s 5(2) unless he can show that his failure to comply with the duty is justified by a reason that relates to the circumstances of the particular case and is substantial. In broad terms, the idea is that, if an employer leaves a disabled person at a substantial disadvantage from his arrangements when he should have taken steps to shield her from that disadvantage, he discriminates against her.

[34] Before the anaesthetic procedure went wrong, Mrs Archibald was fit and able to carry out her duties as a road sweeper. Afterwards, she was not fit to do so. In this case what changed was not the terms, conditions or arrangements on which the council afforded Mrs Archibald employment; what changed was her fitness and hence her ability to carry out her job as a road sweeper. But, as Lord Hamilton remarked in the court below ([2004] IRLR 197 at 203 (para 23)), the sequence of events is not crucial:

> 'Although under the subsection it is the arrangements (or some physical feature of the premises) which "place" the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, I accept that there is no particular chronological sequence involved in such placement. A person already disabled may come to pre-existing arrangements; new arrangements may come to an already disabled person; existing arrangements may affect a person who has become disabled. It is the conjunction of the arrangements and of the substantial disadvantage to the disabled person concerned which is material.'

The issue therefore is whether, after she became disabled, 'any arrangements made' by the council placed Mrs Archibald at a substantial disadvantage in comparison with persons who were not disabled.

[35] Section 6(1) envisages a comparison, but its exact nature is not spelled out. Lady Hale considers that the duty arises if the disabled person is placed at a substantial disadvantage in comparison with 'non-disabled people generally'. It respectfully appears to me, however, that, to be meaningful, the comparison must be with some limited class of persons who are not disabled.

[36] The difficulty in identifying the appropriate comparators arises, in part at least, because s 6(1) is intended to apply in a range of situations. As s 6(2) shows, the 'arrangements' in sub-s (1) comprise not only the basis on which employment

is afforded to an employee, but also the basis on which promotion, a transfer, training or any other benefit is offered or afforded. This means that in s 6(1) one cannot identify a single class of 'persons who are not disabled' for the purposes of comparison. And indeed the draftsman has not tried to do so, preferring to leave it to readers to identify the description of the appropriate comparators, depending on the situation in which the discrimination is said to have occurred—in offering or affording employment, promotion, a transfer or any other benefit, as the case may be.

[37] Moreover, s 6(2)(a) and (b) have been carefully crafted by reference to s 4(1) and (2). An examination of the two sets of provisions confirms that s 6(2)(a) applies only to arrangements for prospective employees. But the wording 'offered or afforded' in s 6(2)(b) has been chosen so that para (b) covers the terms, conditions or arrangements on which employment is offered to prospective employees, as well as those on which employment and other benefits are afforded to current employees and, where appropriate, former employees.

[38] These various factors suggest that the comparison envisaged in s 6(1) need not be with fit people who are in exactly the same situation as the disabled person. For example, if an employer offers a disabled person a job on terms that would place him at a substantial disadvantage by comparison with existing employees who are not disabled, that will trigger the s 6 duty to make adjustments. There is no need to compare the position of the disabled applicant with that of applicants who are not disabled. Even where a disabled person is employed, the comparison need not necessarily be with non-disabled persons who have the same job. This is obvious, for instance, in the case of promotion. Within a company the opportunity for promotion to a particular managerial post will often be open to employees who are currently doing a variety of jobs, in a number of different departments or divisions of the employer's business, whether in the same place or at the other end of the kingdom. In that situation the question under s 6(1) is whether the basis on which the employer affords his employees the opportunity for promotion places the disabled person at a substantial disadvantage in comparison with non-disabled people who are competing for the same promoted post, irrespective of where or what their current job may be. Mutatis mutandis the same applies to the other situations envisaged by s 6(2)(b).

[39] Indeed, even where one is considering the terms, conditions or arrangements on which the disabled person is afforded employment, the comparison need not be with people doing the same job. Suppose, for example, that a disabled person works in an office with many other employees, but she is the only one doing her particular job. If she requires to attend a clinic for treatment for her disability at times which make it impossible for her to meet the conditions of the employer's scheme for flexible working, in terms of s 6(1) she will be at a substantial disadvantage by comparison with all the other employees in the office who are not disabled. Her employer will accordingly be under a duty to take reasonable steps to prevent the scheme from placing her at this disadvantage.

[40] In that kind of case the disabled person is carrying out the work which she is employed to do but is placed at a disadvantage by the conditions of her employer's flexible working scheme. There it is easy to see that an 'arrangement' made by the employer places her at a substantial disadvantage in terms of s 6(1). At first sight, the position is rather less clear where, as in the

present case, an employee becomes disabled and, simply for that reason, is unable to carry out the essential functions of the job she is employed to do. As Lord McCluskey noted obiter ([2004] IRLR 197 at 205 (para 43)) the disabled person's disadvantage might seem to derive from the onset of her disability rather than from any arrangements made by her employer. Such an interpretation of s 6(1) would, however, overlook the provisions of the Code of Practice (*Elimination of discrimination in the field of employment against disabled persons or persons who have had a disability*) which was issued by the Secretary of State under s 53(1) of the 1995 Act and was subject to negative resolution of either House of Parliament under s 54(4). Section 53(6) provides that, where any provision of the code appears to the court to be relevant to any question arising in proceedings under the Act, 'it shall be taken into account in determining that question'.. The key question to be decided in this case is whether an employer may be under a s 6 duty to an employee who becomes unfit to carry out the main, or essential, functions of her job. It appears to me that examples in paras 4.20 and 6.21 of the Code of Practice are indeed relevant to that question. The former says:

> '... if an employee becomes disabled, or has a disability which worsens so she cannot work in the same place or under the same arrangements and there is no reasonable adjustment which would enable the employee to continue doing the current job, then she might have to be considered for any suitable alternative posts which are available. (Such a case might also involve reasonable retraining.)'

Paragraph 6.21 includes this example:

> '... it would be justifiable to terminate the employment of an employee whose disability makes it impossible for him any longer to perform the main functions of his job, if an adjustment such as a move to a vacant post elsewhere in the business is not practicable or otherwise not reasonable for the employer to have to make.'

These passages show, unmistakably, that the code proceeds on the view that an employer may have to make a reasonable adjustment under s 6 in the case of an employee whose disability makes it impossible for her any longer to perform the main, or essential, functions of her job.

[41] Taking account of these passages in the Code of Practice, I therefore conclude that, for the purposes of s 6(1), the terms, conditions and arrangements relating to the essential functions of the disabled person's employment are indeed 'arrangements made by ... the employer' which place the disabled person at a substantial disadvantage by comparison with persons who are not disabled if she becomes unable to carry out those functions.

[42] If that is how s 6(1) is to be interpreted, what is the substantial disadvantage that the disabled person suffers in that situation by comparison with persons who are not disabled? It cannot be that she is required to perform the essential functions of the job, since that requirement is placed on everyone who holds the same job. Here, all road sweepers of Mrs Archibald's grade have to walk and sweep. In fact, however, the terms of the disabled person's contract of employment do not mean that, once she becomes disabled, she is forced to perform the essential functions of her job despite being unfit to do so. Here, Mrs Archibald never swept a road after she became unfit. What actually happens if an employee becomes so disabled that she cannot perform the

essential functions of her job is that, under her contract of employment, she is liable to be dismissed. That is the substantial disadvantage she suffers. The contractual term, whether express or implied, which provides for her dismissal in these circumstances constitutes the relevant 'arrangement' for the purposes of s 6(1). That arrangement places the disabled person at a substantial disadvantage by comparison with persons who are not disabled, because she is liable to be dismissed on the ground of disability whereas they are not. The appropriate comparators are therefore other employees of the employer who are not disabled, can therefore carry out the essential functions of their jobs and are, accordingly, not liable to be dismissed on the ground of disability.

[43] The employer is under a duty to take reasonable steps to prevent the terms of the disabled person's contract from placing her at this substantial disadvantage. As envisaged in s 6(3)(c), this may require the employer to transfer her to a vacant post where she will be able to carry out the essential functions of the job and so will not be at risk of being dismissed. That step would involve putting the disabled person in the new post, not merely giving her the opportunity to apply for the post and appointing her if her application was successful. Section 6(3)(c) is just an example. It may be that in some cases the employer's duty would require him to move the disabled person to a post at a (slightly) higher grade. It all depends on the circumstances. If the employer fails to take the steps that are reasonable, he discriminates against the disabled person in terms of s 5(2) and so discriminates against her unlawfully under s 4(2)(d) if he dismisses her. What steps are reasonable depends on the circumstances of the particular case, which the employment tribunal must establish.

[44] Here, the council were undoubtedly under a s 6 duty to take reasonable steps. Mrs Archibald says that the council's duty was to transfer her to a vacant post in their organisation for which she was suited and in this way to prevent her from suffering the disadvantage of being dismissed, in accordance with the terms of her contract of employment, on the ground that she was not capable of doing the job of road sweeper. If that was their duty and the council failed to comply with it, by dismissing her they discriminated against Mrs Archibald unlawfully under s 4(2)(d). But whether or not that was their duty cannot be determined until the tribunal establish the relevant circumstances which will, of course, include the council's redeployment policy with its requirement for advertisement and competitive interviews for posts of a higher grade.

[45] Since the council were under a s 6 duty to Mrs Archibald and the employment tribunal misconstrued the scope of that duty, their decision cannot stand. I would accordingly allow the appeal and remit the case to the employment tribunal to consider whether, by dismissing Mrs Archibald, the council discriminated against her unlawfully in terms of s 4(2)(d) and, in particular, whether they fulfilled their s 6(1) duty towards her.

BARONESS HALE OF RICHMOND.

[46] My Lords, this case concerns the definition and scope of an employer's duty to make adjustments under s 6 of the Disability Discrimination Act 1995 and in particular whether it arises at all if an employee becomes totally incapable of doing the job for which she is employed but could do another job within the same organisation.

THE LEGISLATION

[47] According to its long title, the purpose of the 1995 Act is— a

> 'to make it unlawful to discriminate against disabled persons in connection with employment, the provision of goods, facilities and services or the disposal or management of premises ...'

But this legislation is different from the Sex Discrimination Act 1975 and the Race Relations Act 1976. In the latter two, men and women or black and white, as the case may be, are opposite sides of the same coin. Each is to be treated in the same way. Treating men more favourably than women discriminates against women. Treating women more favourably than men discriminates against men. Pregnancy apart, the differences between the genders are generally regarded as irrelevant. The 1995 Act, however, does not regard the differences between disabled people and others as irrelevant. It does not expect each to be treated in the same way. It expects reasonable adjustments to be made to cater for the special needs of disabled people. It necessarily entails an element of more favourable treatment. The question for us is when that obligation arises and how far it goes. b c d

[48] The 1995 Act does not apply to everyone who has or has had some mental or physical impairment but only where that impairment 'has a substantial and long-term adverse effect on his ability to carry out normal day-to-day activities' (s 1(1)). It is lawful to discriminate against a spectacle wearer but not against a visually impaired person. This indicates that the Act is concerned with addressing the special needs of those with serious handicaps, in this case in the labour market. It is unlawful for an employer to discriminate against a disabled person in various ways in relation to the offering of employment, the terms on which she is employed, the opportunities afforded 'for promotion, a transfer, training or receiving any other benefit' during employment, dismissing her or subjecting her to any other detriment (s 4). This section largely repeats equivalent provisions in the sex and race discrimination legislation. The difference lies in the meaning given to discrimination in s 5. e f

[49] There are two sorts of discrimination. Section 5(1) deals with less favourable treatment, that is where—

> '(a) for a reason which relates to the disabled person's disability, he treats [her] less favourably than he treats or would treat others to whom that reason does not or would not apply; and (b) he cannot show that the treatment in question is justified.' g

[50] Section 5(2) deals with a failure to make adjustments, that is where— h

> '(a) he fails to comply with a section 6 duty imposed on him in relation to the disabled person; and (b) he cannot show that his failure to comply with that duty is justified.'

[51] The justification defence is special to disability discrimination. It recognises that there may be good reason for less favourable treatment or failing to make the necessary adjustments, but in each case this can only be shown if the reason for it is both material to the circumstances of the particular case and substantial (s 5(3) and (4)). Furthermore, less favourable treatment cannot be justified if an employer has failed to comply with his duty to make adjustments unless it would have been justified even if he had complied (s 5(5)). j

[52] This brings us to the duty to make adjustments contained in s 6, which so far as material reads as follows:

'(1) Where—(a) any arrangements made by or on behalf of an employer, or (b) any physical features of premises occupied by the employer, place the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the arrangements or feature having that effect.

(2) Subsection (1)(a) applies only in relation to—(a) arrangements for determining to whom employment should be offered; (b) any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded.

(3) The following are examples of steps which an employer may have to take in relation to a disabled person in order to comply with subsection (1)—(a) making adjustments to premises; (b) allocating some of the disabled person's duties to another person; (c) transferring him to fill an existing vacancy; (d) altering his working hours; (e) assigning him to a different place of work; (f) allowing him to be absent during working hours for rehabilitation, assessment or treatment; (g) giving him, or arranging for him to be given, training; (h) acquiring or modifying equipment; (i) modifying instructions or reference manuals; (j) modifying procedures for testing or assessment; (k) providing a reader or interpreter; (l) providing supervision.

(4) In determining whether it is reasonable for an employer to have to take a particular step in order to comply with subsection (1), regard shall be had, in particular, to—(a) the extent to which taking the step would prevent the effect in question; (b) the extent to which it is practicable for the employer to take the step; (c) the financial and other costs which would be incurred by the employer in taking the step and the extent to which taking it would disrupt any of his activities; (d) the extent of the employer's financial and other resources; (e) the availability to the employer of financial or other assistance with respect to taking the step. This subsection is subject to any provision of regulations made under subsection (8).

(5) In this section, "the disabled person concerned" means—(a) in the case of arrangements for determining to whom employment should be offered, any disabled person who is, or has notified the employer that he may be, an applicant for that employment; (b) in any other case, a disabled person who is—(i) an applicant for the employment concerned; or (ii) an employee of the employer concerned ...

(7) Subject to the provisions of this section, nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others.'

THE FACTS

[53] Mrs Archibald was employed by Fife Council as a road sweeper manual worker grade 1 from 6 May 1997. As a result of a rare complication during minor surgery on 25 April 1999, she became virtually unable to walk. It has never been disputed that she is a disabled person under the 1995 Act. The medical advice was that, for the foreseeable future, she could no longer carry out the job of road sweeper. She could not walk or sweep. She could however

do sedentary work and was keen to do so. The council arranged for her to undertake a number of computer and administration courses to equip her with appropriate skills. The assessment was very positive and recommended that she was 'more than capable of carrying out work in an office environment'. Over the next few months, she applied for over 100 posts within the council. These were all on the APT&C scale rather than on the manual worker grade 1 scale. The basic wage was very slightly higher than for the manual grade. According to the council's redeployment policy, people seeking redeployment at a higher grade had to undertake competitive interviews. Mrs Archibald failed to obtain any of these posts. She told the employment tribunal that she did not think that this was anything to do with her disability but rather that 'they' did not look past the fact that she was a road sweeper—someone coming from an industrial background having to compete with others from a staff background. Eventually, as she was still unable to return to work as a road sweeper and the redeployment procedure had been exhausted, she was dismissed on grounds of incapacity from 12 March 2001.

THESE PROCEEDINGS

[54] She appealed unsuccessfully within the council and then complained to an employment tribunal. The essence of her disability discrimination complaint was that she should not have been required to go though the competitive interviews if she could show that she was qualified and suitable for the job in question. The tribunal quoted part of s 6(7): 'nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others.' The council's policy was that competitive interviews were required if applying for a job at a higher grade. The tribunal therefore held that, as there was nothing apart from transferring her to another post that the council could have done, they were not in breach of their duty under s 6. The tribunal went on to say that, if there had been a breach, it would have been justified by the policy.

[55] The Employment Appeal Tribunal dismissed her appeal ([2003] All ER (D) 13 (Jan)), on the basis that there was nothing in the arrangements for the sedentary job interviews which placed her at a substantial disadvantage because the policy applied to everyone. Hence the obligation to make an adjustment had not been triggered at all. The Extra Division of the Court of Session ([2004] IRLR 197) also dismissed her appeal on the ground that the obligation to make an adjustment had not been triggered, but their reasoning was rather different. Before them, the focus had shifted from the arrangements made for the sedentary posts for which Mrs Archibald had applied, which did not place her at a disadvantage, to the arrangements made for the road sweeping post which she could no longer do.

[56] Lord Hamilton (at 203 (para 26)) held that the duty in s 6(1) was linked to the particular employment involved: that is, where the disabled employee is placed at a substantial disadvantage in the performance of that particular employment in comparison with people who are not disabled and it is open to the employer to make adjustments to the arrangements of that particular employment to prevent the disadvantage having that effect. Lord Macfadyen (at 205 (para 37)) held that the 'arrangements' could not include the 'fundamental essence of the job' so that the duty did not arise when the employee became incapable of doing the job at all. Lord McCluskey (at 205–206 (para 44)) also saw the duty as arising in relation to the requirements of the particular job, so that it

did not arise if there was nothing the employer could do to make it possible for the employee to continue as a road sweeper.

THE ARGUMENTS ON APPEAL

[57] It is common ground that the 1995 Act entails a measure of positive discrimination, in the sense that employers are required to take steps to help disabled people which they are not required to take for others. It is also common ground that employers are only required to take those steps which in all the circumstances it is reasonable for them to have to take. Once triggered, the scope of the duty is determined by what is reasonable, considered in the light of the factors set out in s 6(4). The debate is about what triggers the duty. The council argue that its purpose is to enable the disabled person to overcome the obstacles which her disability puts in the way of her doing the job for which she has applied or is already employed. The examples of steps which the employer may have to take, set out in s 6(3), are with the exception of (c) all adjustments which might be made to the particular job—adapting the premises, reallocating duties, altering the hours, modifying equipment, or providing training, interpretation or supervision. Once those obstacles have been cleared out of the way, there is a 'level playing field' and the disabled person is free to compete on her merits with anyone else. There is no positive discrimination other than redressing the impact of the disability on her ability to do a job which she is otherwise well fitted to do. This duty cannot arise when the disability means that she cannot do the job at all and there is no adjustment to the arrangements for that job which can make any difference.

[58] The Disability Rights Commission, which has taken up the case on behalf of Mrs Archibald, argue that in such a case the duty is indeed triggered. The control mechanism lies in the fact that the employer is only required to take such steps as it is reasonable for them to have to take. They are not expected to do the impossible. But among the possible steps is (c)—transfer to fill an existing vacancy, which must include an existing vacancy for a different job. Inability to do the present job cannot mean that there is no duty at all. The 1995 Act was clearly intended to apply to existing employees who became disabled as well as to would-be employees who were already disabled. This is reflected in para 4.20 of the Code of Practice (*Elimination of discrimination in the field of employment against disabled persons or persons who have had a disability*), issued by the Secretary of State and laid before Parliament under ss 53 and 54 of the 1995 Act, which says this under the heading 'transferring the person to fill an existing vacancy':

> '... if an employee becomes disabled, or has a disability which worsens so she cannot work in the same place or under the same arrangements and there is no reasonable adjustment which would enable the employee to continue doing the current job, then she might have to be considered for any suitable alternative posts which are available. (Such a case might also involve reasonable retraining.)'

[59] Underlying this debate there may be, as Mr O'Neill QC on behalf of the council argues, a fundamental philosophical difference about the permissible limits of the positive discrimination which the duty to make reasonable adjustments inevitably entails. The 1995 Act predates Council Directive (EC) 2000/78 (OJ 2000 L303 p 16) establishing a general framework for equal treatment in employment and occupation (the 'Framework Directive'). That

directive cannot constitute grounds for reducing the level of protection against discrimination already afforded by member states (art 8(2)). Nevertheless both sides seek to rely upon its principles. The council point to the opening words of recital 17:

> 'This Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training ...'

—while the Commission point to its concluding words: '... without prejudice to the obligation to provide reasonable accommodation for people with disabilities.' The council argue that it is a framework for equal, not preferential, treatment. Article 1 provides its purpose:

> 'The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.'

[60] The obligation to provide reasonable accommodation in art 5 is 'In order to guarantee compliance with the principle of equal treatment'. The Commission point out that art 5 continues:

> 'This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.'

The Commission also argue that equal treatment is not limited to securing equality of opportunity. The directive expressly contemplates positive action, both in general and in the particular case of disability, in art 7:

> '1. With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages linked to any of the grounds referred to in Article 1.
>
> 2. With regard to disabled persons, the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment.'

[61] None of this helps us much in defining the limits of what should be done to safeguard or promote the integration of disabled people in the working environment. But that is clearly an important overall aim which justifies making a reasonable accommodation in what the employer would otherwise do in order to cater for the needs of a specific disabled person.

DISCUSSION

[62] The task before us is essentially one of statutory construction. Section 6(1) applies to 'any arrangements' made by or on behalf of an employer. These arrangements have to relate either to the arrangements for determining to whom

employment will be offered, or to 'any term, condition or arrangements on which employment, promotion, a transfer, training or any other benefit is offered or afforded' (s 6(2)). Subject to that, the term 'arrangements' is undefined. It could clearly relate to the council's redeployment policy, but in this case that did not put Mrs Archibald at a substantial disadvantage compared with anyone else. It could equally apply to the terms on which Mrs Archibald held her road sweeping job. An employer's arrangements for dividing up the work he needs to have done into different jobs are just as capable of being 'arrangements' as are an employer's arrangements for deciding who gets what job or how much each is paid. Some employers might combine cooking and bottle-washing in one job while others might treat them quite differently. The job descriptions for all their posts are 'arrangements' which they make in relation to the terms, conditions and arrangements on which they offer employment Also included in those arrangements is the liability of anyone who becomes incapable of fulfilling the job description to be dismissed.

[63] The next question, therefore, is whether those arrangements placed her 'at a substantial disadvantage in comparison with persons who are not disabled'. The answer to that was clear. The job description required her to walk and sweep and she could not for the foreseeable future do that. Hence she was eventually dismissed for incapacity. Any steps which the council might have to take under s 6(1) must be 'in order to prevent the arrangements ... having that effect'. '[T]hat effect' clearly refers to her being placed at a substantial disadvantage in comparison with non-disabled persons. So who are the non-disabled persons concerned?

[64] If they are only non-disabled people doing the same job, then it could be said that the duty does not arise, because it is her disability rather than council's arrangements which has 'that effect' and there is nothing that the council can do in a case such as this to prevent its doing so. On the other hand, if they are not confined to non-disabled people doing the same job, then there may be things the council could do to prevent the job description having the effect of her being at a substantial disadvantage from others. In some cases they might be able to change or modify the job description. In others they might be able to transfer her to another job, a possibility expressly contemplated by s 6(3)(c). The former argument is difficult to reconcile with the inclusion of s 6(3)(c) as an example of what might be done. If one is only concerned with the particular job, one would not be contemplating transfer as the sort of step which might be required under s 6(1) (as opposed to offered as an act of benevolence). The former argument also involves reading words into s 6(1) which are not there. It is of interest that the Court of Appeal in *Clark v Novacold Ltd* [1999] 2 All ER 977, [1999] ICR 951 declined to read into 'others' in s 5(1)(a) any requirement that those others should be otherwise in similar circumstances to the disabled person. For the reasons already explained, this Act does not require the sort of 'like for like' comparison which is involved in the Sex Discrimination and Race Relations Acts. I conclude, therefore, that the duty is triggered where an employee becomes so disabled that she can no longer meet the requirements of her job description.

[65] The duty is to take such steps as it is reasonable in all the circumstances of the case for the employer to have to take. Could this ever include transferring her to fill an existing vacancy at a slightly higher grade without competitive interview? It is noteworthy that the council did do a great deal to help Mrs Archibald. They arranged retraining for her. They kept her on the books for

a great deal longer than they normally would have done while she retrained and then looked for alternative posts. They automatically short-listed her for the posts for which she applied. They went rather beyond their normal policies in cases of redundancy or ill-health. They were behaving as if they did have a duty towards her under s 6(1) even if they did not think that they did. They would have been prepared to transfer her without competitive interview to another job at the same or a lower grade, even though there might be others better qualified to do it. But as she was at the bottom of the manual grade and all office jobs were nominally at a higher grade, there was no equal or lower grade job to which she could be transferred.

[66] Section 6(3)(c) merely refers to 'an existing vacancy'. It does not qualify this by any words such as 'at the same or a lower grade'. It does refer to 'transferring' rather than 'promoting' her, but as a matter of language a transfer can be upwards as well as sideways or downwards. Furthermore, transferring her 'to fill' an existing vacancy is clearly more than merely allowing her to apply, short-listing or considering her for an existing vacancy. If that were all it meant, it would add nothing to the existing non-discrimination requirements: the employer is already required by s 4(2)(b) not to discriminate against a disabled employee in the opportunities afforded for promotion, transfer, training or any other benefit.

[67] On the face of it, therefore, transferring Mrs Archibald to a sedentary position which she was qualified to fill was among the steps which it might have been reasonable in all the circumstances for the council to have to take once she could no longer walk and sweep. Is there any reason to hold to the contrary?

[68] The employment tribunal thought that there was. They relied upon that part of s 6(7) which provides that 'nothing in this Part is to be taken to require an employer to treat a disabled person more favourably than he treats or would treat others'. But this is prefaced by the words, 'Subject to the provisions of this section ...': so that, to the extent that the duty to make reasonable adjustments requires it, the employer is not only permitted but obliged to treat a disabled person more favourably than others.

[69] There is another possible reason to the contrary in the case of a local authority employer such as this. Section 7 of the Local Government and Housing Act 1989 requires all staff engaged by a local authority to be appointed 'on merit'. This is an extremely important principle. Regrettably, local government does offer opportunities for corrupt appointment practices which have on occasions resulted in people being appointed who were not even competent, let alone the best person available, to do the job. Advertisement and competitive interview is one way of securing that appointments are made on merit. But this is not the only way of doing so. Furthermore, this obligation has always been subject to the requirements of the law relating to disabled persons. When the 1989 Act was passed, it was subject to the quota requirement in the Disabled Persons (Employment) Act 1944. This meant that a person who did not qualify 'on merit' might have to be appointed to fill the quota. Now that the 1944 Act has been replaced by the 1995 Act, the duty in s 7(1) is (in s 7(2)(f)) made subject to ss 5 and 6 of the 1995 Act. Thus local government appointments must always be on merit, subject to the duty to make reasonable adjustments. Usually, those will be reasonable adjustments in the post which is being offered so as to make it accessible to a disabled applicant. But s 7(2)(f) refers generally to ss 5 and 6, so that it is capable of including the step of transferring a disabled person from a post

she can no longer do to a post which she can do, provided that this is a reasonable step for the employer to have to take.

[70] This will depend upon all the circumstances of the case, having regard in particular to the factors laid down in s 6(4). An important component in the circumstances must be the council's redeployment policy. This currently distinguishes between transfer to a post at the same or a lower grade and transfer to a post at a higher grade. Generally it must be reasonable for a council to maintain this distinction. But it might be reasonable to expect a small modification either in general or in the particular case to meet the needs of a well-qualified and well-motivated employee who has become disabled. Manual grades are often technically lower than non-manual grades even if the difference in pay is minimal. The possibility of transfer to fill an existing vacancy might become completely illusory for a manual worker who became incapable of manual work but was assessed as very well fitted for low-grade sedentary work if that person was always up against the problem presented by her background. We are not talking here of high-grade positions where it is not only possible but important to make fine judgments about who will be best for the job. We are talking of positions which a great many people could fill and for which no one candidate may be obviously 'the best'. There is no law against discriminating against people with a background in manual work, but it might be reasonable for an employer to have to take that difficulty into account when considering the transfer of a disabled worker who could no longer do that type of work. I only say 'might' because it depends upon all the circumstances of the case. While the 1995 Act clearly lays great emphasis on the circumstances of the individual case, the general policy of achieving fairness and transparency in local government appointments is also extremely important. The real question may be whether this case should have been seen as a sideways rather than an upwards move.

[71] None of this was considered by the employment tribunal, which disposed of the case on a ground which was clearly wrong. They did not address the question of reasonableness. They did address the question of justification under s 5(2)(b), but did so without the benefit of the Court of Appeal's decision in *Collins v Royal National Theatre Board Ltd* [2004] EWCA Civ 144, [2004] 2 All ER 851 that the justification must be something other than the circumstances which are taken into account for the purpose of s 6(1). As the council's redeployment policy is an important part of those circumstances, it should not be independently relevant as a justification under s 5(2)(b).

[72] For these reasons, essentially the same as those given by my noble and learned friends Lord Hope of Craighead and Lord Rodger of Earlsferry, I would allow the appeal and remit the case to the employment tribunal so that it can consider whether the council fulfilled its s 6(1) duty to take such steps as it was reasonable in all the circumstances for the council to have to take.

COSTS

[73] As I have indicated, the tribunal will have quite a difficult exercise to undertake and it is not for this House to predict the ultimate outcome. This was a test case on a point of principle which the Commission wished to have resolved whatever the outcome of the individual case. If we were to make an order for 'costs in the cause' this would ignore the fact that the Commission have succeeded on the main point of principle which they wished to have accepted. In those circumstances the fairest result is that there be no order for costs or

expenses either in this House or in the court below. There were, of course, no orders for expenses in the employment tribunal or in the Employment Appeal Tribunal. a

LORD BROWN OF EATON-UNDER-HEYWOOD.

[74] My Lords, I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Hope of Craighead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. For the reasons each of them gives, with which I agree, I too would allow this appeal. b

Appeal allowed. Case remitted to employment tribunal.

Dilys Tausz Barrister.

Secretary of State for Trade and Industry v Bairstow

Re Queen's Moat House plc

[2003] EWCA Civ 321

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, POTTER AND HALE LJJ

18 FEBRUARY, 11 MARCH 2003

Company – Director – Disqualification – Evidence – Admissibility – Whether findings of fact made in wrongful dismissal proceedings admissible in disqualification proceedings as evidence of facts so found – Whether challenge in disqualification proceedings to findings of fact in wrongful dismissal proceedings abuse of process.

The defendant brought proceedings for wrongful dismissal against the company of which he had been a managing director. The judge dismissed the defendant's claim and his appeal was unsuccessful. The Secretary of State commenced proceedings under the Company Directors Disqualification Act 1986, seeking a disqualification order against the defendant. At a pre-trial review the judge ordered that the parties were bound by the findings made by the judge in the wrongful dismissal proceedings. The defendant appealed, submitting that the findings of the judge in the wrongful dismissal proceedings were not admissible evidence of those facts in the disqualification proceedings. The Secretary of State contended (i) that the principle relied on by the defendant only applied to prior decisions of a court in criminal proceedings; and (ii) that such a collateral challenge to an earlier decision was an abuse of the process of the court.

Held – (1) The principle that judicial findings in previous proceedings were inadmissible in subsequent proceedings as evidence of the facts upon which they were based was not confined to cases in which the earlier decision was that of a court exercising a criminal jurisdiction. Accordingly, in the instant proceedings, the judge's factual findings and conclusions in the wrongful dismissal proceedings were not admissible as evidence of the facts so found (see [26], [27], [45], [46], below); *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35 and *Three Rivers DC v Bank of England (No 3)* [2001] 2 All ER 513 applied.

(2) A collateral attack on an earlier decision of a court of competent jurisdiction was not necessarily an abuse of the process of the court. An earlier decision of a court exercising a civil jurisdiction was binding on the parties to that action and their privies in any later civil proceedings, but where the parties to the later civil proceedings were not parties to the earlier proceedings or privies of those who were, it would only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated, or if to permit such relitigation would bring the administration of justice into disrepute. In the instant case the Secretary of State had not been party, nor a privy, to the wrongful dismissal proceedings and there was no reason why it would be manifestly unfair that he should be required to prove his allegations, nor would the administration of justice be brought into

disrepute if those allegations had to be proved to the satisfaction of the court hearing the application for a disqualification order by legally admissible evidence. The appeal would, accordingly, be allowed (see [38]–[41], [43]–[46], below); *Hunter v Chief Constable for the West Midlands* [1981] 3 All ER 727 applied.

Notes

For conclusiveness of judgments, verdicts and awards, and for abuse of process, see respectively, 17(1) *Halsbury's Laws* (4th edn reissue) paras 597, 598 and 37 *Halsbury's Laws* (4th edn reissue) para 931.

Cases referred to in judgments

Ali (Saif) v Sydney Mitchell & Co (a firm) [1978] 3 All ER 1033, [1980] AC 198, [1978] 3 WLR 849, HL.

Ashmore v British Coal Corp [1990] 2 All ER 981, [1990] 2 QB 338, [1990] 2 WLR 1437, CA.

Bahai v Rashidian [1985] 3 All ER 385, [1985] 1 WLR 1337, CA.

Barings plc (in admin) (No 2), Re, Secretary of State for Trade and Industry v Baker (No 2) [1998] 1 BCLC 590.

Barings plc (No 5), Re, Secretary of State for Trade and Industry v Baker (No 5) [2000] 1 BCLC 523, CA; *affg* [1999] 1 BCLC 433.

Brendon v Spiro [1937] 2 All ER 496, [1938] 1 KB 176, CA.

Brinks Ltd v Abu-Saleh (No 1) [1995] 4 All ER 65, [1995] 1 WLR 1478.

Christy (Thomas) Ltd (in liq), Re [1994] 2 BCLC 527.

Hall (Arthur JS) & Co (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon) (a firm), Harris v Scholfield Roberts & Hill (a firm) [2000] 3 All ER 673, [2002] 1 AC 615, [2000] 3 WLR 543, HL; *affg* [1999] 2 FCR 193, [2002] 1 AC 615, [1999] 3 WLR 873, CA.

Hawaz v Thomas Cook Group Ltd (27 October 2000, unreported), QBD.

Hollington v F Hewthorn & Co Ltd [1943] 2 All ER 35, [1943] KB 587, CA.

Hui Chi-ming v R [1991] 3 All ER 897, [1992] 1 AC 34, [1991] 3 WLR 495, PC.

Hunter v Chief Constable for the West Midlands [1981] 3 All ER 727, [1982] AC 529, [1981] 3 WLR 906, HL.

J v Oyston [1999] 1 WLR 694.

Land Securities plc v Westminster City Council [1993] 4 All ER 124, [1993] 1 WLR 286.

McCauley v Vine [1999] 1 WLR 1977, CA.

North West Water Ltd v Binnie & Partners (a firm) [1990] 3 All ER 547.

Phosphate Sewage Co Ltd v Molleson (1879) 4 App Cas 801, HL.

R v Turner (1832) 1 Mood 347, 168 ER 1298.

Reichel v Magrath (1889) 14 App Cas 665, HL.

Rondel v Worsley [1967] 3 All ER 993, [1969] 1 AC 191, [1967] 3 WLR 1666, HL.

Savings and Investment Bank Ltd v Gasco Investments (Netherlands BV) [1984] 1 All ER 296, [1984] 1 WLR 271.

Secretary of State for Trade and Industry v Ashcroft [1997] 3 All ER 86, [1998] Ch 71, [1997] 3 WLR 319, CA.

Smith v Linskills (a firm) [1996] 2 All ER 353, [1996] 1 WLR 763, CA.

Symphony Group plc v Hodgson [1993] 4 All ER 143, [1994] QB 179, [1993] 3 WLR 830, CA.

Three Rivers DC v Bank of England (No 3) [2001] UKHL 16, [2001] 2 All ER 513, [2003] 2 AC 1.

Walpole v Partridge & Wilson (a firm) [1994] 1 All ER 385, [1994] QB 106, CA.

Williams (Rex) Leisure plc, Re [1994] 4 All ER 27, [1994] Ch 350, [1994] 3 WLR 745, CA.

Case referred to in skeleton arguments

McIlkenny v Chief Constable of the West Midlands [1980] 2 All ER 227, [1980] QB 283, [1980] 2 WLR 689, CA.

Appeal

John Bairstow appealed, with permission of Pumfrey J given on 20 February 2002, from the judge's order made on 5 December 2001 at a pre-trial review of an action brought by the Secretary of State for Trade and Industry under s 8 of the Company Directors Disqualification Act 1986, seeking a disqualification order against, inter alia, Mr Bairstow, by which the judge ordered that the Secretary of State and Mr Bairstow respondent were not entitled to challenge but were bound by findings of fact made by Nelson J in judgments dated 23 July 1999 and 3 December 1999 ([2000] 1 BCLC 549) given in proceedings for wrongful dismissal brought by Mr Bairstow and others against Queen's Moat House plc. The facts are set out in the judgment of Sir Andrew Morritt V-C.

Charles Purle QC (instructed by *Jones Day Gouldens*) for Mr Bairstow.

Michael Todd QC and *Philip Gillyon* (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

11 March 2003. The following judgments were delivered.

SIR ANDREW MORRITT V-C.

INTRODUCTION

[1] The appellant, Mr John Bairstow, was the chairman and joint managing director of Queen's Moat House plc (QMH). He was dismissed on 18 August 1993. Later that year he (and others of his co-directors) instituted proceedings against QMH claiming damages for wrongful dismissal. QMH claimed that he was rightly dismissed and alleged that he had been guilty of grave misconduct, neglect in the performance of his duty and breach of his service agreement. The action was tried by Nelson J between 6 October 1997 and 7 September 1998. Nelson J gave two judgments, the first on 23 July 1999 and the second, after further argument, on 3 December 1999 ([2000] 1 BCLC 549). Limited leave to appeal was granted by Simon Brown and Rix LJJ to Mr Bairstow on 26 October 2000. That appeal was dismissed by the Court of Appeal on 17 May 2001 ([2001] EWCA Civ 712, [2001] 2 BCLC 531). Leave to appeal was granted to Mr Bairstow by the House of Lords but, as the parties compromised their differences, has not proceeded.

[2] In the meantime, in February 2000, the Secretary of State for Trade and Industry commenced these proceedings under s 8 of the Company Directors Disqualification Act 1986 seeking a disqualification order, as defined in s 1, against Mr Bairstow (and three of his fellow directors of QMH) on the ground that his conduct in relation to QMH made him unfit to be concerned in the management of a company. The application is supported by affidavits of Mr Adrian Burn, a chartered accountant and one of the persons appointed by the Secretary of State under s 432(2) of the Companies Act 1985 to investigate the affairs of QMH, and

Mr JR Sibley, then a director and the deputy inspector of companies in the company law and investigations directorate of the Department of Trade and Industry. Mr Burn sets out at length and in detail the criticisms of the conduct of Mr Bairstow on which the Secretary of State relies and the facts and documents on which they are based. Exhibit BAFB 5 contains statements made by persons other than the respondents to the application and extracts from transcripts of interviews with them. Mr Sibley describes the involvement of the Secretary of State in the appointment of inspectors and other matters relating to his decision to institute these proceedings under s 8 of the 1986 Act. He draws attention to the proceedings before Nelson J, the substantial identity of the issues in those proceedings and the conduct of Mr Bairstow on which the Secretary of State relies in these and the conclusions of Nelson J in relation to those issues in the two judgments to which I have referred.

[3] On 5 March 2001 Mr Bairstow swore an affidavit in answer to those of Mr Burn and Mr Sibley. It runs to 226 pages though much of it consists of quotations from transcripts of evidence given by others to the inspectors or to Nelson J. The various points made by Mr Bairstow (or other respondents) were dealt with by Mr Burn in a further lengthy affidavit sworn by him on 15 June 2001. On the same day Mr Gardner, the successor in office of Mr Sibley, swore another affidavit as to the course of Mr Bairstow's appeals from the judgments of Nelson J.

[4] On 4 December 2001 there was a pre-trial review before Pumfrey J. The Secretary of State was represented by counsel, Mr Bairstow appeared in person. Pumfrey J ordered, amongst other things:

> '(1) that [the Secretary of State] and Mr Bairstow be not entitled to challenge but be bound by the findings made by [Nelson J] in proceedings between Mr Bairstow (and others) and [QMH] by judgments dated 23 July 1999 and 3 December 1999 ...
>
> (3) that Mr Bairstow be permitted to file and serve further evidence dealing with mitigation.'

On 20 February 2002 Pumfrey J granted Mr Bairstow permission to appeal on the ground that the principle on which he had relied should be examined by the Court of Appeal.

[5] Accordingly the issue for our determination is whether the judge was entitled to make the order he did. In his judgment Pumfrey J set out the basic facts, described the extensive overlap between the issues before Nelson J and these proceedings, considered the nature of disqualification proceedings and then turned to the principle on which the Secretary of State relies. That is the principle described and applied in *Hunter v Chief Constable for the West Midlands* [1981] 3 All ER 727 at 733, [1982] AC 529 at 541 that it is an abuse of the process to initiate—

> 'proceedings in a court of justice for the purpose of mounting a collateral attack on a final decision against the intending plaintiff which has been made by another court of competent jurisdiction in previous proceedings in which the intending plaintiff had a full opportunity of contesting the decision in the court by which it was made.'

[6] Pumfrey J referred to a number of subsequent cases in which that principle has been considered and said:

> 'In my judgment, the overriding question is: what approach is most likely to achieve justice? In my view, the interests of justice are unlikely to require a second investigation of facts which have already been the subject of exhaustive examination over many days in closely fought civil proceedings and in circumstances where the potential unfairness of the proceedings has already been examined by a court competent to do so and which has rejected the suggestion that there was any substantial unfairness in those proceedings. .Of course, in making any pre-emptive decision there is always a risk of injustice, but the magnitude of that risk has to be assessed against the whole background of the case and, in particular, the nature of the previous proceedings. Here I do not consider that the question is in any way difficult to decide.'

[7] Pumfrey J considered particular submissions made to him by Mr Bairstow and concluded:

> 'I have come to the conclusion that once the facts have been established in the judgment of Nelson J it would require very compelling fresh considerations before a re-examination of those facts could be justified.'

He determined that such a re-examination could not be justified and made the order under appeal.

[8] Counsel for Mr Bairstow submits that the judge was wrong. He contends that the judgments of Nelson J are not binding by way of estoppel as between the Secretary of State and Mr Bairstow and, relying on *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35, [1943] KB 587 and subsequent cases, that the factual findings and conclusions of Nelson J are not evidence of those facts. He submits that the wide powers conferred on judges by CPR 3.1 and 32.1 do not enable them to make admissible as evidence that which in law is not. He contends that the principle relied on by the Secretary of State does not apply to one, such as Mr Bairstow, who has not initiated proceedings for the purpose of mounting a collateral attack on a final decision of a court of competent jurisdiction. Why, he submits, should a defendant or respondent such as Mr Bairstow be stigmatised as abusing the process of the court because he insists that the serious allegations made against him are proved by legally admissible evidence?

[9] Counsel for the Secretary of State accepts that the judgments of Nelson J are not binding by way of estoppel as between the Secretary of State and Mr Bairstow. He contends that the decision of the Court of Appeal in *Hollington*'s case, in so far as it remains good law, applies only to prior decisions of a court exercising a criminal jurisdiction. But, he submits, even if the factual findings and conclusions of Nelson J are not admissible as evidence in these proceedings of facts so found the decision of the House of Lords in *Hunter*'s case and other cases to the same effect show that it can be and is an abuse of the process for Mr Bairstow to require the same issues to be relitigated.

PROCEEDINGS UNDER THE 1986 ACT

[10] Before considering the extent and proper application of the principles on which each side relies it is necessary to explain the nature of the proceedings under the 1986 Act and the procedure by which they are conducted. A disqualification order prohibits the person against whom it is made, otherwise than with the leave of the court, from acting as a director or liquidator of a company or as a receiver or manager of the property of a company or from being

concerned or taking part, directly or indirectly, in the formation, promotion or management of a company. Such an order may be made in any of the circumstances prescribed by ss 2–8. In the case of applications under ss 6–8 an order may be made if the court is satisfied that the conduct as a director of a company of the person against whom the order is sought makes him unfit 'to be concerned in the management of a company' (see ss 6(1)(b) and 8(2) of the 1986 Act).

[11] In determining whether a person's conduct makes him unfit to be concerned in the management of a company the court is required by s 9 to have regard to the matters specified in Sch 1, Pt I and, where the company in question has become insolvent, to the matters specified in Pt II. As QMH has not become insolvent only the matters specified in Pt I could be relevant in these proceedings. In summary those matters are the director's own misfeasance, breach of fiduciary or other duty in relation to a company, his own misapplication or accountability for the money or property of a company and the extent of his responsibility for the company entering into any transaction liable to be set aside under the Insolvency Act 1986 or failing to keep proper accounts and other records. The issue for the court's determination, namely unfitness to be concerned in the management of a company, must be decided by reference to the totality of the conduct relied on. Such conduct has to be proved or admitted for there is no such thing as a default judgment in proceedings under the 1986 Act.

[12] Section 16(1) of the 1986 Act provides that the person against whom the order is sought 'may appear and himself give evidence or call witnesses'. Section 20 provides for certain statements to be admissible in evidence but it is not suggested that it has any relevance to issues arising on this appeal. The procedure by which such claims are to be pursued is prescribed by the Insolvent Companies (Disqualification of Unfit Directors) Proceedings Rules 1987, SI 1987/2023, as amended. By r 3 the claim is to be supported by one or more affidavits or, in the case of the official receiver, a written report. Such affidavit or report must (see r 3(3)) include 'a statement of the matters by reference to which the defendant is alleged to be unfit to be concerned in the management of a company'. Rule 6 requires the defendant to file in court any affidavit evidence in opposition to the application which he wishes the court to take into consideration. It was decided by this court in *Re Rex Williams Leisure plc* [1994] 4 All ER 27, [1994] Ch 350 that the provisions of r 6 apply so as to require a defendant who seeks to exercise his right under s 16 to give evidence or call witnesses to do so by filing affidavits. It was recognised that the court enjoys a residuary discretionary control over its own procedure so as to allow a witness to supplement his affidavit evidence and to permit him to call as a witness on subpoena one who refuses to swear an affidavit. The circumstances in which the court will allow such evidence will be exceptional and a defendant has no right to insist on it.

[13] In *Re Rex Williams Leisure plc* the Court of Appeal also dealt with the question of hearsay evidence. But their conclusion in that respect has now been overtaken by the provisions of the Civil Evidence Act 1995. By s 1(1) evidence in civil proceedings can no longer be excluded on the grounds that it is hearsay of whatever degree. Hearsay is defined by s 1(2)(a) as 'a statement made otherwise than by a person while giving oral evidence in the proceedings which is tendered as evidence of the matters stated'. Where hearsay evidence is tendered and the party doing so does not intend to call the maker of the statement the opposing

party may do so for the purpose of cross-examining him on that statement but only with the leave of the court (see s 3 of the 1995 Act and CPR 33.4).

[14] Accordingly as things stand the only witnesses at the hearing of the application to disqualify Mr Bairstow are Messrs Burn, Sibley and Gardner and Mr Bairstow himself. It may be that the court would permit Mr Bairstow to call for the purposes of cross-examination on their respective statements those whose statements are contained in exhibit BAFB 5. Similarly Mr Bairstow may satisfy the court that he should be allowed to subpoena as a witness one who has refused to make an affidavit on his behalf. Notwithstanding these possibilities, all of which are within the control of the court, I regard the suggestion that the order under appeal is required to prevent a trial of a length approximating that before Nelson J as fanciful.

PREVIOUS DECISIONS AS ADMISSIBLE EVIDENCE

[15] I turn then to the proposition on which counsel for Mr Bairstow relies. In *Hollington's* case the defendant had been involved in a road traffic accident in consequence of which the plaintiff's son had died. The defendant was convicted of careless driving and the plaintiff as the personal representative of his son sued the defendant for damages for negligence. The plaintiff sought to rely on the conviction as prima facie evidence that the defendant was driving carelessly at the time. The judge rejected the conviction as evidence but found for the plaintiff on other grounds. On the defendant's appeal the plaintiff claimed that the judge had been wrong to reject the conviction as such prima facie evidence. The judgment of the court was given by Goddard LJ. He recognised that relevance is the main consideration determining whether or not evidence is admissible.

[16] The court ruled that the conviction was inadmissible on two grounds; first, that the opinion of the court exercising the criminal jurisdiction as evidenced by the certificate of conviction was not relevant; second, as hearsay evidence it did not comply with the best evidence rule. It is common ground that the second reason is no longer valid. Hearsay is now generally admissible under the 1995 Act. In any event a subsisting conviction is now evidence that the person in question committed the offence recorded in it in all civil proceedings. In the case of defamation actions it is conclusive evidence; in all other civil proceedings it is prima facie evidence only (see the Civil Evidence Act 1968, ss 11 and 13). Accordingly the decision can only be authoritative if the first ground continues to be sustainable.

[17] The reasoning of the court on that first ground is clear from the following passage in the judgment ([1943] 2 All ER 35 at 40, [1943] KB 587 at 593–594):

> 'In truth, the conviction is only proof that another court considered that the defendant was guilty of careless driving. Even were it proved that it was the accident that led to the prosecution, the conviction proves no more than what has just been stated. The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court: it cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover, the issue in the criminal proceedings is not identical with that raised in the claim for damages. Assume that evidence is called to prove that the defendant did collide with the plaintiff, that has only an evidential value on the issue as to whether the defendant, by driving carelessly, caused damage to the plaintiff. To link up or identify the careless driving with the accident, it would be necessary in most cases, probably in all, to call substantially the same evidence before the court trying the claim

for personal injuries, and so proof of the conviction by itself would amount to no more than proof that the criminal court came to the conclusion that the defendant was guilty. It is admitted that the conviction is in no sense an estoppel, but only evidence to which the court or a jury can attach such weight as they think proper. Nevertheless, it is obvious that once the defendant challenges the propriety of the conviction the court, on the subsequent trial, would have to retry the criminal case, to find out what weight ought to be attached to the result. It frequently happens that a bystander has a complete and full view of an accident; it is beyond question that while he may inform the court of everything he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide: but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not. The well-recognised exception in the case of scientific or expert witnesses depends on considerations which, for present purposes, are immaterial. So, on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant.'

[18] Such reasoning and conclusion, though criticised by Lord Diplock in *Hunter v Chief Constable for the West Midlands* [1981] 3 All ER 727 at 734, [1982] AC 529 at 543 and by Lord Hoffmann in *Arthur JS Hall & Co (a firm) v Simons, Barratt v Ansell (t/a Woolf Seddon) (a firm), Harris v Scholfield Roberts & Hill (a firm)* [2000] 3 All ER 673 at 781, [2002] 1 AC 615 at 702, has been recognised as expressing the position at common law in a number of subsequent decisions to which I shall refer in chronological order. In *Savings and Investment Bank Ltd v Gasco Investments (Netherlands BV)* [1984] 1 All ER 296, [1984] 1 WLR 271 the issue was the admissibility in evidence of the report of inspectors appointed under s 35 of the Companies Act 1967. Peter Gibson J recognised ([1984] 1 All ER 296 at 303, [1984] 1 WLR 271 at 280) that the decision of the Court of Appeal in *Hollington*'s case 'still represents the position at common law' and concluded that the report was not relevant or admissible.

[19] In *Hui Chi-ming v R* [1991] 3 All ER 897, [1992] 1 AC 34 the Privy Council applied the principle of *Hollington*'s case to exclude the conviction of A in an earlier trial from being adduced in evidence in a later trial of B on a cognate charge. In delivering the advice of the Privy Council Lord Lowry referred ([1991] 3 All ER 897 at 902, [1992] 1 AC 34 at 43) to the observations of Goddard LJ in *Hollington*'s case which I have quoted (at [17], above) as 'greatly in point'. Later, he added, 'it is the irrelevance of the outcome of an earlier trial, as illustrated by cases such as *R v Turner* (1832) 1 Mood 347, 168 ER 1298, that makes evidence of that outcome inadmissible'.

[20] In *Land Securities plc v Westminster City Council* [1993] 4 All ER 124, [1993] 1 WLR 286 the issue was whether an earlier arbitration award was admissible in later proceedings for the determination of a fair market rent. Hoffmann J applied the principle so as to exclude an earlier arbitration award. He said ([1993] 4 All ER 124 at 126, [1993] 1 WLR 286 at 288):

'An arbitration award on the other hand is an arbitrator's opinion, after hearing the evidence before him of the rent at which the premises could reasonably have been let. The letting is hypothetical, not real. It is therefore not direct evidence of what was happening in the market. It is the arbitrator's opinion of what would have happened. In principle the judgment, verdict or award of another tribunal is not admissible evidence to

prove a fact in issue or a fact relevant to the issue in other proceedings between different parties. The leading authority for that proposition is *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35, [1943] KB 587, in which a criminal conviction for careless driving was held inadmissible as evidence of negligence in a subsequent civil action. There has been criticism of this decision and important exceptions have since been created by statute, notably in the Civil Evidence Act 1968, but none of them would apply here.'

[21] In *Symphony Group plc v Hodgson* [1993] 4 All ER 143, [1994] QB 179 the Court of Appeal was concerned with the practice and procedure for making costs orders against one who was not a party to the proceedings in which the costs were incurred. Balcombe LJ formulated a number of principles of which the sixth is in these terms (see [1993] 4 All ER 143 at 153, [1994] QB 179 at 193):

'The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger: see *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35, [1943] KB 587 and *Cross on Evidence* (7th edn, 1990) pp 100–101. Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be admissible: see *Brendon v Spiro* [1937] 2 All ER 496 at 503, [1938] 1 KB 176 at 192 per Scott J, cited with approval by this court in *Bahai v Rashidian* [1985] 3 All ER 385 at 389, 391, [1985] 1 WLR 1337 at 1343, 1345. This departure from basic principles can only be justified if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule.'

[22] In *Three Rivers DC v Bank of England (No 3)* [2001] UKHL 16, [2001] 2 All ER 513, [2003] 2 AC 1 the House of Lords considered the extent to which the findings of Bingham LJ in an extra-statutory report into the collapse of the Bank of Credit and Commerce International could be relied on in subsequent proceedings. The issue before the House of Lords was whether the claim in the action had been properly struck out. A majority considered that it had not been. Three of the members of the Appellate Committee recognised that the findings would not be admissible in evidence at the trial of the action. Thus Lord Steyn described the report (at [5]) as being: 'ruled out by settled principles of law.' Lord Hope of Craighead stated:

'[31] The first point that has to be borne in mind is that neither the report itself nor any of its findings or conclusions will be admissible at any trial in this case. At this stage, when the only material that is available for consideration apart from the pleadings is the report and an incomplete bundle of relevant documents, it is tempting to fill in the gaps by reference to Bingham LJ's findings and the conclusions which he was able to draw from his review of the evidence. Nevertheless a sharp dividing line must be observed between, on the one hand, his narrative of the evidence and, on the other hand, his findings and conclusions in the light of that evidence.

[32] It can, as I have said, be assumed that if the claim is not struck out the claimants will in due course have access to the evidence which provides the source material for that narrative, and that that evidence will be capable of

being led by them at the trial. But, as Bingham LJ's findings and conclusions based on that narrative are inadmissible, they must be held to be incapable either of being led in evidence at the trial or of being used by either side in any other way in support of the competing arguments.'

Lord Hutton expressed the same opinion (at [132]). I do not understand either Lord Hobhouse of Woodborough or Lord Millett to have disagreed with these opinions.

[23] In *Hawaz v Thomas Cook Group Ltd* (27 October 2000, unreported) Keene J upheld the ruling of Judge Simpson, sitting in the Mayor's and City of London Court, that a decision of Ferris J in civil proceedings that Mr Hawaz had forged certain traveller's cheques was inadmissible in subsequent civil proceedings between him and another person. After setting out the rival arguments Keene J concluded—

'that the principles adumbrated in *Hollington*'s case remain applicable in cases where none of the statutory or common law exceptions operate. Those principles prevent the findings made in earlier civil cases from being used subsequently as evidence of the facts found. They do not in themselves operate as a bar to the findings being put by way of cross-examination as to credit, subject to the control of the court, but that is a different topic with which it will be necessary to deal later in this judgment. But in so far as it was sought to adduce the findings of Ferris J in order to establish that the respondent had committed fraud and forgery in fact against Sheikh Ahmed and had therefore been involved in a fraudulent claim on the travellers cheques in this action the learned judge was correct to rule that those findings were inadmissible in law.'

[24] Finally I should refer to the 1986 Act proceedings heard by Jonathan Parker J reported as *Re Barings plc (No 5), Secretary of State for Trade and Industry v Baker (No 5)* [1999] 1 BCLC 433. The proceedings arose out of the collapse of Barings plc due to the unauthorised trading activity of an employee of a subsidiary company in Singapore. There had been inquiries in both England and Singapore into what went wrong. These had led to a report of the Bank of England and another from inspectors appointed by the Minister of Finance in Singapore. The question arose as to the extent, if at all, to which the findings in either report were admissible in evidence. The Secretary of State did not seek to rely on 'evaluative judgments or express criticisms'. Evans-Lombe J had already determined that hearsay statements recorded in either report were admissible (see *Re Barings plc (in admin) (No 2), Secretary of State for Trade and Industry v Baker (No 2)* [1998] 1 BCLC 590). This left findings of primary or secondary fact made by the authors of either report. As to these Jonathan Parker J said ([1999] 1 BCLC 433 at 496):

'It seems to me to be implicit in the decision of Evans-Lombe J that findings of primary and secondary fact (as noted above, evaluative judgments are to be excluded for present purposes) are also admissible as evidence in these proceedings. But in any event, whether or not that be strictly correct, I take the view that the implied statutory exception identified in [*Re Rex Williams Leisure plc* [1994] 4 All ER 27, [1994] Ch 350], the wide-ranging nature of which was explained by Millett LJ in [*Secretary of State for Trade and Industry v Ashcroft* [1997] 3 All ER 86 at 94–95, [1998] Ch 71 at 81–82]—a passage quoted by Evans-Lombe J in his judgment in *Re Barings plc (in admin) (No 2), Secretary*

of State for Trade and Industry v Baker (No 2) [1998] 1 BCLC 590 (see 594–595)—covers findings of fact, as well as pure hearsay statements.'

The validity or otherwise of this conclusion was not challenged by Mr Baker in his subsequent appeal (see *Re Barings plc (No 5)* [2000] 1 BCLC 523 at 537 (para 41)).

[25] Counsel for the Secretary of State contends that the principle established in *Hollington*'s case is applicable only where the earlier decision was made in criminal proceedings. He contends that this distinction is warranted by a comparison between certain features of a criminal and a civil trial. In a criminal case it is not possible to be sure as to the basis of the conviction or the factual finding on which it is founded. It is likely that the issues in the criminal trial will be substantially different to those in a civil action. The rules of evidence are more restrictive. By contrast, in a civil action the basis of the decision is, or should be, clear from the judgment. The issues and the evidence on which the facts were found will be readily ascertainable. The range of admissible evidence is much wider. Why, asked counsel for the Secretary of State forensically, should the opinion of a judge in giving judgment in an earlier civil action be accorded no weight when the evidence of any other expert would be admissible? Counsel also relied on the criticism of *Hollington*'s case voiced by Lord Diplock in *Hunter v Chief Constable for the West Midlands* [1981] 3 All ER 727 at 734, [1982] AC 529 at 543 that it 'is generally considered to have been wrongly decided'.

[26] I am unable to accept the distinction on which counsel for the Secretary of State relies. Even if *Hollington* could originally have been confined to cases in which the earlier decision was that of a court exercising a criminal jurisdiction, it has stood for over 60 years as establishing a much broader proposition. There was no criminal prosecution in any of the other cases to which I have referred except *Hui Chi-ming v R* [1991] 3 All ER 897, [1992] 1 AC 34. The submission of counsel is inconsistent with the judicial statements made in each of the other cases to which I have referred, in particular of Lord Steyn, Lord Hope and Lord Hutton in *Three Rivers DC v Bank of England (No 3)* [2001] 2 All ER 513. It is true that in most of them the decision in question was not that of a court, but of inspectors appointed under the Companies Act, an arbitrator or extra-statutory investigators. But that feature was not the basis of the decision in any of those cases and cannot account for the dictum of Balcombe LJ in *Symphony Group plc v Hodgson* [1993] 4 All ER 143, [1994] QB 179 or the decision of Keene J in *Hawaz*'s case.

[27] Accordingly I would accept the submission of counsel for Mr Bairstow that the factual findings and conclusions of Nelson J in the earlier proceedings are not admissible as evidence of the facts so found in these proceedings. Counsel for the Secretary of State accepted that he could not rely on any statutory or common law exception to render those conclusions admissible for the purpose of proving those facts. Thus it is unnecessary to consider further the decisions of Evans-Lombe or Jonathan Parker JJ in *Re Barings plc (No 2)* and *Re Barings plc (No 5)*. Counsel for the Secretary of State also accepted that if the factual conclusions of Nelson J are inadmissible there is nothing in the CPR, in particular CPR 32.1, to alter the position.

COLLATERAL CHALLENGE TO AN EARLIER DECISION AS AN ABUSE OF THE PROCESS

[28] Accordingly I turn to the principle on which the Secretary of State does rely. The lynchpin of his argument is the decision of the House of Lords in *Hunter*'s case. Before referring to it in any detail it is convenient to look at one of

the earlier cases. In *Reichel v Magrath* (1889) 14 App Cas 665 Reichel had taken proceedings against the Bishop of Oxford and the patrons of a benefice for a declaration that he was still the vicar of the benefice and that an instrument of resignation was null and void. He lost before North J and his appeals to both the Court of Appeal and the House of Lords were dismissed. In the second action Magrath claimed to be the incumbent of the benefice, having been appointed to fill the vacancy caused by the resignation of Reichel, but that Reichel refused to vacate the parsonage houses or glebe lands. He sought declarations and injunctions designed to evict Reichel. In his defence to that claim Reichel sought to set up the same case as had been rejected by all three courts in the action he had brought against the Bishop. Magrath applied to have the defence struck out. He succeeded before the Queen's Bench judges on the grounds that the matter was res judicata and in the Court of Appeal on the basis that to set up the same defence was an abuse of the process of the court. Reichel appealed to the House of Lords. He failed. Lord Halsbury LC said (at 668):

> '... it would be a scandal to the administration of justice if, the same question having been disposed of by one case, the litigant were to be permitted by changing the form of the proceedings to set up the same case again. It cannot be denied that the only ground upon which Mr. Reichel can resist the claim by Mr. Magrath to occupy the vicarage is that he (Mr. Reichel) is still vicar of Sparsholt. If by the hypothesis he is not vicar of Sparsholt and his appeal absolutely fails, it surely must be in the jurisdiction of the Court of Justice to prevent the defeated litigant raising the very same question which the Court has decided in a separate action. I believe there must be an inherent jurisdiction in every Court of Justice to prevent such an abuse of its procedure and I therefore think that this appeal must likewise be dismissed.'

Lord Fitzgerald and Lord Macnaghten agreed. Lord Watson and Lord Herschell gave concurrent speeches. This decision is inconsistent with the submission of counsel for Mr Bairstow that the principle on which the Secretary of State relies cannot apply because Mr Bairstow has not initiated any attack on the earlier judgments of Nelson J.

[29] In *Hunter's* case the plaintiffs had been arrested on suspicion of having caused bomb explosions in a crowded pub in Birmingham. They were remanded in custody from time to time in the course of which they signed statements admitting the charges, but were seen to have sustained serious facial injuries. The first question at the subsequent trial was whether the statements had been procured by violence and threats or whether they were admissible as voluntary. This was decided by Bridge J at a voire dire and the trial proceeded. At the trial the accused repeated their allegations as to how their statements came to be made and Bridge J gave the appropriate directions to the jury. The jury found them guilty. Leave to appeal to the Criminal Division of the Court of Appeal was refused. The policemen alleged to have been responsible for the alleged assaults were charged but acquitted. Four years later the plaintiffs commenced civil proceedings for damages for assault and personal injuries resulting therefrom relying on the same assaults as they had relied on at both the voire dire and the trial. The Chief Constable applied for an order under RSC Ord 18, r 19 or the inherent jurisdiction of the court striking out the statement of claim and dismissing the action. He failed before Cantley J but succeeded in the Court of Appeal and the House of Lords.

[30] Lord Diplock, with whom the other members of the Appellate Committee agreed, considered that the case exemplified an abuse of the process of the court in the terms I have already quoted (at [5], above). He noted that a collateral attack on a final decision of a court of competent jurisdiction may take a number of different forms and quoted the speech of Lord Halsbury LC in *Reichel*'s case. He observed that the case before the House was the first in which the issue arose in respect of a decision of a court of criminal jurisdiction and that the decision of the Court of Appeal in *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35, [1943] KB 587 had no bearing on it. He considered, at some length, the provisions of ss 11–13 of the Civil Evidence Act 1968 and their effect on the decision in *Hollington*'s case. He concluded that the fresh evidence by which the conviction might be challenged in subsequent civil proceedings without being an abuse of the process of the court is such as to satisfy the test laid down by Lord Cairns LC in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801 at 814. The test formulated by Lord Cairns LC is:

> 'As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before.'

In *Hunter v Chief Constable for the West Midlands* [1981] 3 All ER 727, [1982] AC 529 there was no evidence which satisfied that test, with the consequence that it was an abuse of the process of the court to seek to relitigate the issues which had been determined by Bridge J and the jury in the earlier criminal proceedings. In those circumstances the claim had been properly struck out.

[31] This principle has been applied in a number of subsequent cases to which we were referred. Thus, in *North West Water Ltd v Binnie & Partners (a firm)* [1990] 3 All ER 547, consultant engineers had been found to be liable for negligence in an action brought by the victims of an explosion in the underground tunnel they had designed. In a subsequent action for negligence brought by the water authority for whom they had designed the tunnel they denied the allegations of negligence. Drake J held that the consulting engineers were precluded by estoppel from doing so. He held also that it was an abuse of the process of the court for the consulting engineers to continue to deny that which had been decided against them, albeit in proceedings brought by different parties. Accordingly he struck out their defence.

[32] In *Re Thomas Christy Ltd (in liq)* [1994] 2 BCLC 527, 1986 Act proceedings had been brought against a Mr Manson and gave rise to a number of factual findings against him. Subsequently two applications were issued, one by Mr Manson appealing against the rejection of his proof of debt, the other by the liquidator for misfeasance. There was a substantial overlap between the 1986 Act proceedings and the proof of debt appeal. Jacob J applied the principle established

in *Hunter*'s case and declined to allow Mr Manson, who was appearing in person, to relitigate the same issues. In *Brinks Ltd v Abu-Saleh (No 1)* [1995] 4 All ER 65, [1995] 1 WLR 1478 Jacob J applied the same principle in the case of an earlier conviction. In the absence of any evidence satisfying the test laid down by Lord Cairns LC in the *Phosphate Sewage* case he struck out the defence.

[33] In *J v Oyston* [1999] 1 WLR 694 the defendant had been convicted of raping and assaulting the plaintiff. The plaintiff then sued the defendant for damages in respect of the same rape and assault. The defendant denied the allegations. Smedley J refused to strike out his defence on the ground that by s 11 of the 1968 Act the conviction was only prima facie evidence. In those circumstances the defendant was entitled, if he could, to persuade the judge at trial that he had not committed the acts of which complaint was made. A similar conclusion was reached by the Court of Appeal in *McCauley v Vine* [1999] 1 WLR 1977.

[34] In recent years the principle of *Hunter*'s case has also arisen in the context of actions by a party against his former legal adviser relating to the conduct of earlier civil or criminal proceedings or their settlement. In *Walpole v Partridge & Wilson (a firm)* [1994] 1 All ER 385, [1994] QB 106 the plaintiff had been convicted before the justices for obstructing a veterinary officer in the course of his duty. He instructed the defendants to advise him on the merits of an appeal but they failed to advise him to lodge his notice of appeal in time. When he then sued his solicitors for negligence they claimed that his action should be struck out as a collateral attack on the final decision of a court of competent jurisdiction. They were unsuccessful on the ground that the issues before the justices and in the civil proceedings were different. Ralph Gibson LJ pointed out ([1994] 1 All ER 385 at 392, [1994] QB 106 at 116) that the decision of the House of Lords in *Hunter*'s case was that the initiation of proceedings as described by Lord Diplock may be an abuse of the process of the court, not that it necessarily is. He observed ([1994] 1 All ER 385 at 393, [1994] QB 106 at 117) that the decision of two different courts may well be different if reached on markedly different evidence.

[35] In *Smith v Linskills (a firm)* [1996] 2 All ER 353, [1996] 1 WLR 763 the plaintiff had been convicted of burglary. He sued his solicitors for the negligent conduct of his defence. The court directed the trial of a preliminary point of law whether if the plaintiff had been convicted because of the negligence of the defendant the plaintiff's claim was sustainable in law. The question was answered in the negative by both the judge and the Court of Appeal because the evidence on which the plaintiff relied did not pass the test laid down by Lord Cairns LC in the *Phosphate Sewage* case.

[36] The issue arose again in the various appeals reported under the style of *Arthur JS Hall & Co (a firm) v Simons* [2000] 3 All ER 673, [2002] 1 AC 615; affirming [1999] 2 FCR 193, [2002] 1 AC 615. The Court of Appeal was bound by the decisions of the House of Lords in *Rondel v Worsley* [1967] 3 All ER 993, [1969] 1 AC 191 and *Saif Ali v Sydney Mitchell & Co (a firm)* [1978] 3 All ER 1033, [1980] AC 198 to recognise the advocate's immunity from suit in respect of acts or omissions in the conduct of proceedings in court. The Court of Appeal indicated ([1999] 2 FCR 193 at 218, [2002] 1 AC 615 at 643 (para 37)) that the principle of *Hunter*'s case should be applied first. If the proceedings were struck out or dismissed then the question of immunity did not arise; but if the action was not struck out or dismissed on that ground then the justification for the advocate's immunity must be sought elsewhere. The Court of Appeal repeated (at para 38) the observations made in both *Walpole*'s case and *Smith*'s case that *Hunter*'s case did not decide that

the initiation of proceedings collaterally challenging an earlier judgment is necessarily an abuse of the process, only that it might be. The Court of Appeal emphasised the importance of considering (1) the nature and effect of the earlier judgment, (2) the nature and basis of the claim made in the later proceedings and (3) any grounds relied on to justify the collateral challenge.

[37] The House of Lords decided that the advocate's immunity should be reconsidered. They held unanimously in relation to civil proceedings and by a majority of five to two in relation to criminal proceedings that the immunity of the advocate was not required to prevent collateral attacks on earlier criminal convictions or civil judgments. The relevance for present purposes lies in the observations made in respect of the application of the principle in *Hunter*'s case. Thus, Lord Browne-Wilkinson ([2000] 3 All ER 673 at 765, [2002] 1 AC 615 at 685) confined it to cases where the prospective relitigation would be manifestly unfair to the defendant or would bring the administration of justice into disrepute. Lord Hoffmann ([2000] 3 All ER 673 at 782, [2002] 1 AC 615 at 702–703) agreed that the principle only applied 'in cases in which relitigation of an issue previously decided would be "manifestly unfair" to a party or would bring the administration of justice into disrepute'. He specifically approved the observation of Ralph Gibson LJ in *Walpole*'s case that the initiation of such proceedings is not necessarily an abuse of the process, but that it may be. Lord Hope ([2000] 3 All ER 673 at 752, [2002] 1 AC 615 at 722) accepted that all cases which can be treated as amounting to a collateral challenge to a subsisting conviction will be dismissed or struck out as an abuse of the process. Lord Hutton ([2000] 3 All ER 673 at 805, [2002] 1 AC 615 at 727) and Lord Millett ([2000] 3 All ER 673 at 829, [2002] 1 AC 615 at 752) agreed with Lord Hoffmann. Lord Hobhouse noted ([2000] 3 All ER 673 at 820, [2002] 1 AC 615 at 742) that challenging a previous decision does not necessarily connote an abuse of the process. Later he added:

> The "collateral attack" point is a species (or "sub-set") of abuse of process. There is no general rule preventing a party inviting a court to arrive at a decision inconsistent with that arrived at in another case. The law of estoppel per rem judicatam (and issue estoppel) define when a party is entitled to do this. Generally there must be an identification of the parties in the instant case with those in the previous case and there are exceptions. So far as questions of law are concerned, absent a decision specifically binding upon the relevant litigant, the doctrine of precedent governs when an earlier legal decision may be challenged in a later case. A party is not in general bound by a previous decision unless he has been a party or privy to it or has been expressly or implicitly covered by some order for the marshalling of litigation (*Ashmore v British Coal Corp* [1990] 2 All ER 981, [1990] 2 QB 338). This overlaps with the concept of vexation where the same person is faced with successive actions making the same allegations which have already been fully investigated in a previous case in which the later claimant had an opportunity to take part.'

[38] In my view these cases establish the following propositions. (a) A collateral attack on an earlier decision of a court of competent jurisdiction may be but is not necessarily an abuse of the process of the court. (b) If the earlier decision is that of a court exercising a criminal jurisdiction then, because of the terms of ss 11–13 of the 1968 Act, the conviction will be conclusive in the case of later defamation proceedings but will constitute prima facie evidence only in the case of other civil proceedings. (It is not necessary for us to express any view as

to whether the evidence to displace such presumption must satisfy the test formulated by Lord Cairns LC in *Phosphate Sewage Co Ltd v Molleson* (1879) 4 App Cas 801, cf the cases referred to at [32], [33] and [35], above.) (c) If the earlier decision is that of a court exercising a civil jurisdiction then it is binding on the parties to that action and their privies in any later civil proceedings. (d) If the parties to the later civil proceedings were not parties to or privies of those who were parties to the earlier proceedings then it will only be an abuse of the process of the court to challenge the factual findings and conclusions of the judge or jury in the earlier action if (i) it would be manifestly unfair to a party to the later proceedings that the same issues should be relitigated or (ii) to permit such relitigation would bring the administration of justice into disrepute.

CONCLUSION

[39] In this case the earlier decisions are those of Nelson J in civil proceedings. It is common ground that his factual findings and conclusions are not binding on the parties to these proceedings as the Secretary of State was not a party or privy of a party to the proceedings before Nelson J. Accordingly the first question is whether to relitigate any of the issues before him would be manifestly unfair to either the Secretary of State or Mr Bairstow. I see no reason why it should be manifestly unfair to the Secretary of State that he should be required to prove the serious allegations he makes with regard to the conduct of Mr Bairstow. He has adduced evidence in the form of the affidavit of Mr Burn designed to prove his case by admissible evidence without the assistance of the judgment of Nelson J. No doubt the order of Pumfrey J would give him a short cut but I do not consider that to deny him that short cut would be unfair to the Secretary of State.

[40] Obviously it would not be manifestly unfair to Mr Bairstow to require the Secretary of State to prove his case. I cannot stigmatise the attitude of Mr Bairstow in requiring the Secretary of State to prove his case by legally admissible evidence as an abuse of the process of the court. He will have to deal with the evidence of Mr Burn and will be liable to be cross-examined in respect of the findings of Nelson J. And in the absence of any compelling evidence from Mr Bairstow the judge may well draw the same inferences from the evidence of Mr Burn as Nelson J did from the extensive evidence before him. But it is the judge hearing the 1986 Act application, not Nelson J, who has to be satisfied that Mr Bairstow is by reason of his conduct in relation to QMH unfit to be concerned in the management of a company.

[41] Then would permitting such relitigation bring the administration of justice into disrepute? I do not think so. First, the allegations made by the Secretary of State are serious. Second, they have to be proved to the satisfaction of the court hearing the application for a disqualification order by legally admissible evidence. This application is not like other civil proceedings in which a defence may be struck out and judgment be entered in default. As I said earlier there can be no default judgment in proceedings such as these. Third, these proceedings are in the control of the court. Mr Bairstow is not entitled to adduce any further evidence whether from himself or others without the court's leave. Mr Bairstow will have to satisfy the court that there are good grounds for challenging the evidence of Mr Burn and that the evidence he seeks to adduce is relevant to that issue.

[42] I would, in any event, conclude that the order of Pumfrey J went too far. If the earlier decision had been that of a court exercising a criminal jurisdiction then the conclusions of Nelson J would have been prima facie evidence only. I

can see no reason why the decision of a civil court on a lower burden of proof, which is not binding as an estoppel per rem judicatam, should be treated as conclusive proof.

[43] For all these reasons I would allow the appeal and set aside the order of Pumfrey J. It will be necessary to hold a further pre-trial review to deal with the outstanding applications of Mr Bairstow for permission to adduce further evidence which became unnecessary in the light of the order Pumfrey J was prepared to make. I would emphasise again that it is incumbent on Mr Bairstow to identify which parts of the evidence of Mr Burn he challenges, to indicate why he does so and to demonstrate that the further evidence he seeks to adduce is clearly relevant to the issue. While CPR 32.1 cannot render admissible evidence which is inadmissible, it can and should be used to confine the issues, exclude the marginal and limit the evidence Mr Bairstow seeks to adduce to that which is truly probative.

[44] I would allow this appeal, set aside para 1 of the order of Pumfrey J and remit the matter to Pumfrey J for a further pre-trial review in the light of the conclusions of this court.

POTTER LJ.

[45] I agree.

HALE LJ.

[46] I also agree.

Appeal allowed.

Kate O'Hanlon Barrister.

R (on the application of Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs

R (on the application of Drain) v Secretary of State for Environment, Food and Rural Affairs

[2004] EWHC 1217 (Admin)

QUEEN'S BENCH DIVISION (DIVISIONAL COUR)

MAURICE KAY LJ AND RICHARDS J

22–26 APRIL, 22 JULY 2004

Highway – Dedication – Presumption – Presumption of dedication where way over land actually enjoyed by public as of right and without interruption for relevant period unless there was sufficient evidence of no intention during relevant period to dedicate highway – Whether necessary for acts relied on by landowner as evidence of lack of intention to dedicate highway to have been communicated to users of way – Whether necessary for lack of intention to dedicate highway to exist throughout relevant period – Highways Act 1980, s 31(1).

In two cases applications were made for modification orders adding public footpaths to the definitive map and statement of rights of way and the modification orders were made. The owners of the land over which the footpaths ran objected to the orders, which were accordingly submitted for confirmation to the Secretary of State. An inspector was appointed and a public local inquiry held. Section 31(1)[a] of the Highways Act 1980 provided that where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, had been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way was to be deemed to have been dedicated as a highway unless there was 'sufficient evidence that there was no intention during that period to dedicate it'. The inspector considered the requirements of s 31(1) of the 1980 Act and directed herself that any action on the part of the landowner in respect of his intention not to dedicate a footpath had to be overt and contemporaneous, but that it was not necessary that his intention not to dedicate be made known to the users of the way, and that the lack of intention to dedicate did not have to be demonstrated throughout the whole period of 20 years. She found sufficient evidence of intention not to dedicate in each case and accordingly did not confirm the orders. Both claimants challenged her decision. The issues before the court were, inter alia, (i) the character of the evidence required to satisfy the proviso in s 31(1); and (ii) whether the words 'during that period' in the proviso in s 31(1) meant that it was necessary to prove that throughout the 20 year period there had been no intention to dedicate the way as a highway.

a Section 31, so far as material, is set out at [4], below

Held – (1) Although in the absence of something overt and contemporaneous a landowner would generally find it difficult to point to 'sufficient evidence' of a lack of intention to dedicate, there was no requirement that evidence of a lack of intention to dedicate had to be brought to the notice of the users or be likely to come to their attention (see [29], [30], below); dicta of Sullivan J in *R v Secretary of State for the Environment, ex p Billson* [1998] 2 All ER 587 at 605–606 and *R v Secretary of State for the Environment, Transport and the Regions, ex p Dorset CC* [2000] JPL 396 applied.

(2) The statutory presumption of dedication was rebuttable by sufficient evidence to negative the intention to dedicate for part of the 20-year period (subject to the question of de minimis); a landowner was not required to prove the lack of an intention to dedicate throughout the 20-year period. In the instant cases, the inspector had been correct in the way she had directed herself, and had found sufficient evidence, and both claims would, accordingly, be dismissed (see [41], [43], [53], [60], below); dicta of Sullivan J in *R v Secretary of State for the Environment, ex p Billson* [1998] 2 All ER 587 at 606 and *R v Secretary of State for the Environment, Transport and the Regions, ex p Dorset CC* [2000] JPL 396 applied.

Notes

For statutory presumption of dedication: length of user under statute, see 21 *Halsbury's Laws* (4th edn) (2004 reissue) para 124.

For the Highways Act 1980, s 31, see 20 *Halsbury's Statutes* (4th edn) (2003 reissue) 114.

Cases referred to in judgment

Fairey v Southampton CC [1956] 2 All ER 843, [1956] 2 QB 439, [1956] 3 WLR 354, CA.

Huddersfield Police Authority v Watson [1947] 2 All ER 193, [1947] KB 842, DC.

Jaques v Secretary of State for the Environment [1995] JPL 1031.

Jones v Bates [1938] 2 All ER 237, CA.

Mann v Brodie (1885) 10 App Cas 378, HL.

O'Keefe v Secretary of State for the Environment and Isle of Wight CC [1996] JPL 42; *affg* [1998] JPL 468, CA.

Poole v Huskinson (1843) 11 M & W 827, 152 ER 1039.

R v Oxfordshire CC, ex p Sunningwell Parish Council [1999] 3 All ER 385, [2000] 1 AC 335, [1999] 3 WLR 160, HL.

R v Secretary of State for the Environment, ex p Billson [1998] 2 All ER 587, [1999] QB 374, [1998] 3 WLR 1240.

R v Secretary of State for the Environment, ex p Cowell [1993] JPL 851 CA.

R v Secretary of State for the Environment, Transport and the Regions, ex p Dorset CC [2000] JPL 396.

R v Secretary of State for the Environment, ex p Blake [1984] JPL 101.

Turner v Walsh (1881) 6 App Cas 636, PC.

Ward v Durham CC (1994) 70 P&CR 585, CA.

Williams-Ellis v Cobb [1935] 1 KB 310, [1934] All ER Rep 465, CA.

Cases referred to in skeleton arguments

Folkestone Corp v Brockman (1914) 12 LGR 334, [1914] AC 338, HL.

Metropolitan Police District Receiver v Croydon Corporation, Monmouthshire CC v Smith [1957] 1 All ER 78, [1957] 2 QB 154, [1957] 2 WLR 33, CA.

Astley v IRC [1975] 3 All ER 696, CA.
Minister of Pensions v Higham [1948] 1 All ER 863, [1948] 2 KB 153.
Colchester Estates (Cardiff) v Carlton Industries plc [1984] 2 All ER 601, [1986] Ch 80, [1984] 3 WLR 693.
Hue v Whiteley [1929] 1 Ch 440.
R v Suffolk CC, ex p Steed [1997] 1 EGLR 131, CA.
A-G (ex rel Yorkshire Derwent Trust Ltd) v Brotherton [1992] 1 All ER 230, [1992] 1 AC 425, [1991] 3 WLR 1126, HL.

Applications for judicial review

R (on the application of Godmanchester Town Council) v Secretary of State for Environment, Food and Rural Affairs

Godmanchester Town Council applied for judicial review of the decision contained in a letter dated 21 March 2003 of Helen Slade, an inspector appointed by the Secretary of State, to refuse to confirm the Cambridgeshire County Council (Public Footpath No 15 Godmanchester) Definitive Map Modification Order 2002 made on 20 March 2002 under s 53(2)(b), (3)(c)(i) of the Wildlife and Countryside Act 1981. The facts are set out in the judgment of the court.

R (on the application of Drain) v Secretary of State for Environment, Food and Rural Affairs

Leslie Ernest Drain applied for judicial review of the decision contained in a letter dated 9 June 2003, an inspector appointed by the Secretary of State, to refuse to confirm the West Berkshire District Council Definitive Map and Statement Footpath 25, 25a and 25b Aldworth/17 Streatley Modification Order 2000 made on 4 September 2000 under s 53(2)(b), (3)(c)(i) of the Wildlife and Countryside Act 1981. The owner of the land over which the footpath the subject of the modification order ran, Yattendon Estates Ltd, appeared as an interested party. The facts are set out in the judgment of the court.

George Laurence QC and *Ross Crail* (instructed by *Zermansky & Partners*, Leeds) for Godmanchester Town Council and Dr Drain.
Timothy Mould (instructed by the *Treasury Solicitor*) for the Secretary of State.
Edwin Simpson (instructed by *Blandy & Blandy*, Reading) for the interested party.

Cur adv vult

22 July 2004. The following judgment of the court was delivered.

MAURICE KAY LJ.

[1] This is the judgment of the court, to which both members have contributed substantially.

[2] The court has before it two claims concerning the interpretation of what has become known as 'the proviso' to s 31(1) of the Highways Act 1980. The claimants challenge the approach towards the proviso that was adopted in *R v Secretary of State for the Environment, ex p Billson* [1998] 2 All ER 587, [1999] QB 374 and followed in *R v Secretary of State for the Environment, Transport and the Regions, ex p Dorset CC* [2000] JPL 396. The claims are brought with the support of the Ramblers Association.

[3] The claims arise out of applications made under s 53 of the Wildlife and Countryside Act 1981 for modification orders adding public footpaths to the definitive map and statement of rights of way kept by the relevant surveying authority. In each case a modification order was made but, as a result of an objection by the landowner, was submitted to the Secretary of State for confirmation pursuant to the provisions of Sch 15 to the 1981 Act. In each case the outcome of the confirmation process was an inspector's decision not to confirm the order. The same inspector, Helen Slade, happens to have acted in both cases. It is her two decisions that are the subject of the challenge.

LEGISLATIVE FRAMEWORK

[4] Section 31 of the 1980 Act provides:

'(1) Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it.

(2) The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice such as is mentioned in subsection (3) below or otherwise.

(3) Where the owner of the land over which any such way as aforesaid passes—(a) has erected in such manner as to be visible to persons using the way a notice inconsistent with the dedication of the way as a highway, and (b) has maintained the notice after the 1st January 1934, or any later date on which it was erected, the notice, in the absence of proof of a contrary intention, is sufficient evidence to negative the intention to dedicate the way as a highway.

(4) In the case of land in the possession of a tenant for a term of years, or from year to year, any person for the time being entitled in reversion to the land shall, notwithstanding the existence of the tenancy, have the right to place and maintain such a notice as is mentioned in subsection (3) above, so, however, that no injury is done thereby to the business or occupation of the tenant.

(5) Where a notice erected as mentioned in subsection (3) above is subsequently torn down or defaced, a notice given by the owner of the land to the appropriate council that the way is not dedicated as a highway is, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner of the land to dedicate the way as a highway.

(6) An owner of land may at any time deposit with the appropriate council—(a) a map of the land on a scale of not less than 6 inches to 1 mile, and (b) a statement indicating what ways (if any) over the land he admits to have been dedicated as highways; and, in any case in which such a deposit has been made, statutory declarations made by that owner or by his successors in title and lodged by him or them with the appropriate council at any time—(i) within six years from the date of the deposit, or (ii) within six years from the date on which any previous declaration was last lodged under this section, to the effect that no additional way (other than any specifically indicated in the declaration) over the land delineated on the said map has

been dedicated as a highway since the date of the deposit, or since the date of the lodgment of such previous declaration, as the case may be, are, in the absence of proof of a contrary intention, sufficient evidence to negative the intention of the owner or his successors in title to dedicate any such additional way as a highway ...

(9) Nothing in this section operates to prevent the dedication of a way as a highway being presumed on proof of user for any less period than 20 years, or being presumed or proved in any circumstances in which it might have been presumed or proved immediately before the commencement of this Act.'

THE GODMANCHESTER CLAIM

[5] On 13 August 1999 Godmanchester Town Council applied to Cambridgeshire County Council as surveying authority for a modification order adding to the definitive map and statement a public footpath around the perimeter of Monks Pit, Godmanchester, linking two points already shown on the Cambridgeshire definitive map as public footpath no 4 Godmanchester. Following an initial refusal by the county council to make the order and a successful appeal, the Secretary of State directed the making of the order. The order, known as the Cambridgeshire County Council (public footpath no 15 Godmanchester) Definitive Map Modification Order 2002, was made on 20 March 2002. The owners of the land over which the footpath runs objected to the order, which was accordingly submitted for confirmation to the Secretary of State. An inspector was appointed, a public local inquiry was held in February 2003, and the decision letter was issued on 21 March 2003.

[6] The modification order was made under s 53(2)(b) and (3)(c)(i) of the 1981 Act, on the basis that evidence had been discovered which, when considered with all other relevant available evidence, showed that a public right of way on foot subsisted or was reasonably alleged to subsist over the footpath. Before the inspector, the case for the order was presented on behalf of the town council and was based on oral and written witness evidence of public user of the footpath for a period in excess of 20 years, which was claimed to satisfy the requirements of s 31 of the 1980 Act or, in the alternative, to justify an inference of dedication at common law.

[7] The inspector found that, subject to the proviso, the requirements of s 31 were satisfied. The right of the public to use the footpath had been 'brought into question' within the meaning of s 31(2) in April 1999 by the erection of a fence across its route. The relevant 20-year period for the purposes of s 31(1) was therefore April 1979 to April 1999. There had been use of the footpath by the public on foot 'as of right and without interruption' for that 20-year period.

[8] The inspector then turned to the proviso. She directed herself by reference to *Ex p Dorset CC* [2000] JPL 396, stating:

'24. ... In order for it to be presumed that a highway has been dedicated, it is necessary to show that during the 20-year period in question, the landowner made no indication that it was not his intention to dedicate a footpath. If it can be shown that the landowner did make such intention clear, then any claim must fail. *Ex parte Dorset* is relevant to this issue, and the objector drew my attention to it. It was held that any action on the part of the landowner in this respect had to be contemporaneous (to avoid a retrospective assertion being made) and it had to be overt (ie not secretive).

a However, it was not considered necessary for that intention to necessarily be made known to the users of the way …'

[9] The inspector referred to various matters which were not sufficient to satisfy her that there was no intention to dedicate. But there was one piece of evidence which she did consider to be sufficient for this purpose:

b '28. Nevertheless, I have considered carefully the evidence of the letter dated 27 July 1990 to the county council's planning officer. This letter makes a clear reference to the problems being experienced by the landowner in relation to trespass. Several problems are mentioned including the unauthorised vehicular access and the illegal use of the water area. But the last two sentences are, in my view, the crucial ones. I therefore quote them c in full as follows: "We are somewhat reluctant to erect security fencing to prevent pedestrian trespass around those parts of the pit which are not designated as a public footpath but clearly something has to be done to prevent illegal access to the land if the public is unwilling to restrict its movement to the definitive line of the footpath. Your comments on this d point, in particular, would be appreciated."

29. Unfortunately, the response from the county council was not presented to the inquiry, but that does not detract from the nature of the statement I have quoted. Given that at the time it was written, there was only one footpath on the definitive map (footpath 4) it is difficult to interpret e the letter in any other way than indicating that the landowner did not want pedestrian access round the pit (or lake). Even if the meaning of the word "trespass" in this context is unclear, I consider that the specific reference to "illegal access" clearly relates to pedestrian activity.

30. In my view this letter is contemporaneous as it was written during the period of 20-years use prior to 1999. It is also overt in that it was a letter f written openly to a local authority department as part of the planning process connected with the permission to reinstate the area, following the remedial road works to the A14. As I have indicated in para 24 above, it is not necessary for the contents of this letter to have been made known to the users of the path for it to satisfy the criteria of the 1980 Act. I must therefore conclude that it does constitute evidence of a lack of intention to dedicate, g expressed during the relevant period, and thus the claim does not satisfy s 31 of the 1980 Act.'

[10] In the remainder of the decision letter the inspector rejected the alternative argument that a right of way had been shown to exist at common law.

h

DR DRAIN'S CLAIM

[11] On 20 May 1994 Dr Drain, acting on behalf of the Ramblers Association, applied to Berkshire County Council, the then surveying authority, for a modification order adding to the definitive map and statement a public footpath j in the parishes of Streatley and Aldworth linking byway 24 Aldworth to footpath 7 Streatley. Following an initial refusal by the council to make the order and a successful appeal, the Secretary of State directed the successor authority, West Berkshire District Council, to make the order. The order, known as the West Berkshire District Council Definitive Map and Statement Modification Order 2000, was made on 4 September 2000. The owners of the land over which the footpath runs, Yattendon Estates Ltd, objected to the order, which was

accordingly submitted for confirmation to the Secretary of State. An inspector was appointed, a public local inquiry was held in April 2002, and a decision not to confirm the order was issued in May 2002. That decision was challenged by way of judicial review and was quashed by consent in September 2002 on grounds that are not material to the present proceedings. A new inspector was appointed, a second public local inquiry was held in March–April 2003, and a fresh decision letter was issued on 9 June 2003. It is that fresh decision which is now challenged.

[12] The modification order was made under s 53(2)(b) and (3)(b) of the 1981 Act, on the basis that there had expired in relation to the footpath a period such that the enjoyment by the public of the footpath during that period raised a presumption that it had been dedicated as a public path. Before the inspector the case for the modification order was presented by Dr Drain and was based on oral and written witness evidence of public user of the footpath from the 1920s onwards, which was claimed to satisfy the requirements of s 31 of the 1980 Act or, in the alternative, to justify an inference of dedication at common law.

[13] In this case, too, the inspector found that, subject to the proviso, the requirements of s 31 were satisfied. The right of the public to use the footpath had been 'brought into question' within the meaning of s 31(2) in 1992 by the erection of a sign reading 'Private No Footpath' near each of its end points. The relevant 20-year period for the purposes of s 31(1) was therefore 1972–1992. There had been use of the footpath by the public on foot 'as of right and without interruption' for that 20-year period.

[14] Turning to the proviso, the inspector referred first to a number of matters that were not sufficient to satisfy her that there was no intention to dedicate. But she went on:

> '49. However, as I have mentioned in para 38 above, a copy of the tenancy agreement between the estate and the tenant farmer was presented in evidence, and contained a pertinent clause. Clause 17 of the agreement relates to game and trespass, and states: "... *To warn and keep off all unauthorised persons from shooting fishing sporting molesting the game or trespassing over any part of the farm to give notice to the Landlord of any continued acts of trespass and not to allow any footpaths to be created. To permit the Landlord to take proceedings against trespassers or poachers in the Tenant's name. To lay information and give evidence and sign if required notices to trespassers and others to keep off the farm.*" Although this clause appears to deal largely with the protection of the sporting interests in the land, the language is sufficiently broad to include reference to "others".
>
> 50. In order for me to interpret the significance of this evidence, I refer to the cases of *Ex p Billson* [1998] 2 All ER 587, [1999] QB 374 and *Ex p Dorset CC* [2000] JPL 396. If I apply the findings of Dyson J in *Ex p Dorset CC* I must consider whether the tenancy agreement constitutes an act sufficient to satisfy what he refers to as the "proviso" of s 31(1) of the 1980 Act. In this he was guided by the judgment of Sullivan J in *Ex p Billson* which suggested that any action taken to satisfy the proviso needs to be overt and contemporaneous, but does not necessarily have to be communicated to the users.
>
> 51. Although the tenancy agreement was an agreement only between the parties concerned, it was a legal document and was drafted in accordance with various agricultural legislation in force at the time. It dates from 1950, but at the inquiry the land agent confirmed that it was still in force in 1986

a when the tenant farmer retired. The company which was formed in 1955 to manage the affairs of the estate took over all such agreements that had previously been in force. As the agreement was still extant in 1986, it was in force for a substantial part of the 20-year period I am considering in respect of the Order route. The tenancy agreement was therefore in my view an overt and contemporaneous expression of the wishes of the landlord in b respect of the tenant's management of the property. The judgment in *Ex p Billson* makes it clear that the lack of intention to dedicate does not have to be demonstrated throughout the whole period of 20 years, as long as it is manifest for a sufficient part of it. I consider that 14 years (1972–1986) is a sufficient period to qualify. The accepted interpretation of the proviso means that to satisfy the requirements of s 31 of the 1980 Act the tenant did c not need to put the terms of the clause sufficiently into practice to bring home to users that his landlord had no intention of dedicating any public rights of way across the land. As I have already concluded in para 48, above, that the signage was not effective in this regard, there is no evidence that he did so. Nevertheless, I conclude that the existence of cl 17 in the tenancy d agreement is sufficiently overt and contemporaneous to satisfy the proviso. I consequently consider that there is sufficient evidence of a lack of intention to dedicate the public right of way during the relevant period.'

[15] Finally, the inspector concluded that no inference of dedication could be made at common law.

e

ISSUES

[16] There are three issues: (i) whether the inspector was wrong to apply the approach in *Ex p Billson* and *Ex p Dorset CC* as to the character of the evidence required to satisfy the proviso, in particular that it is not necessary for the acts f relied on to have been communicated to users of the way; (ii) whether the inspector was wrong to apply the approach in *Ex p Billson* and *Ex p Dorset CC* that, in order to satisfy the proviso, it is sufficient to negative the intention to dedicate for part of the 20-year period and it is not necessary to prove that throughout the 20-year period there was no intention to dedicate; and (iii) whether, even if she adopted the correct approach as regards (i) and (ii), the inspector nevertheless g erred in finding sufficient evidence to satisfy the proviso in relation to the footpath in Dr Drain's claim.

[17] The first two issues concern the correct general approach towards the proviso. The third is a subsidiary issue turning very much on the facts of the particular case.

h

THE CHARACTER OF THE EVIDENCE REQUIRED TO SATISFY THE PROVISO

[18] Mr Laurence QC's attack on *Ex p Billson* and *Ex p Dorset CC* is put on the basis that the judgments of Sullivan J and Dyson J mark a departure from established principle. It is therefore necessary to refer to earlier authority, such j as it is. The starting point is *Fairey v Southampton CC* [1956] 2 All ER 843, [1956] 2 QB 439 which was concerned with s 1 of the Rights of Way Act 1932 and the proviso which was there expressed in the same terms (see, further, [36], below). The ratio of the case is concerned with when the right of the public to use a way is 'brought into question' within the meaning of what is now s 31(2). However, Denning LJ went on to say, obiter:

'In my opinion a landowner cannot escape the effect of twenty years' prescription by saying that, locked in his own mind, he had no intention to dedicate; or by telling a stranger to the locality (who had no reason to dispute it) that he had no intention to dedicate. In order for there to be "sufficient evidence that there was no intention" to dedicate the way, there must be evidence of some overt acts on the part of the landowner such as to show the public at large—the public who used the path, in this case the villagers—that he had no intention to dedicate. He must, in LORD BLACKBURN'S words, take steps to disabuse those persons of any belief that there was a public right (see *Mann v. Brodie* (1885) 10 App. Cas. 378, 386). Such evidence may consist, as in the leading case of *Poole v. Huskinson* (1843) 11 M&W 827 (152 ER 1039), of notices or a barrier, or the common method of closing the way one day a year. That was not done here; but we must assume that the landowner turned off strangers in so open and notorious a fashion that it was clear to everyone that he was asserting that the public had no right to use it. On this footing there was sufficient evidence to show that there was no intention to dedicate.' (See [1956] 2 All ER 843 at 846–847, [1956] 2 QB 439 at 458.)

On this basis, evidence of a lack of intention to dedicate is only 'sufficient' if it is of 'overt acts' such as to manifest the lack of intention to the users.

[19] Between 1983 and 1994, the judgment of Denning LJ was considered in a number of cases, in most of which Mr Laurence appeared as counsel. In *Ex p Blake* [1984] JPL 101 at 102, Walton J said:

'Quite clearly, it was not sufficient for the landowner merely to come along and beat his breast and say that all was lost, because there was an intention never to dedicate. That intention had to be manifested by sufficient overt or notorious acts.'

[20] Section 31 was considered by the Court of Appeal in *R v Secretary of State for the Environment, ex p Cowell* [1993] JPL 851. In his judgment Rose LJ rejected an argument that 'sufficient evidence' in sub-s (1) was limited either to or by the matters identified in sub-ss (3)–(6). He added (at 855):

'Although proof of matters there identified would provide sufficient evidence in a particular case, what evidence was sufficient in other cases would necessarily vary from case to case.'

Both Rose and Staughton LJJ referred to the dicta of Denning LJ in *Fairey*'s case [1956] 2 All ER 843, [1956] 2 QB 439, Staughton LJ commenting (at 857) that the manifestation of intention by some overt act—

'was not said in the section itself, but it seemed a sensible rule. Subsections (3), (5) and (6) all dealt with acts which were, to a greater or lesser extent, overt; those were examples of how sufficient intention might be demonstrated. So perhaps it was right to say that evidence of intention had always to be in the form of overt acts.'

He added:

'But did it have to be overt to every single user of the way on every single day of the year? There was nothing in the section to say that. Denning L.J. in the *Fairey* case gave as an example the common practice of closing a way for one day in the year. He [Staughton LJ] was not sure that that would always be sufficient for example if the landowners chose to charge a toll on

a Christmas Day, when nobody would be out riding their horses, or on a day when there was a howling blizzard and when nobody would go out, even on a horse. It might be thought that that was not sufficient evidence of an intention not to dedicate. Again, it was a question of fact.'

[21] In *Ward v Durham CC* (1994) 70 P&CR 585 at 590 Nicholls V-C said:

b 'In the absence of overt acts demonstrating an intention not to dedicate, such as displaying a "no right of way" notice, the court ought to be slow to find that a landowner's unexpressed intention not to dedicate is sufficient evidence for the purpose of section 31.'

[22] In *O'Keefe v Secretary of State for the Environment and Isle of Wight CC* [1996] c JPL 42 at 59 Pill J referred to *Fairey*'s case, *Ex p Blake* and *Ex p Cowell* and [the commentary] stated:

'On the point of construction, there was of course a danger of putting a gloss on the word "intention" in the statute and normally, when intention was at issue, a witness was permitted to say after the event what his intention d at the time had been. In the context of the 1980 Act however, he (Pill J.) respectfully agreed that that intention had to be made manifestly by contemporaneous and overt acts. The object of the Act, or one of its objects, was to simplify proof of dedication which was presumed upon proof of user. The statute gave a landowner means of protection against that presumed dedication upon production of sufficient evidence to negative the intention e to dedicate during the relevant period of use. Read as a whole, section 31 contemplated overt acts during the relevant period; use, as defined, on the one hand, acts which negative an intention to dedicate on the other ... Further, it would be a rare case in which a statement after the 20-year period of what the intention had been during that period could be "sufficient f evidence" unless made manifest by acts during the 20-year period.'

An appeal to the Court of Appeal was dismissed ([1998] JPL 468), but there is no statement of principle regarding this aspect of the case in the judgment of Mummery LJ.

[23] The last of the pre-*Billson* cases is *Jaques v Secretary of State for the* g *Environment* [1995] JPL 1031, a decision of Laws J. He said (at 1037):

'... under section 31 the landowner had to prove merely that he had no intention to dedicate; certainly, he had to prove it by overt acts, directed (as Lord Denning indicated in *Fairey*) to the public who use the way in question.'

h Laws J then found that, in the case before him, the landowner had disproved by overt acts plainly directed to the users any intention on his part to dedicate. However, he then proceeded to consider s 31(1), observing that 'despite the statutory changes, the area of the law remains convoluted'. Having set out what persons asserting a right of way must prove under the first part of the subsection, he added (at 1037–1038):

j 'Quite plainly, the second part of section 31(1) imported a further requirement. It meant that *even if* use of the required quality was proved, the status of right of way would not be established if the landowner demonstrated an intention not to dedicate. The logical relationship between the two parts of the subsection entailed that proof of an intention not to dedicate could be constituted by something less than proof of facts which

had to have made it clear to the public that they had *no* right to use the way: otherwise, once the interested public had established their case under the first part of the subsection, there would be no room for the operation of the second part. That was not a very satisfactory state of affairs. It was plain that the landowner had to disprove an intention to dedicate by overt acts directed to the members of the public in question, but equally plain that they need not actually bring home to the public that there was no right to use the way. He could only conclude that any sufficiently overt act or series of acts indicating an intention to keep the way private would be enough for the landowner's purposes in relation to the second part of the subsection, though they did not in fact bring home to the public his objection to their using his land.'

[24] We now turn to *Ex p Billson* [1998] 2 All ER 587, [1999] QB 374 and *Ex p Dorset CC* [2000] JPL 396.

[25] The landowner in *Ex p Billson* succeeded because the users were unable to establish user as of right. When Sullivan J turned to consider 'sufficient evidence' under the proviso, what he said was therefore obiter. He said:

'Is the deed "sufficient evidence" of the landowner's intention, given that it was not publicised or made manifest to the users of the way? The authorities cited by Mr Laurence, *Ex p Blake* ... *Ex p Cowell* ... *Ward*'s case ... and *O'Keefe*'s case ... do no more, in my view, than establish the proposition that evidence of the landowner's intention must be overt and contemporaneous. Thus, it will not avail the landowner to assert after the event that he had no intention to dedicate, but he is not required to publicise his intention to users of the way. The only dicta to the contrary are those of Denning LJ in *Fairey v Southampton CC* [1956] 2 All ER 843, [1956] 2 QB 439. Mr Laurence accepts that they were obiter. In so far as they equate the evidence necessary to satisfy the proviso with the evidence necessary to bring home to the public that their right to use the way is being called into question, they go too far, in my view. Implicit in Mr Laurence's submissions is the existence of a very fine line between acts that are sufficiently "open and notorious" to be capable of bringing the landowner's intention not to dedicate to the attention of the public, but which are not so open and notorious that they succeed in bringing the user of the way into question. His approach seems to me to leave little if any scope for the operation of the proviso. The landowner must not keep his intention locked in his own mind, but whether his acts are fairly described as overt or covert must be a question of fact for the inspector. One can imagine far-fetched hypothetical examples: writing a letter to oneself and placing it in one's desk drawer, but the inspector was entitled to conclude in this case that the formal execution of a deed addressed to "all men" and depositing that deed with the appropriate government department was a sufficiently overt act. I accept that the analogy with s 31(6) is not precise, because Parliament created a specific means of negativing intention, and the declaration has to be deposited with a highway authority and renewed every six years, but it is fair to observe that Parliament did not feel that it was necessary to bring the existence of such a declaration to the attention of the public using the way. It is true that in order to be effective under s 31(3) the notice has to be visible to persons using the way, but erecting such a notice is merely one way of establishing a contrary intention, and is deemed to be sufficient in the absence of proof of a contrary intention. One would expect that the evidential threshold

required to bring the landowner within such a deeming provision would be relatively high.' (See [1998] 2 All ER 587 at 606–607, [1999] QB 374 at 394–395.)

[26] In *Ex p Dorset CC*, Dyson J expressly adopted the reasoning of Sullivan J in *Ex p Billson*. It is common ground that the judgment of Dyson J on the proviso is part of the ratio of the case. It is essentially the foundation of Mr Mould's submission to us. It is necessary to set it out at some length. Dyson J said ([2000] JPL 396 at 406–407):

'On the face of it, the language of the proviso is straightforward. All that is required is that there be sufficient evidence of lack of intention to dedicate. Coming to the matter untutored by previous authority, one may be forgiven for thinking that what Parliament intended was that the tribunal of fact simply decide as a matter of fact whether there is or is not sufficient evidence of intention to dedicate. Indeed, in *Cowell*, Rose L.J. emphasised that it is a question of fact. Staughton L.J. made the point that the need for an overt act is not to be found in the statute. In *O'Keefe*, Pill J. referred to the danger of putting a gloss on the word "intention". I accept that as a matter of fact the tribunal of fact will rarely, if ever, find that there is sufficient evidence of lack of intention to dedicate in the absence of overt and contemporaneous acts on the part of the owner. I do not, however, think that such a requirement can be spelled out of section 31(1) as a matter of construction. In my judgment, Parliament left it to the tribunal of fact to decide whether the evidence in any given case is sufficient for the purposes of negativing the intention to dedicate. The section states no criteria as to what constitutes "sufficient evidence", although in section 31(3) and (6) two particular examples are given as to what will suffice ... [I]t cannot be suggested that subsections (3) and (6) are exhaustive of the circumstances in which there will be sufficient evidence. They are (the only) two examples of what, as a matter of law, will amount to sufficient evidence. I would, therefore, not place any gloss on the proviso at all. But if a gloss is justified, it seems to be common ground that it cannot be that advocated by Denning L.J. As explained by Sullivan J ... the intention not to dedicate does not have to be brought home to the users, since otherwise, in view of section 31(2), there would be no role for the proviso at all. Furthermore, as explained by Laws J., the relationship between the two parts of section 31(1) itself demands that, in disproving an intention to dedicate, the owner need not bring home to the users that there was no right to use the way ... It is necessary to stand back from the textual criticism to which the various obiter dicta have been subjected, and seek to ascertain the purpose of the proviso. It is clearly to protect the landowner, by enabling him to defeat a claim of presumed dedication by proving that he did not intend to dedicate. The only requirement imposed by Parliament is that there should be *sufficient* evidence of that intention. In my view, there is no reason in logic or policy why the only evidence that can be sufficient is of overt acts which are aimed at the users, but which do not bring home to them the owner's objection. As Staughton L.J. pointed out in *Cowell*, the overt acts rule (if that is what it is) is a sensible rule of evidence, since it prevents a landowner from asserting after the event that he had no intention to dedicate. The rule that the owner must bring his objection home to the users is relevant to section 31(2), since, as Denning L.J. made clear in *Fairey*, one of the objects of that subsection is to give users the opportunity to meet

the owner's challenge. But I can see no reason to construe the proviso to section 31(1) as imposing a requirement that falls somewhere between what I have called the overt acts rule and that which is required for the purposes of section 31(2).'

[27] In the present cases the inspector expressly relied upon and applied *Ex p Dorset CC* and, to a lesser extent, *Ex p Billson*. For the applications to this court to succeed on this issue, Mr Laurence accepts that he must persuade us they are wrong—indeed we must be 'convinced' of error to be justified in not following them, particularly *Ex p Dorset CC* (see *Huddersfield Police Authority v Watson* [1947] 2 All ER 193 at 196, [1947] KB 842 at 848). He seeks to convince us by the following submissions: (i) Although there is no previous binding authority to this effect, the earlier cases are strongly persuasive authority in favour of a requirement that 'sufficient evidence' connotes evidence of overt acts which come or are likely to come to the attention of users. This is apparent from the judgments of Denning LJ in *Fairey*'s case [1956] 2 All ER 843 at 846, [1956] 2 QB 439 at 458 ('overt acts ... such as to show the public at large'), Walton J in *Ex p Blake* [1984] JPL 101 at 102, 104 ('overt or notorious acts', 'indicated quite clearly to the whole world'), Staughton LJ in *Ex p Cowell* [1993] JPL 851 ('overt acts' which might not be sufficient if it were unlikely that they would be observed), Nicholls V-C in *Ward*'s case (1994) 70 P&CR 585 at 590 (the example of 'overt acts demonstrating an intention not to dedicate' being 'displaying a "no right of way" notice'), Pill J in *O'Keefe*'s case [1996] JPL 42 at 59 (drawing on the passages to which we have just referred and relating 'overt acts' to 'steps ... taken ... to disabuse users of the belief that the way had been dedicated') and Laws J in *Jaques v Secretary of State for the Environment* [1995] JPL 1031 at 1037 ('overt acts directed ... to the public who use the way in question' which 'need not actually bring home to the public that there was no right to use the way'). Sullivan and Dyson JJ failed to appreciate the consistency and force of this line of persuasive authority. (ii) It is erroneous to suggest that construing the proviso as requiring acts which come or are likely to come to the attention of users leaves it without a role. Some acts will be such as to render it impossible for the users to establish that the user had been 'as of right' for 20 years but others, while not having that effect, may be sufficient to enable the landowner to establish the absence of an intention to dedicate, provided that they were likely to come to the attention of the users. (iii) Section 31(3), (5) and (6), although only examples of 'sufficient evidence', justify the inference that what is required is acts that give users at least a reasonable opportunity of becoming aware of them and their significance. (iv) It cannot have been the policy of the legislation to enable the proviso to be satisfied by proof of acts, still less a state of mind, of which users are unlikely to have contemporaneous knowledge. Such a policy would enable a well-advised landowner to defeat a public right by an undisclosed and private act. It would tip the balance between the interests of the landowner and the public in favour of the landowner. (v) Such an approach is inconsistent with the policy of the Highways Act 1980 as recently articulated by the House of Lords in *R v Oxfordshire CC, ex p Sunningwell Parish Council* [1999] 3 All ER 385, [2000] 1 AC 335, which was decided after *Ex p Billson* and *Ex p Dorset CC*. In *Ex p Sunningwell*, Lord Hoffmann referred to the unpredictability of litigation concerning public rights of way before the Rights of Way Act 1932. He said:

'The purpose of the 1932 Act was to make it unnecessary to infer an actual dedication and, in the absence of specific rebutting evidence, to treat user as

a of right as sufficient to establish the public right.' (See [1999] 3 All ER 385 at 398, [2000] 1 AC 335 at 358.)

And:

b 'In passing the 1932 Act, Parliament clearly thought that the previous law gave too much weight to the interests of the landowner and too little to the preservation of rights of way which had been for many years in de facto use. As Scott LJ pointed out in *Jones v Bates* [1938] 2 All ER 237 at 249, there was a strong public interest in facilitating the preservation of footpaths for access to the countryside.' (See [1999] 3 All ER 385 at 399, [2000] 1 AC 335 at 359.)

c Thus, submits Mr Laurence, the landowner should have to show his hand openly at the time of the user, just as the users show their hand openly by using the way. The evidence of a lack of intention to dedicate should be sufficient for that purpose, not just sufficient to satisfy an inspector or a court after the event.

[28] We do not purport to set out each and every way in which Mr Laurence formulated and reformulated his lengthy submissions but we believe that we d have summarised their essence. They may appear to be formidable but, in our judgment, they are flawed for the reasons advanced in *Ex p Billson* and *Ex p Dorset CC*, as further developed by Mr Mould in his submissions to us.

[29] Such is the extent of our agreement with the judgment of Dyson J in *Ex p Dorset CC* that it is almost otiose for us to say much more on this issue. e However, we are disposed to say: (1) We agree with Sullivan and Dyson JJ that the dicta of Denning LJ in *Fairey*'s case [1956] 2 All ER 843, [1956] 2 QB 439 should not be followed. We agree with what Laws J said in *Jaques*'s case [1995] JPL 1031 about the relationship between the two parts of s 31(1). (2) We reject the submission that Sullivan and Dyson JJ failed to appreciate the consistency and force of a line of persuasive authority. To a significant extent the passages relied f upon by Mr Laurence were conditioned by the dicta of Denning LJ with which we respectfully disagree. (3) Like Dyson J, we consider that it is misleading to speak of 'the overt acts rule'. In our judgment, there is no such rule of law in relation to the proviso. The words of the statute simply do not require it. Indeed, we question whether it is properly described as a 'rule' of evidence. What can be g said is that, in the absence of something overt and contemporaneous, a landowner will generally find it difficult to point to 'sufficient evidence' of a negative—a lack of intention to dedicate. Ultimately, however, what is 'sufficient evidence' outside the specific circumstances contemplated by s 31(3)–(6) is, as Rose LJ said in *Ex p Cowell* [1993] JPL 851 at 855, something that 'would necessarily vary from case to case'. (4) It follows that there is no requirement that h evidence of a lack of intention to dedicate must be brought to the notice of the users or be likely to come to their attention. (5) Questions of 'the balance' between the users and the landowners are matters of policy. Section 31(1) and its predecessor assist the users by providing for a deemed dedication upon proof of 20 years' enjoyment as of right and without interruption, provided that the j landowner cannot rebut the presumption by proving a lack of intention to dedicate. That is as far as Parliament sees fit to go in addressing the balance and it is neither necessary nor desirable for us to go further. (6) We are unpersuaded that the decision of the House of Lords in *Ex p Sunningwell* requires us to depart from *Ex p Billson* and *Ex p Dorset CC*. *Ex p Sunningwell* is not concerned with the proviso in s 31(1). Its subject matter is the state of mind of users who are seeking to establish enjoyment 'as of right'.

[30] For these reasons, we conclude that *Ex p Dorset CC* was correctly decided and that the inspector in the present cases was right to apply it to the evidence before her. In these circumstances, Mr Laurence accepts that he can only succeed in the claims or either of them upon the other issues to which we now turn.

THE MEANING OF 'DURING THAT PERIOD'

[31] Mr Laurence introduced this issue as a 'postscript', by a relatively late amendment of the grounds. His enthusiasm for it grew even during the course of the hearing. If the court rejects his submissions on the previous issue, he sees this as an alternative way of achieving what he submits to be an appropriate balance between the interests of users and the interests of landowners in the operation of s 31.

[32] Mr Laurence's basic submission is that, when the proviso refers to sufficient evidence that there was no intention 'during that period' to dedicate the way as a highway, the expression 'during that period' is to be read as meaning 'throughout that period'. In order to satisfy the proviso, therefore, there must be sufficient evidence to show that there was a continuous intention not to dedicate throughout the 20-year period.

[33] A similar argument was advanced by Mr Laurence without success in *Ex p Billson* [1998] 2 All ER 587, [1999] QB 374. Sullivan J held:

> 'I do not accept Mr Laurence's submission that for the proviso to operate at all there must be evidence that there was no intention to dedicate for the whole of the 20-year period. Whilst "that period" is a reference back to the 20-year period, "during that period" is not to be equated with "throughout that period". Thus, if there is sufficient evidence that for say five or ten years during the 20-year period a landowner who objected to riders or walkers across his land had no intention to dedicate, that would defeat a claim of dedication under s 31(1). I consider that such an approach is consistent with that adopted by Balcombe LJ in *Ex p Cowell* in respect of the effect of a s 31(3) notice which is not maintained throughout the whole of the relevant period. It is effective for the period during which it is maintained. If the evidence shows that there was no intention to dedicate for only a very short period during the 20 years questions of de minimis may well arise. They would have to be resolved on the facts by the inspector hearing the evidence.' (See [1998] 2 All ER 587 at 607, [1999] QB 374 at 395–396).

[34] In common with the rest of what he said in relation to the proviso, Sullivan J's observations on the 'during' issue, although obiter, were carefully considered. Further, his approach was again followed by Dyson J in *Ex p Dorset CC* [2000] JPL 396, though the specific point does not appear to have been the subject of further argument. Dyson J held (at 408) that an objection made by the landowners in 1975 was 'the clearest overt act which evidenced the owners' intention not to dedicate' and that the inspector had been reasonably entitled to conclude that the objection 'had continuing effect into the 20-year period ending in August 1995'. Having referred in that respect to a letter dated 10 October 1977 which the inspector had treated as sufficient evidence of the owners' continuing intention not to dedicate the way, Dyson J concluded:

'That was sufficient evidence that there was no intention to dedicate during the 20 year period ending in August 1995. In my view, it is impossible to impugn the Inspector's decision on this point.'

[35] It seems to us that, in order to persuade this court to depart from the approach adopted in *Ex p Billson* and *Ex p Dorset CC*, Mr Laurence must surmount the same hurdle as in relation to the previous issue: he must convince us that Sullivan and Dyson JJ were wrong.

[36] His first submission raises a point not advanced in the previous cases. It is based on the statutory predecessor to s 31 of the 1980 Act, namely s 1 of the Rights of Way Act 1932. In its original form s 1 read:

'(1) Where a way, not being of such a character that user thereof by the public could not give rise at common law to any presumption of dedication, upon or over any land has been actually enjoyed by the public as of right and without interruption for a full period of twenty years, such way shall be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way, or unless during such period of twenty years there was not at any time any person in possession of such land capable of dedicating such way.

(2) *Where any such way has been enjoyed as aforesaid for a full period of forty years, such way shall be deemed conclusively to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate such way.*' (My emphasis.)

The words we have italicised in sub-s (1), which Mr Laurence conveniently refers to as the second proviso, and the whole of sub-s (2) were subsequently deleted by amendment. They are relied on, however, as casting light on the proper construction of the first proviso to sub-s (1) and, therefore, of the statutory successor to that proviso in s 31(1) of the 1980 Act.

[37] The background to the second proviso was that at common law an intention to dedicate land as a highway could be inferred only against a person who had the capacity to dedicate it; and, in particular, where the land was in settlement, there could be no valid dedication unless all parties interested in the settlement were sui juris and concurred or could be presumed to concur. The second proviso reflected the common law position by providing that there could be no deemed dedication if it was proved that at no time during the 20-year period was there a person in possession with the capacity to dedicate, as in a case where the land was in settlement for the whole of the period. Mr Laurence's submission is that, since 'during such period of 20 years' in the second proviso plainly meant 'throughout such period of 20 years', and like expressions in the same subsection must bear the same meaning, it follows that 'during that period' in the first proviso must also have meant 'throughout that period'; and the meaning of the expression cannot have changed between then and the inclusion of the same proviso in s 31(1) of the 1980 Act.

[38] We reject that submission. In the case of the second proviso, the need to prove that the criterion was met throughout the 20-year period arose out of the use of the additional words 'at any time'. Those words are strikingly absent from the first proviso. Had it been the legislative intention to require sufficient evidence that there was no intention to dedicate 'at any time' during the 20-year period, ie to require proof of the lack of such an intention throughout the period,

one would expect the same formula to have been used as in the second proviso. In our judgment, therefore, Mr Laurence's reference to s 1(1) of the 1932 Act works against his case rather than in favour of it.

[39] The rest of the argument based on the language and structure of the statutory provisions can be considered by reference to s 31 of the 1980 Act, though corresponding points could be made about s 1 of the 1932 Act. Mr Laurence points to an element of continuity inherent in the provisions of s 31(3)–(6). By sub-s (3) a notice is sufficient evidence to negative the intention to dedicate if the owner has erected it in the manner specified and 'has maintained the notice after the 1st January 1934, or any later date on which it was erected'. Subsection (6) treats the deposit of a map and statement as having continuing effect only if followed up, at intervals not exceeding six years, by appropriate statutory declarations. It is submitted that such provisions support the view that the proviso requires proof of a continuing lack of intention to dedicate throughout the 20-year period.

[40] In our view the subsections do not take matters very far. It is true that they refer in each case to a continuing state of affairs. They do not specify, however, that that state of affairs must continue for the whole of the 20-year period in order for the subsections to apply. On the face of it, their effect is to create a statutory presumption of sufficient evidence to negative the intention to dedicate for so long as the conditions laid down continue to be met. They are neutral on the question whether the intention must be negatived throughout the 20-year period or whether it suffices to negative it for part of the 20-year period. Moreover, even if s 31(3)–(6) were to be read as applying only where the relevant state of affairs continued for the whole of the 20-year period, it would not follow that the general terms of the proviso in s 31(1) were to be read in the same way. There would be no illogicality in requiring strict conditions to be met in order to give rise to a statutory presumption in the landowner's favour, while leaving it open for assessment on the facts of an individual case whether acts of a character, or in respect of a period of time, insufficient to meet the strict conditions were nevertheless sufficient evidence to negative the intention to dedicate.

[41] Mr Mould posits a case where, during the first years of the 20-year period, there is no evidence that the landowner intended not to dedicate, but during the latter part of the period the landowner deployed one of the means provided for in s 31(3)–(6) as evidencing his lack of intention to dedicate. On the claimants' approach the action taken by the landowner would be incapable of amounting to sufficient evidence to displace the rebuttable presumption of dedication, because there would be no evidence of such intention subsisting throughout the 20-year period. That, submits Mr Mould, cannot reasonably be said to have been the legislative intention. The purpose of the provisions is to give the landowner confidence that continuing public use of his land for passage will not, of itself, give rise to a public right being established against him. It cannot be right that such protection will not be achieved unless and until 20 years have elapsed since the landowner acted under the provisions.

[42] Mr Laurence, on the other hand, submits that it cannot have been the legislative intention to allow claims by the public to be defeated as easily as will be the case if the approach in *Ex p Billson* and *Ex p Dorset CC* is followed on the 'during' issue as well as the first issue. That approach would not only enable claims to be defeated by evidence of an intention not to dedicate after, say, 19 years of use of the way by the public as of right and without interruption (or after,

say, 38 years of the 40-year period that formerly existed under s 1(2) of the 1932 Act), but would also enable them to be defeated by sharp practice after, say, 21 years of such use had passed. At that point the landowner could do some private act (in the sense of an act that did not come to the knowledge of users of the way) sufficient to negative the intention to dedicate but insufficient to bring into question the public's right to use the way. He could then wait for some time before doing an act sufficient to bring the right into question. Once the right was brought into question, the 20-year period would be calculated back from that time; and the landowner, by his earlier private act, would have engineered a situation in which there was sufficient evidence to negative the intention to dedicate during the 20-year period. That line of reasoning is relied on as reinforcing the case for construing 'during that period' as meaning 'throughout that period' if it is held that private acts are sufficient to negative the intention to dedicate.

[43] We prefer Mr Mould's submissions as to legislative intent. In our view it is more likely that the legislature intended the statutory presumption of dedication to be rebuttable by sufficient evidence to negative the intention to dedicate for part of the 20-year period (subject to the question of de minimis) than that it intended to require the landowner to prove the lack of an intention to dedicate throughout the 20-year period. The possibility of sharp practice, as identified by Mr Laurence, is not a strong enough reason for adopting the construction he puts forward. Even if a claim under the statute could be defeated by such a device, it might well still be possible to infer a dedication at common law. Although Mr Laurence described this as very much a last throw, it is something to which a decision-maker could be expected to give particularly close attention in circumstances of the kind envisaged.

[44] A further aspect of Mr Mould's case to which we should refer is his submission that the effect of s 31 of the 1980 Act and of its statutory predecessor is that 20 years' user as of right and without interruption creates a statutory presumption of a continuing intention to dedicate, which may be rebutted in accordance with the proviso by showing that the continuity is broken. In our view it is wrong to talk in terms of a continuing intention to dedicate. Where at common law a period of user as of right gives rise to an inference of dedication, the inference is of dedication at a point of time before or at the same time as the earliest user (see eg 21 *Halsbury's Laws* (4th edn) (2004 reissue) para 118, and *Turner v Walsh* (1881) 6 App Cas 636, as quoted in *Williams-Ellis v Cobb* [1935] 1 KB 310 at 324–325, [1934] All ER Rep 465 at 473). In those circumstances it does not make sense to talk of a continuing intention to dedicate during the period of user. The same must apply in relation to the statute: if 20 years' user gives rise to a deemed dedication, what is deemed to have occurred is a dedication at a point of time rather than a continuing intention to dedicate over the 20-year period. Rejection of Mr Mould's argument on that point, however, does not entail rejection of his wider submission that *Ex p Billson* [1998] 2 All ER 587, [1999] QB 374 and *Ex p Dorset CC* [2000] JPL 396 were correctly decided on the 'during' issue. There is no reason in principle why the statute should not provide that, where 20 years' user gives rise to a presumption of dedication at some point of time, the presumption may none the less be rebutted by sufficient evidence that for part of those 20 years there was no intention to dedicate.

[45] To the extent that the decided cases under s 31 of the 1980 Act or its statutory predecessor cast any light on the 'during' issue, they tend to support the construction adopted in *Ex p Billson* and *Ex p Dorset CC*.

[46] In *Fairey's* case [1956] 2 All ER 843 at 848, [1956] 2 QB 439 at 460, Birkett LJ said of s 1 of the 1932 Act: a

> 'It does not profess to alter the general law as to the manner in which public rights are deemed to have come into existence. The important change is in the length of time which is enough to establish the intention. If the way can reasonably be presumed to have been dedicated as public, then b proof of public user for twenty years past is now enough, if the user has been "as of right", without interruption, *and it is not proved by the landowner that the intention to dedicate the way was not continuous during the twenty years ...*' (My emphasis.)

Mr Laurence makes various criticisms of that passage, including what is said c about the relationship between the common law and the statute (a point upon which we have already touched), but the fact remains that Birkett LJ clearly read the proviso in a way that is contrary to the claimants' submissions on the 'during' issue: he regarded it as sufficient for the landowner to prove that at some part of the 20 years there was no intention to dedicate.

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[47] Mr Simpson also drew our attention to certain observations of Denning LJ in the same case. In the context of his finding that the Rights of Way Act 1932 was retrospective, Denning LJ referred to the interval of 17 months between the time when the Act was passed (12 July 1932) and the time when it came into operation (1 January 1934). He stated:

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> 'If a notice were put up before 1933, it would have this effect: if the twenty years had not then run, the notice would prevent a public right being acquired, whereas if it had already run, the notice would serve as an emphatic assertion that the path had theretofore been used by tolerance of the owner and not by right of the public ...' (See [1956] 2 All ER 843 at 847, f [1956] 2 QB 439 at 459.)

Mr Simpson relies on the passage as showing that Denning LJ was of the view that a notice put up for only the last part of the 20-year period would negative the intention to dedicate within the meaning of the proviso. We consider it more likely, however, that, as Mr Laurence submitted in reply, Denning LJ's point was g simply that the erection of a notice would cause the right of the public to use the way to be brought into question (see s 1(6) of the 1932 Act) and that he was not expressing any view about the operation of the proviso. On the 'during' issue, therefore, we derive no assistance one way or the other from Denning LJ's judgment.

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[48] *Ex p Blake* [1984] JPL 101 concerned a challenge to a decision of the Secretary of State, accepting an inspector's recommendation, that a path known as Green Drive had not been dedicated as a bridleway. Walton J held that the starting point was s 31 of the 1980 Act, in relation to which there were two essential matters: the first was the question of 20 years' user as of right and j without interruption, and the second was the proviso. In relation to the proviso, he stated (at 103) that the onus was upon the landowner, Sheffield City Council, 'to show that they had no intention during the relevant period, or during sufficient part of the relevant period, to dedicate the land'. That suggests that he thought it sufficient for the intention to dedicate to be negatived for part of the period.

[49] That view is supported by what Walton J went on to say (at 103–104) in relation to the first factual matter relied on, namely the erection of a notice:

> 'It was impossible for Sheffield to rely upon the specific defence in section 31 since it was quite clear that although the notice was put up, it was not maintained in position for the whole of the period. But that did not prevent the fact that there was one there at the commencement of the period from being taken into consideration. The inspector had established that there was in position, on the balance of probabilities, of course, until around 1956, a notice stating that the user of the path was entirely permissive. Although Sheffield could not rely, under the terms of section 31, upon the special defence of a notice, it was at the least a strong public statement available to be seen by all those using Green Drive that it was only being used permissively. If this was right, that demonstrated by itself that there was no intention on the part of Sheffield to dedicate the road as a highway of any sort until after around 1956. The bearing of this on the case was obvious; between 1956 and 1973, when all access to horse riders was cut off, there was less than 20 years. This aspect of the matter by itself would be fatal to the applicant's case.'

[50] Although he appears to have considered that a notice needed to be maintained for the whole of the period in order to come within the specific 'defence' in s 31(3), he plainly regarded the presence of the notice for part of the period as sufficient to negative the intention to dedicate under the general terms of the proviso. It is true that the language used, with its reference to permissive user, harks back to the issue of user as of right; but the issue with which he was dealing was the proviso, and it was in the context of the proviso that he considered this aspect of the matter by itself to be fatal to the applicant's case. That point is not affected by the fact that he went on to examine other evidence of an intention not to dedicate and concluded (at 104) that Sheffield had made out its case that 'it had at all material times and for all material periods indicated quite clearly to the whole world that it was not proposing to dedicate the Green Drive as a bridleway'.

[51] In *Ex p Cowell* [1993] JPL 851 it was held that the charging of a periodic toll could amount to sufficient evidence that there was no intention to dedicate. This is not in itself inconsistent with the claimants' case that there must be a continuing intention not to dedicate throughout the 20-year period: as the claimants submit, recurrent or even sporadic acts might be such that, taken together, they could properly be held to amount to sufficient evidence of a continuing intention. The central reasoning in *Ex p Cowell* therefore adds nothing on this issue. At the end of the judgment, however, Balcombe LJ made this observation (at 858):

> 'Their Lordships had cited all the relevant cases save one which he would mention because it had formed part of Mr. Laurence's argument: *R. v. Secretary of State for the Environment, ex p. Blake* [1984] J.P.L. 101 where Walton J. (rightly in his view, although criticised by Mr. Laurence) held that a notice which was not maintained throughout the whole of the relevant period necessary under section 31(3) could nevertheless be relied on as evidence that during the time that notice was displayed, the way was being used with the permission of the owner, and therefore, during that period at least, there was not user "as of right".'

That observation, endorsing what was said by Walton J in *Ex p Blake*, was picked up by Sullivan J in *Ex p Billson* and so provides a direct link between *Ex p Blake* and *Ex p Billson*. For reasons already given when considering *Ex p Blake*, we take the view that *Ex p Blake* supports the approach taken in *Ex p Billson* towards this issue.

[52] In conclusion, although we were at one point attracted by Mr Laurence's submissions on this issue, we are very far from convinced that the approach adopted in *Ex p Billson* and *Ex p Dorset CC* was wrong. Indeed, we consider the approach to be supported by the statutory language, the balance of the argument about legislative intent and the earlier authorities.

[53] Accordingly we take the view that the inspector was correct in both decisions to direct herself on this issue by reference to *Ex p Billson* and *Ex p Dorset CC*.

THE SUBSIDIARY ISSUE IN DR DRAIN'S CLAIM

[54] A subsidiary issue in Dr Drain's case is whether, even if she was right to follow the approach in *Ex p Billson* and *Ex p Dorset CC*, the inspector erred in finding sufficient evidence to satisfy the proviso on the facts of the case. Mr Laurence's submission runs as follows. As can be seen from para 51 of her decision, the inspector based herself solely on cl 17 of the 1950 tenancy agreement entered into between the then owner of the freehold, Lord Iliffe, and the tenant. When in 1955 Yattendon Estates Ltd (the company) acquired the freehold, the benefit and burden of the covenants in the tenancy agreement passed to it by operation of law. The company's automatic succession to the benefit of the covenant in cl 17 was not, however, an expression of any intention on its part for the purposes of s 31(1) of the 1980 Act with regard to the relevant footpath. It would be wholly artificial to attribute to the successor-in-title, simply by virtue of the succession and the continuance of the tenancy, Lord Iliffe's intention in imposing the covenant in the first place. The inspector therefore erred in law or reached an unreasonable conclusion in finding that the tenancy agreement was an overt and contemporaneous expression of the company's intention not to dedicate.

[55] In our draft judgment as originally released to counsel, we said that we did not accept that what the inspector said on this issue was to be read as a bare finding on the legal consequences of succession to the tenancy agreement: the finding needed to be read in the context of 'the factual position as revealed in the unchallenged evidence before her'. Counsel for the claimant contended that our conclusion was based on a false premise, in that some of the evidence to which we referred was in fact challenged at the inquiry. We therefore deferred the handing down of the judgment and invited further written submissions. We have reconsidered the relevant part of the judgment in the light of the submissions received. In the result, we accept that our original reasons require modification but we adhere to the conclusion expressed in our original draft.

[56] It was not in issue before the inspector that the company which acquired the freehold and succeeded to the tenancy agreement in 1955 was a family company which was formed in that year to manage the affairs of the estate. The land agent who, as the inspector stated, confirmed at the inquiry that the tenancy agreement was still in force in 1986 when the tenant farmer retired was Mr Petter. It was not in issue that Mr Petter had been employed by the company since 1972. He gave evidence that '[t]he estate never had any intention of dedicating this track as a public path' and that '[e]mployees of the

estate have always been instructed to challenge members of the public who are found using the track'. He was cross-examined on both points. In relation to the former he made no concessions. In relation to the latter, however, he did make concessions. Moreover it appears from other parts of the decision that on the evidence as a whole, which included a large body of evidence from users of the path, the inspector did not accept the company's case that use of the path had been subject in practice to continual challenge by farm-workers and gamekeepers over the material period (see especially paras 28 and 36). In the circumstances it would in our view be unsafe to infer that the inspector accepted Mr Petter's evidence as to the instructions given to employees of the estate to challenge members of the public who were found using the path. We proceed on the basis that it was a point on which she made no finding, express or implied. We also take into account that, although Mr Petter confirmed that the tenancy agreement continued in force, there is nothing to show that he made specific reference to cl 17.

[57] The relevant factual position is therefore more complex than we had understood it to be when writing our original draft judgment. There remains, however, the uncontested fact that the succession to the tenancy agreement in 1955 was by a family company formed to manage the affairs of the estate. It is clear that the inspector also heard evidence about the management of the estate by the company during the relevant period. This included Mr Petter's evidence about the continuance in force of the agreement and his evidence, which was challenged but was not the subject of concession, that the company never had the intention of dedicating the track as a public path. In our judgment the inspector's finding in relation to cl 17, when viewed against that background, should be read not as a bare finding on the legal consequences of succession and continued existence of the tenancy agreement, but as a positive finding that the company 'took over' the agreement, including the covenant, with the same intention as Lord Iliffe had in entering into the agreement in the first place, and that the agreement was indeed an overt and contemporaneous expression of the company's wishes in respect of the tenant's management of the property.

[58] On that basis, which we consider to be a fair reading of the decision, the claimant's case on the subsidiary issue falls away: it is plain that there was no error of law and that the finding was reasonably open to the inspector. It is therefore unnecessary for us to decide whether the bare fact of succession by operation of law to a tenancy agreement containing cl 17, and the continued existence of the agreement thereafter, would have been a sufficient basis for a finding that the successor in title did not have the intention to dedicate. It may, however, be helpful for us to indicate that we were very far from persuaded by Mr Laurence's submissions on this issue. There seems to us to be a strong case that, just as the terms of cl 17 of the tenancy agreement could properly be regarded as a continuing expression of the intention of Lord Iliffe so long as he was owner of the freehold, so they could properly be regarded as a continuing expression of the intention of the company following its acquisition of the freehold and its succession to the benefits and burdens of the agreement. It is true that the benefits and burdens of the agreement passed by operation of law; but they passed only because of the deliberate acquisition of the freehold, which must be taken to have been done by the company with full knowledge of the legal consequences; and the agreement remained in force thereafter for over 30 years with no evidence of any attempt by the company to vary or determine it. In those

circumstances it is difficult to see any artificiality in attributing to the successor-in-title the same intention as the original owner of the freehold with regard to cl 17. a

[59] We therefore find against the claimant on the subsidiary issue in Dr Drain's case.

CONCLUSION

[60] For the reasons given above, the challenge to the approach adopted in *Ex p Billson* and *Ex p Dorset CC* fails, and both claims must be dismissed. b

Applications dismissed.

Dilys Tausz Barrister.

Senthuran v Secretary of State for the Home Department

[2004] EWCA Civ 950

COURT OF APPEAL, CIVIL DIVISION

DAME ELIZABETH BUTLER-SLOSS P, LAWS AND WALL LJJ

1, 16 JULY 2004

Human rights – Right to respect for private and family life – Whether life of adult siblings living together family life – Human Rights Act 1998, Sch 1, Pt I, art 8.

S arrived in the United Kingdom in July 1997 when he was 17 years old and applied for asylum. More than four years later his application was refused by the Secretary of State by letter. Throughout that time S was living in the United Kingdom with at least one of his adult brothers or sisters. S appealed against the Secretary of State's decision. The immigration adjudicator dismissed his asylum appeal but allowed the appeal under art 8[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provided for the right to respect for private and family life. The Immigration Appeal Tribunal allowed the Secretary of State's appeal against the adjudicator's decision, finding that S was financially independent, he was employed, that he was not dependent upon other members of his family and they were not dependent upon him, and that a person in that position could not bring himself under art 8 of the convention as he had reached the age where normally someone would be expected to be leading an independent life and he was doing so. Alternatively, it held that if S did have any family life in the United Kingdom it was tenuous, and it was manifestly proportionate for domestic immigration laws to be applied. S appealed.

Held – The family life of adult siblings living together was capable of engaging art 8 of the convention. Whilst some generalisations were possible, each case would be fact-sensitive, and that placed an obligation on both adjudicators and the appeal tribunal to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why art 8 was, or was not engaged. In the instant case the reasoning of the appeal tribunal had not brought into the equation the striking features that (i) S had arrived in the United Kingdom in 1997 at the age of 17, and had been living continuously with one or more of his siblings ever since; and (ii) that more than four years had elapsed between his arrival and the Secretary of State's refusal letter. Those facts had been manifestly relevant to the appeal tribunal's consideration of art 8, both in relation to the existence of family life and the proportionality of any interference with it. The reasoning of the appeal tribunal, therefore, had not been adequate to support its conclusion that art 8 was not engaged. The determination would, accordingly, be set aside, and the appeal would be remitted to the appeal tribunal for rehearing (see [15], [17]–[20], [23], below).

Advic v UK (1995) 20 EHRR CD 125 considered.

a Article 8, so far as material, provides, 'Everyone has the right to respect for his ... family life ...'

Notes

For the right to respect for family life, see 8(2) *Halsbury's Laws* (4th edn reissue) para 151.

For the Human Rights Act 1998, Sch 1, Pt I, art 8, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 555.

Cases referred to in judgment

Advic v UK (1995) 20 EHRR CD 125, E Com HR.

Salad v Secretary of State for the Home Dept [2002] UKIAT 06698, IAT.

Appeal

Nadarajah Senthuran appealed, with permission given by Maurice Kay LJ on 28 May 2004, from the decision of the Immigration Appeal Tribunal notified on 13 November 2003 allowing the appeal of the Secretary of State for the Home Department against the decision of an Immigration Adjudicator (B Andonian) dated 28 March 2003 allowing, under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), Mr Senthuran's appeal against the refusal by the Secretary of State by letter dated 16 October 2001 of his application for asylum. The facts are set out in the judgment of the court.

Shivani Jegarajah (instructed by *MK Sri & Co*, Harrow) for the appellant.

Philip Coppel (instructed by the *Treasury Solicitor*) for the Secretary of State.

1 July 2004. The court announced that the appeal would be allowed, that the decision of the Immigration Appeal Tribunal would be set aside and that the Secretary of State's appeal against the decision of the immigration adjudicator would be remitted to the Immigration Appeal Tribunal for rehearing, for reasons to be given later.

16 July 2004. The following judgment of the court was delivered.

WALL LJ.

[1] This is the judgment of the court.

[2] On 1 July 2004, having heard counsel for the Secretary of State, we announced our decision in this case, namely that the appeal would be allowed; that the decision of the Immigration Appeal Tribunal (IAT) would be set aside; and that the Secretary of State's appeal against the decision of the immigration adjudicator would be remitted to the IAT for rehearing. We reserved our reasons for that decision, which we now give.

THE APPEAL

[3] Mr Nadarajah Senthuran (the appellant) appeals, with permission granted by Maurice Kay LJ on paper on 28 May 2004, against a decision of the IAT, notified on 13 November 2003 following a hearing on 3 October 2003, which allowed an appeal by the Secretary of State against the decision of Mr B Andonian, an immigration adjudicator dated 28 March 2003, following a hearing on 14 March 2003.

[4] The appellant's application for asylum was refused by the Secretary of State by letter dated 16 October 2001, and was also certified as one to which the subsequently repealed provisions of para 9(4)(b) of Sch 4 to the Immigration and Asylum Act 1999 applied because—

> '... your fear of persecution is manifestly unfounded and that your claim is one to which para 9(7) does not apply because you have adduced no evidence of torture in Sri Lanka.'

[5] The appellant appealed. The adjudicator dismissed the appellant's asylum appeal, but did not uphold the Secretary of State's certificate with respect to the asylum claim. The adjudicator allowed the appeal under art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[6] The Secretary of State appealed to the IAT against the adjudicator's art 8 determination with the permission of the acting Vice-President given on 23 May 2003. The appellant did not seek to appeal to the IAT against the dismissal of his asylum claim.

THE FACTS

[7] The appellant, who is a citizen of Sri Lanka and a Tamil, was born on 21 June 1980. He arrived in the United Kingdom on 26 July 1997, a month after his seventeenth birthday. He applied for asylum on the ground that he had a well-founded fear of persecution in Sri Lanka. For reasons, which the Secretary of State gives in his refusal letter of 16 October 2001, the appellant was not interviewed about the substance of his claim. Notice of refusal of leave to enter after refusal of asylum was given on 31 October 2001. The appellant appealed under cover of a letter dated 16 November 2001. He also set out additional grounds for claiming asylum, including claims based on art 8 of the convention. We have not seen these additional grounds, but do not need to do so since they appear, from the Secretary of State's supplementary reasons for refusal letter dated 16 October 2002, to deal with the possible extra-territorial effect of art 8, and are not germane to this appeal.

[8] It will be immediately observed from the chronological sequence set out in the previous paragraphs, that more than four years elapsed between the appellant's arrival in the United Kingdom, and the Secretary of State's first letter giving his reasons for refusing the asylum claim. Throughout that time the appellant was living in the United Kingdom with at least one of his brothers or sisters.

THE ADJUDICATOR'S DECISION

[9] The reasons given by the adjudicator for finding that the appellant's removal from the United Kingdom would both constitute a breach of his art 8 rights and be disproportionate, were as follows:

> '13. The appellant's brother, Kajenthiran, and sister, Subanthy, were granted refugee status. The appellant's other sister's husband is a refugee and the appellant's brother Suthakumar, and mother are waiting for their appeals to be heard. The appellant's mother came to the United Kingdom with three of her grandchildren in the year 2002. Their parents were killed by the army in 1994, when they were arrested on suspicion of

having supplied banned items to the Liberation Tigers of Tamil Eelam (LTTE).

14. The appellant said that he had lost contact with his father, and before he retired he worked as a technical assistant in the immigration department in Kilanochi. He retired with a pension and decided to return to Meesalai. The family wrote eight or nine letters to him but have not had any reply.

15. The appellant is currently working and studying. He had been working for the Royal Mail as a postman for about six months. Before that, he was a cashier in a restaurant. He studies on a course for information technology. This course leads to a degree course and lasts two years.

16. The appellant's brother, who has refugee status, works in a hospital pharmacy and is studying for a degree in pharmacology. He expects to qualify in two years' time. The appellant's sister qualified as a nurse in Sri Lanka and works in a hospital in the United Kingdom. She will be sitting a hospital examination later this year. The appellant's brother, Suthakumar, works for a food company as a general assistant.

17. The appellant said that he had no family to return to in Sri Lanka. His brothers and sisters are both refugees. They are people who contribute to the economy in this country, as does the appellant. They do not benefit from public funds. The appellant arrived in this country when he was 17 years of age and, even though he was a minor, the Home Office took an extraordinarily long period of time, namely over four years, to make a decision on his case. That was unreasonable, in my view, and gave the appellant an expectation that he would in due course be entitled to remain in this country, and cashing in on that expectation he regarded himself as settled and found a job and studied as well. That progress, as far as he is concerned, has been continuing to date. The appellant supports himself and lives in a close family unit with his mother, brothers and sister.'

THE DECISION OF THE IAT

[10] In para 3 of its determination, the IAT deals with the history very shortly and in the following terms:

'The claimant is a Sri Lankan Tamil who was born on 21 June 1980. He is now 23 years old. He arrived in this country when he was just seventeen on 26 July 1997. He claimed refugee status; the refugee status was refused in 2001.'

[11] The IAT then identifies the issue to be decided in the following terms:

'... whether family relationships that the claimant undoubtedly has with other people in this country are sufficient: (a) to establish that he has a family life here; and (b) that it would be disproportionate for that family life to be interfered with.'

[12] We propose to set out the balance of the IAT's judgment in full:

'4. The members of his family who are here are much older than him and they are his brothers and sisters. Recently his mother, some nephews and nieces have arrived in this country as well but the principal

relationship would appear to be with his brothers and sisters. These are aged 36, 32 and 30, and as far as I am aware, there may be another brother or sister of a similar sort of age. Some of these members of the family live with the claimant in Wembley where he works as a postman and where he has also studied at Harrow College on a student course dealing with access to information technology. He says that whilst he keeps in touch with his family here he has no family left in Sri Lanka. As I have already mentioned, his mother has come to this country, that was in 2002, and three teenage nieces and nephews have also come. We will assume, giving him the benefit of the doubt that he is in regular touch with them.

5. It was said by the adjudicator that the family relationship which he has established which I have just outlined, were such that in the circumstances of the case it would be disproportionate to allow the ordinary immigration laws of this country to prevail. We do not agree. We have been assisted today by the authority of the Tribunal in the case of *Salad* [2002] UKIAT 06698 following a finding of the European Commission of Human Rights in the case of [*Advic v UK* (1995) 20 EHRR CD 125] which held that in the ordinary course of events the fact that there are siblings in the same jurisdiction as an applicant does not establish a family life per se. There must be some genuine connection between siblings for family life to obtain, particularly where one is dealing with adults. I will cite the paragraphs that appear to me to be relevant.

> 13. In [*Advic*] the Commission said: "Nevertheless, in accordance with the Commission's case law, the exclusion of a person from [a] country in which his close relatives reside may raise an issue under Article 8 of the Convention. However, in examining cases of this nature the Commission's first task is to consider whether a sufficient link exists between the relatives concerned to give rise to the protection of [Article 8] of the Convention. Although this will depend on the circumstances of each particular case, the Commission has already considered that the protection of Article 8 did not cover links between adult brothers who had been living apart for a long period of time and who [were] not dependent on each other. Moreover, the relationship between a parent and [an] adult child [would] not necessarily [acquire] the protection of Article 8 of the Convention without evidence of further elements of dependency, involving more than the normal, emotional ties."

6. We consider that if one is to follow [*Advic*] it would seem in this case that the claimant may not have established that there is in fact that family relationship that could give rise to protection under art 8 of the convention. The claimant is financially independent, he works for the Post Office, he is not dependent upon other members of his family and they are not dependent upon him. He is now a twenty three year old man. It seems to us that a person in that position cannot bring himself under Article 8 of the Convention, he has reached the age where normally one would expect someone to be leading an independent life and he is. If we were to be wrong about that we would conclude that it would be manifestly proportionate for the immigration laws of this country to be applied. Insofar as there is any

family life at all for this claimant in this country it is tenuous. If the claimant wishes to visit members of his family in this country after being returned to Sri Lanka, he may, of course, make an application in the usual way to the High Commission in Colombo for a visitor's visa and he can see the family then. We appreciate, of course, that it would be difficult if not impossible for some members of the family to travel to Sri Lanka to see him: although this is a matter to be taken into account it is not one that we consider in the circumstances of this case to be of particular importance.

7. In all the circumstances, therefore, we consider: (a) that no family life, sufficient to attract the protection of art 8 actually has been shown to exist in this case; but (b) if it has, then the immigration laws of this country must take precedence over any art 8 issues. For these reasons this appeal is allowed.'

ANALYSIS

[13] It is, we think, reasonably clear from para 7(a) of the determination that although the IAT uses the word 'may' in the second line of para 6 of its determination ('the claimant may not have established that there is in fact that family relationship that could give rise to protection under art 8 of the convention') the IAT in fact decided that art 8 of the convention was not engaged because no family life had been shown to exist.

[14] In reaching that conclusion, the IAT relied on both *Advic v UK* (1995) 20 EHRR CD 125 and *Salad v Secretary of State for the Home Dept* [2002] UKIAT 06698. However, as the IAT's citation from *Advic*'s case makes clear, the first task is to consider whether a sufficient link exists between the relatives concerned to give rise to the protection of art 8. This, inevitably, is a question of fact. In *Advic*'s case, the Commission held that art 8 of the convention 'did not cover links between adult brothers who had been living apart for a long period of time and who were not dependent on each other'. In *Salad*'s case, there had been no contact between the appellant and her siblings after the latter had left Somalia, and she had spent only a very short time living with them in the United Kingdom. There was no evidence of dependency beyond normal ties between siblings, and art 8 was not engaged.

[15] We do not think that *Advic*'s case is authority for the proposition that art 8 of the convention can never be engaged when the family life which it is sought to establish is that between adult siblings living together. In our judgment, the recognition in *Advic*'s case that, whilst some generalisations are possible, each case is fact-sensitive, places an obligation on both adjudicators and the IAT to identify the nature of the family life asserted, and to explain, quite shortly and succinctly, why it is that art 8 is or is not engaged in a given case.

[16] We are very conscious of the pressures under which both adjudicators and the IAT have to work, and we recognise equally that it is not for this court to pore over every nuance in an adjudication or IAT determination. However, the simple and well-established fact remains that the IAT has a duty to give adequate reasons for its decisions, and litigants are entitled to know why they have won or lost, particularly in a jurisdiction where the consequences of success or failure are so profound.

[17] In our judgment we do not think the reasoning of the IAT sufficient to justify its conclusion that art 8 is not engaged on the facts of this case. We reach that conclusion for several reasons.

[18] Firstly, it is a striking feature of this case that the appellant arrived in the United Kingdom in 1997 at the age of 17, and has been living continuously with one or more of his siblings ever since. These two aspects of the case immediately distinguish it, on its facts, from both *Advic*'s case and *Salad*'s case.

[19] Secondly, an equally striking feature of the case is that more than four years elapsed between the appellant's arrival in the United Kingdom and the Secretary of State's refusal letter. The adjudicator described the length of time taken by the Secretary of State to make a decision on the appellant's case as 'unreasonable'. It is difficult to quarrel with that observation.

[20] In our judgment, the facts we have identified in the preceding two paragraphs are manifestly relevant to the IAT's consideration of art 8, both in relation to the existence of family life and the proportionality of any interference with it. Yet it is clear from the IAT's reasoning (the whole of which we have set out) that it did not bring them into the equation. To put the matter in a slightly different way, the recitation of the appellant's circumstances contained in para 4 of the adjudication upon which the IAT founds its conclusion that there is no family life (alternatively that it is tenuous and interference by removal from the United Kingdom would be proportionate) appears to leave wholly out of account the highly relevant factors identified in [18] and [19], above.

[21] For the Secretary of State, Mr Coppel argued that the decision had to be read as a whole. He made a valiant attempt to persuade us that the IAT had these matters in mind, since it had recited them as facts in para 3 of its adjudication (set out at [10], above). We agree, of course, that the decision must be read as a whole. However, as Laws LJ pointed out during the course of the argument, there is a substantial qualitative difference between a tribunal reciting facts as part of the history, and a tribunal incorporating the same facts into its reasoning process. It is clear to us, despite Mr Coppel's submissions, that the reader of the determination would simply be at a loss to know what, if anything, the IAT made of those matters; and in those circumstances there was a failure of the duty to give reasons.

[22] We also think that certain of the findings made by the adjudicator needed to be addressed if his decision was to be reversed. What weight should be given to them in relation to either limb of the art 8 equation will be a matter for the IAT on its reconsideration of the Secretary of State's appeal. At this point, we simply record them. The adjudicator found that the appellant had been tortured: he appears, accordingly to have found the appellant credible. The adjudicator found that the appellant had no family in Sri Lanka. The adjudicator also found that the appellant lived 'in a close family unit with his mother, brothers and sisters', although whether his mother will be permitted to stay in the United Kingdom is, of course, an open question. Finally, both on the existence of family life and in relation to proportionality, the adjudicator was plainly influenced by the delay in processing the appellant's claim.

[23] In these circumstances, and for these reasons, we do not think that the IAT's reasoning is adequate to support its conclusion. It follows that its determination must be set aside, and the Secretary of State's appeal will be remitted to the IAT for rehearing.

[24] We wish to make it quite clear that the issues in the appeal when it is reheard will be at large. We did not hear counsel for the appellant, and she will be free at the hearing of the appeal to advance all the arguments she did not

have the opportunity to advance before us. We wish to make it equally clear, moreover, that nothing in this judgment should be read as indicating what the outcome of the appeal should be. We have set aside the determination of the IAT because its reasons are insufficient to support it. A different constitution of the IAT will now rehear the appeal, and will reach whatever conclusion it thinks right on the arguments placed before it.

Appeal allowed. Case remitted to the Immigration Appeal Tribunal for rehearing.

Melanie Martyn Barrister.

R v Auguste

[2003] EWCA Crim 3929

COURT OF APPEAL, CRIMINAL DIVISION

KAY LJ, DOUGLAS BROWN J, AND SIR MICHAEL WRIGHT

9 DECEMBER 2003

Drugs – Dangerous drugs – Occupier of premises permitting activities in connection with drugs to take place there – Knowingly permitting or suffering the smoking of cannabis, cannabis resin or prepared opium – Whether actual smoking necessary – Misuse of Drugs Act 1971, s 8(d).

The defendant was the occupier of a flat which was raided by police. The police found eight people inside the flat and, in due course, found a piece of cannabis resin and two hand-rolled cannabis cigarettes which had never been lit. The police detected no smell of cannabis having been smoked and there was no evidence that there had been smoking of cannabis on that day. The defendant was charged, inter alia, as the occupier of the premises, with the offence of knowingly permitting or suffering the smoking of cannabis resin on the premises, contrary to s 8(d)[a] of the Misuse of Drugs Act 1971. The activities prohibited by that subsection were 'smoking cannabis, cannabis resin or prepared opium'. At trial the prosecution's case was that the defendant had permitted people to come to his flat and smoke cannabis there on that day. In cross-examination the defendant said that if the other people had started to smoke cannabis he would not have stopped them. He was convicted and he appealed. The prosecution contended that an offence under s 8(d) of the 1971 Act was complete the moment that permission had been given, whether or not smoking subsequently took place.

Held – Some actual smoking had to take place before an offence under s 8(d) of the 1971 Act could be committed. Mere giving of a tacit approval in advance was not sufficient basis for a conviction. The only logical explanation as to why the particular drugs specified in sub-s (d) had been singled out as being the relevant ones for an offence of that kind was that Parliament had been seeking to deal with the situation where a person might discover, by reason of the smell, that the prohibited activity was taking place on their premises. Accordingly, there had been no case upon which the defendant could have been convicted, and the appeal would therefore be allowed (see [10]–[12], [16], [17], below).

R v Brock [2001] 1 WLR 1159 considered.

Notes

For offences by occupiers or managers of premises, see 11(1) *Halsbury's Laws* (4th edn reissue) para 403.

Section 8(d) of the Misuse of Drugs Act 1971 was substituted by s 38 of the Criminal Justice and Police Act 2001, from a date to be appointed.

For the Misuse of Drugs Act 1971, s 8, see 28 *Halsbury's Statutes* (4th edn) (2001 reissue) 685.

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a Section 8, so far as material, is set out at [9], below

Case referred to in judgment
R v Brock [2001] 1 WLR 1159, CA.

Cases referred to in skeleton arguments
R v Souter [1971] 2 All ER 1151, [1971] 1 WLR 1187, CA.
R v Thomas, R v Thomson (1976) 63 Cr App R 65, CA.

Appeal
Paul David Auguste appealed with leave of the single judge against his conviction on 17 January 2003 in the Crown Court at Middlesex after a hearing before Judge Matheson QC and a jury for the offence of permitting premises to be used for smoking cannabis resin contrary to s 8(d) of the Misuse of Drugs Act 1971. The facts are set out in the judgment of the court.

Tania Panagiotopoulou (assigned by the *Registrar of Criminal Appeals*) for the appellant.
Philip Rueff (instructed by the *Crown Prosecution Service*) for the Crown.

KAY LJ (giving the judgment of the court).

[1] On 17 January 2003 in the Crown Court at Middlesex before Judge Matheson QC and a jury the appellant was convicted of permitting premises to be used for smoking cannabis resin. He was subsequently made the subject of an order that he do 60 hours' community service. He now appeals against his conviction with the leave of the single judge.

[2] The facts were relatively straightforward and can readily be told. The appellant was at the relevant time the sole tenant and occupant of a flat, 30 Tickford House, Lisson Grove in London. On 31 October 2001, just after 8 pm, the police carried out a raid on that flat. They had been conducting video surveillance of the premises from around 5 pm onwards. The video showed a considerable number of people coming and going from the flat over a period of three hours. It also showed that the appellant had arrived around 5.25 pm. When the police gained access to the premises, they found eight persons inside, including the appellant and a co-accused, Mr Suwar, and other people as well. Mr Suwar was a friend of the appellant's and had visited the flat a number of times. On looking round the flat, the police found a number of potentially significant items. On the seat cover of the seat on which the appellant was sitting when the police had arrived they found a piece of cannabis resin. The appellant accepted it was his, and he pleaded guilty to possession of that substance at the magistrates' court. Also found in the flat were quantities of cannabis, which were the subject of other counts in the indictment. It is those other items that lead to the charge with which we are concerned. Two hand-rolled cannabis cigarettes, 'reefers', which had never been lit and never been smoked, were found. One was on top of the microwave in the kitchen and another on scaffolding at the back of the building, to which place various of those inside had been seen to go. The premises were searched and a sum of £410 in notes was found on the floor. The police said that they could detect no smell of cannabis having been smoked in the premises. Neither of the two reefers had been lit. There were no cigarette ends suggestive of any recent smoking and, indeed, it was accepted by the Crown that there was no evidence at all to contradict the suggestion that there had been no smoking in those premises on that day.

[3] The prosecution's case, put simply, was that the appellant had permitted people to come to his premises and therein to smoke cannabis on that day. They

made that allegation notwithstanding the absence of any evidence that there had been any smoking on the day in question.

[4] The appellant gave evidence in relation to the matter. He said that he had been working at the time of the raid and had a particular job on a lady's flat. He said the money found in the flat was not his and he did not know whose it was. He did not sell drugs. He had known Mr Suwar as a friend for several years. He had telephoned his other visitors that day, inviting them to visit so that they could watch a video and have something to eat. He had returned home at 5.25 pm and been surprised to find that there were already people inside the premises. He said that he questioned the occupants as to how they had gained entry. They suggested that the door had been open, but he had not believed that account. He had then freshened up after returning home, cooked and consumed a meal, using food he had bought, and watched television. Others asked if they could visit to watch a video and they would bring food. He said that they were, as he put it, 'fussing about in the kitchen'. He could not see them from where he sat in the dimly lit living room.

[5] As the police arrived, the majority came into the living room. Two or three remained in the kitchen area. He remained where he was, except possibly getting up to adjust the television. As to his piece of cannabis, he admitted putting it on the sofa. He said about it:

> 'I was going to have some myself, possibly when others were there. I would probably have rolled a spliff after a few minutes of the video. I had not seen any other drugs in my flat. I had not seen anyone else rolling cannabis cigarettes. There had been no discussion about drugs.'

He said that he had not seen the money until he was shown it by the police.

[6] Various other items were put to him. He dealt with those. Then he said that he did not know that the others had cannabis on them. He added: 'But if they did, I would have assumed it was for their personal use.' He had not previously seen either of the two reefers that were found:

> 'I didn't see anyone smoke cannabis in my flat between 5.25 and 8 pm. No one had asked my permission to smoke cannabis in the flat, and the other seven who were there were just there to have a meal and watch a video. I answered questions put to me because at the time I thought it was just me being arrested.'

[7] In cross-examination he was asked about those who were there. He was asked what he would have done if others had lit a joint. He replied: 'I wouldn't have stopped them.'

[8] In his interview with the police he admitted that on earlier occasions people had smoked cannabis in his premises and he had not stopped them.

[9] The first ground of appeal with which we are concerned is a point of principle relating to an interpretation of the relevant section of the statute, that is s 8 of the Misuse of Drugs Act 1971. That section provides:

> 'A person commits an offence if, being the occupier or concerned in the management of any premises, he knowingly permits or suffers any of the following activities to take place on those premises, that is to say—(a) producing or attempting to produce a controlled drug in contravention of section 4(1) of this Act; (b) supplying or attempting to supply a controlled drug to another in contravention of section 4(1) of this Act, or offering to supply a controlled drug to another in contravention of

section 4(1); (c) preparing opium for smoking; (d) smoking cannabis, cannabis resin or prepared opium ...' a

Those are the relevant words for these purposes. There is a statutory alteration proposed to that part of the statute, but it is not yet in force.

[10] The point that is taken, as it was taken at the trial by counsel, is that the section requires that before an offence can be committed there has been some b actual smoking that has taken place. It is submitted it is insufficient merely if a tentative permission has been given in advance of any such activity taking place and it is necessary for the prosecution to establish that there was smoking that had taken place and that that smoking had been permitted. The Crown submit that that is a wrong interpretation of the section and that the offence is complete the minute that permission has been granted whether or not smoking c subsequently takes place or not.

[11] In her helpful submissions to this court, Miss Panagiotopoulou has invited the court to say there are a number of reasons why the submission made by the Crown is wrong. She points, firstly, to the wording of the section itself and points to the fact that the opening words of the section make it an offence where d a person 'knowingly permits or suffers any of the following activities to take place on [the] premises'. She highlights the use of the expression 'any of the following activities'. It is then, as one of those activities that it is an offence to permit that smoking of cannabis is listed. She submits that the way that is worded is suggestive of a need for the activity to have taken place before an offence is committed. She further submits that there are circumstances in which it would e be unconscionable for an offence to be committed if in fact the interpretation suggested by the Crown was the correct interpretation. She, for example, points to the situation where somebody is approached and asked if the smoking of cannabis can take place on their premises and gives an indication of approval at that time but subsequently prohibits the activity to take place when the moment f comes when the person seeks to smoke the cannabis. She submits that in such circumstances it would be wrong if that amounted to an offence.

[12] She further invites our consideration of the precise activities which are made an offence by the section. She points to the fact that it is not simply the taking of unlawful drugs that is described as one of the prohibited activities, but g the only drugs the taking of which or the consuming of which would amount to an offence of this kind are those where there has in fact been smoking. The only drugs at the time when the Act was passed were normally smoked are then listed: cannabis, cannabis resin and prepared opium. Other substances may now regularly be smoked, but they were not then. Her submission is that that was not a matter of pure coincidence that Parliament simply banned those offences. h Taking of other drugs would be equally serious, but the opportunity for the householder to know that that was happening in his premises would be very much more limited. Each of those has the characteristic that those who indulge in that activity will necessarily produce a smell which ought to alert the householder. She submits that the only sensible reading of this section is that j Parliament was trying to deal with a situation where that form of activity was actually taking place and where the householder had not either prevented it or taken steps to try to stop it once he was aware that it was taking place, he having the particular knowledge that would arise from the very activity by reason of the smell to which we have referred. She submits that when one looks at the totality of the picture, the only sensible way to read this section is to read it as if the

activity must have taken place and that the mere giving of a tacit approval in advance cannot be a sufficient basis for a conviction.

[13] On behalf of the Crown, Mr Rueff has submitted that that simply is wrong and that there is no logical reason, reading the section in the way in which it is written, why Parliament should not have sought to prohibit the mere granting of approval. He submits that the minute an approval has been granted, the offence is committed and any subsequent withdrawal from the approval would at most be mitigation.

[14] Both counsel agree that this is a point that has never directly arisen before in any case. There is a passage in the case of *R v Brock* [2001] 1 WLR 1159, which seems to be supportive of the appellant's case. In the course of giving the judgment of the court in that case, Rose LJ said (at 1169 (para 23)):

> 'What the prosecution must prove to establish the offence of permitting under section 8(b) is: (i) knowledge, actual or by closing eyes to the obvious, that heroin dealing is taking place; and (ii) unwillingness to prevent it, which can be inferred from failure to take reasonable steps readily available to prevent it.'

It is submitted that in so far as that is of assistance to the court, there, in relation to one of the other activities prohibited by s 8, it was specifically being said that the activity had to take place.

[15] The case in which that expression of opinion was given by Rose LJ was a case where there had in fact been activity of the relevant kind that had taken place. The court was not therefore specifically considering the situation with which we are concerned. None the less it is helpful, but in no sense is it conclusive in relation to these matters.

[16] We have come to the conclusion that the submissions made on behalf of the appellant are cogent submissions that ought to, and do, succeed. It seems to us that it would be strange, unless the court was to recognise the submission made on behalf of the appellant, that some forms of taking of drugs in a premises were contained within this section and others were not if what was envisaged by Parliament was a general prohibition on the giving of permission for premises to be used for the taking of drugs. It seems to us that the submission that has been made that Parliament was actually seeking to deal with the situation where a person might discover, by reason of the smell, that activity was taking place on their premises is the only logical explanation as to why those particular drugs had been singled out as being the relevant ones for an offence of this kind. It seems to us in those circumstances that, looking at the section as a whole and weighing the competing considerations in relation to this matter, the section makes most sense if one interprets it as being necessary to establish that the requisite activity had taken place.

[17] In this case the judge accepted the Crown's submission and left the case to the jury on the alternative basis. It was common ground that it was not open to the jury to conclude that the smoking of cannabis had actually taken place in the premises, and therefore it follows that if a proper direction to the jury had been given or if indeed the submission of no case had properly been considered, this was a case where, on our conclusion as to the law, there was no case upon which this appellant could be convicted. For those reasons, we have come to the conclusion that this appeal should succeed and we allow it.

Appeal allowed.

Stephen Leake Barrister.

Drinkall v Whitwood

[2003] EWCA Civ 1547

COURT OF APPEAL, CIVIL DIVISION

SIMON BROWN, JONATHAN PARKER AND THOMAS LJJ

29 OCTOBER, 6 NOVEMBER 2003

Practice – Compromise of action – Approval of court – Approval on behalf of infant – Agreement reached between parties on liability while claimant an infant – Approval of court not sought – Whether agreement binding – CPR 21.10.

The claimant was seriously injured when she was aged 14 by a motor car driven by the defendant. While she was still a minor, before proceedings were issued, the claimant through her solicitors made an offer pursuant to CPR Pt 36 to settle the issue of liability on a 80:20 basis in her favour. The offer was accepted. Shortly before the claimant attained her majority the defendant withdrew from the settlement agreement. The claimant issued proceedings in the county court pleading that the settlement agreement was binding on the issue of liability. The defendant pleaded that as the claimant had been a minor the parties had been unable to enter a binding settlement without the approval of the court as required by CPR 21.10(1)(a),[a] and that such approval had not been sought. The question of whether there was a valid compromise agreement was ordered to be tried as a preliminary issue. The district judge concluded that there was a binding agreement which had been reached between the parties. The judge upheld that decision on the defendant's appeal before him. The defendant appealed to the Court of Appeal.

Held – A partial settlement agreement reached before proceedings were commenced relating to a claim by or on behalf of a child, like a complete settlement agreement reached in the same circumstances, was not binding on the parties and could be repudiated by either side until it had been approved by the court as provided for by CPR 21.10. The fact that the agreement had been reached pursuant to the express provisions of CPR Pt 36 could make no difference. It followed that the settlement agreement in the instant case had been invalid and the defendant had been entitled to repudiate it. The appeal would therefore be allowed (see [13]–[19], [22], [23], below).

Dietz v Lennig Chemicals Ltd [1967] 2 All ER 282 applied.

Per curiam. Those acting for child claimants in future may well think it prudent to issue proceedings to obtain the court's approval for any partial settlement of the claim lest the defendant otherwise seeks to repudiate it. Once a child claimant reaches adulthood a settlement agreement which until then has been invalid can, unless and until repudiated, be treated as an offer and accepted by either side (see [20], [22], [23], below).

Notes

For compromise etc in civil proceedings by or on behalf of a child, see 5(3) *Halsbury's Laws* (4th edn reissue) para 1814.

a CPR 21.10, so far as material, is set out at [7], below

Case referred to in judgments

Dietz v Lennig Chemicals Ltd [1967] 2 All ER 282, [1969] 1 AC 170, [1967] 3 WLR 165, HL.

Appeal

The defendant, Dean Harry Whitwood, appealed with permission of Hale LJ, from the decision of Judge Heppel QC on 6 February 2003 dismissing the defendant's appeal from the decision of District Judge Glentworth on 4 October 2002 on a preliminary issue in proceedings for damages for personal injury brought by the claimant, Kerry Drinkall, against the defendant, that an agreement reached as to the issue of liability before the claimant had attained the age of 18 which had not been approved by the court was a binding agreement. The facts are set out in the judgment of Simon Brown LJ.

Peter Burns (instructed by *James Chapman & Co*, Manchester) for the defendant.
Adam Korn (instructed by *Stamp Jackson and Procter*, Hull) for the claimant.

Cur adv vult

6 November 2003. The following judgments were delivered.

SIMON BROWN LJ.

[1] Kerry Drinkall (the claimant) was born on 18 October 1983. On 19 January 1998, aged 14, bicycling home from school, she was in collision with a motor car driven by the defendant. She was, alas, seriously injured, sustaining in particular a severe closed head injury which has left her with some permanent brain damage.

[2] On 5 April 2000, before proceedings were issued, the claimant through solicitors made a Pt 36 offer (see CPR 36.10) to settle the issue of liability on a 80:20 basis in her favour, an offer accepted on 7 April 2000 by the defendant's insurer's loss assessors.

[3] Some 18 months later, on 26 September 2001 (22 days short of the claimant attaining her majority on her eighteenth birthday), the defendant withdrew from that settlement agreement (as later explained, with a view to contending for a higher degree of contributory negligence because the claimant had not been wearing a cyclist's helmet).

[4] On 11 January 2002 the claimant issued particulars of claim in the Kingston-upon-Hull County Court relying on the April 2000 exchange of letters which, she pleaded, constituted a binding agreement on the issue of liability. The defendant disputed that, pleading that the claimant was a minor in April 2000 and that—

> 'The parties were unable to enter a binding settlement whether as alleged or at all without the approval of the court, which approval was not sought or given. In the premises no binding agreement has been reached.'

[5] The issue whether there was a valid compromise agreement was ordered to be tried as a preliminary issue.

[6] District Judge Glentworth on 4 October 2002 decided that the agreement was valid and binding. Judge Heppel QC on 6 February 2003 upheld that decision on the defendant's appeal before him. This second appeal comes before the court with the permission of Hale LJ. (The defendant now recognises, as Hale LJ

pointed out, that his appeal from District Judge Glentworth should itself properly have been brought in the first place to this court rather than to Judge Heppel.)

[7] The appeal turns on the true construction and application of CPR 21.10 which, so far as material, is in these terms:

> '(1) Where a claim is made—(a) by or on behalf of a child ... no settlement, compromise or payment and no acceptance of money paid into court shall be valid, so far as it relates to the claim by [or] on behalf of ... the child ... without the approval of the court.
>
> (2) Where—(a) before proceedings in which a claim is made by or on behalf of ... a child ... (whether alone or with any other person) are begun, an agreement is reached for the settlement of the claim; and (b) the sole purpose of proceedings on that claim is to obtain the approval of the court to a settlement or compromise of the claim, the claim must—(i) be made using the procedure set out in Part 8 (alternative procedure for claims); and (ii) include a request to the court for approval of the settlement or compromise.'

[8] The district judge observed, in her short judgment:

> 'In effect, what the defendant is seeking to do is to use the protection given to minors to resile from an agreement which was reached between the claimant, through her litigation friend, and the defendant.'

And concluded:

> 'In my judgment, there is a binding agreement which has been reached between the parties which requires the court's approval at the appropriate time.'

She ordered that judgment on liability be entered for the claimant as to 80% of the claim for an amount to be decided by the court.

[9] The determinative paragraphs in Judge Heppel QC's judgment upholding that decision are these:

> '23. In my judgment, the provision of CPR 21.10 applies to a claim which is made in proceedings, not an entitlement to a claim made before proceedings are begun. In my judgment, so much is clear from the introductory words of para (2) which read: "Where—(a) before proceedings *in which a claim is made* (my emphasis)."
>
> 24. There is, in my judgment, for the purposes of Pt 21, no claim in existence before proceedings bringing such claim are commenced. The Civil Procedure Rules do not, in my judgment, bite on settlements reached before proceedings are commenced, unless one or other party wants them to by proceeding under Pt 8 for court approval, pursuant to CPR 21.10(2) ...
>
> 26. During the course of the appeal my attention was drawn to the notes in the Civil Procedure text ... relating to r 21.10, part of which reads as follows: "Agreements for the settlement of claims involving children and patients may be reached before proceedings are begun. In these circumstances it will be necessary to obtain the court's approval of the settlement or compromise."
>
> 27. In my judgment, in so far as it suggests that obtaining the court's approval of the settlement or compromise is mandatory, the note is wrong. "Valid" for the purposes of Pt 21 relates to settlements after proceedings

have begun and not ones reached before proceedings are issued. So much is clear, in my judgment, from r 21.10(2) which makes, as I have sought to indicate, special provision for the bringing of proceedings solely for the purposes of getting the court's approval.

28. CPR 21.10 is, in my judgment, procedural, and applies only to agreements reached within court proceedings or to proceedings voluntarily brought to obtain approval. It does not affect the substantive law of contract involving infants.'

[10] The 'substantive law of contract involving infants', to which Judge Heppel was there referring, is the rule that, in the ordinary way, minor's contracts are enforceable by the minor but are not binding upon him unless he expressly ratifies them upon coming of age.

[11] Sympathetic though one may be to the conclusion reached by Judge Heppel, the difficulties in his reasoning are quickly apparent. It is, for example, surely clear that the 'claim' referred to at the end of cl (a) in para (2) of CPR 21.10 must necessarily pre-date the commencement of proceedings since para (2) expressly envisages issuing Pt 8 proceedings to approve 'an agreement ... reached for the settlement of the claim'.

[12] As it happens, however, it is unnecessary for this court to reach its own conclusion on the correctness or otherwise of the judge's reasoning below since, as Mr Burns's researches at last discovered (although not until after permission was given to appeal to this court), the House of Lords decided the very point arising here by reference to materially identical rules in *Dietz v Lennig Chemicals Ltd* [1967] 2 All ER 282, [1969] 1 AC 170. The rules then in question were as follows:

'... RSC, Ord 80, r 11 ... "Where in any proceedings ... money is claimed by or on behalf of a person under disability, no settlement, compromise or payment and no acceptance of money paid into court ... shall ... be valid without the approval of the court."... RSC, Ord 80, r 12 ... "... Where, before proceedings in which a claim for money is made by or on behalf of a person under disability (whether alone or in conjunction with any other person) are begun, and agreement is reached for the settlement of the claim, and it is desired to obtain the court's approval to the settlement ... the claim may be made in proceedings begun by originating summons and in the summons an application may also be made for—(a) the approval of the court to the settlement ..."' (See [1967] 2 All ER 282 at 298, [1969] 1 AC 170 at 183.)

[13] The short facts of *Dietz*'s case were that, before proceedings were issued, the plaintiff widow accepted the defendants' offer of £10,000 to settle her and her infant son's Fatal Accidents Acts (and Law Reform (Miscellaneous Provisions) Act 1934) claim 'subject to the approval of the court'. An originating summons was then issued for the court to approve that settlement. Between then and the hearing of the application, however, the plaintiff, unknown to the solicitors on either side, remarried. The master duly approved the settlement but, before the consent order had been drawn up, the defendants' solicitors learned of the plaintiff's remarriage and applied to set the order aside. The master acceded to that application, rightly, as was thereafter successively held by the judge, the Court of Appeal and the House of Lords. There were essentially two issues in the case. First, was the settlement agreement prior to its approval binding on the parties (or at least on the defendants) or could either side repudiate? Second, even

if it was not binding, was the master right, once he had approved it, to set aside his consent order rather than draw it up? Both points were decided against the plaintiff, the first because that was held to be the true effect of RSC Ord 80, r 11 (equivalent to CPR 21.10(1)); the second because the defendants' consent to the court's approval of the settlement had been induced by an innocent misrepresentation. It is, of course, the first point alone which is critical for the purposes of the present appeal.

[14] The two reasoned speeches were given by Lord Morris of Borth-y-Gest and Lord Pearson. On the point now at issue, Lord Morris said ([1967] 2 All ER 282 at 297–299, [1969] 1 AC 170 at 182–184):

> 'In my view, there was no binding agreement made in August ... If in the present case a writ had first been issued, and if thereafter there had been discussions leading to agreement, such agreement would have lacked validity unless and until the approval of the court was given. This is made clear by RSC, Ord 80, r 11 ... The present case came within the provisions of RSC, Ord 80, r 12 ... When ... the originating summons was taken out it made a "claim" on behalf of a person under disability (ie, the infant) ... the agreement "for the settlement of the claim" would depend for its validity on obtaining approval of the court ... If the court's approval were given, a binding agreement would result on the basis of which certain directions could be given by the court.'

[15] Lord Pearson said ([1967] 2 All ER 282 at 302–303, [1969] 1 AC 170 at 189–190):

> 'There was a suggestion made in the course of the argument that the compromise rule, if it means what it appears to say—if "invalid" means "of no legal effect"—is ultra vires. I do not accept that suggestion. When the claim of an infant or other person under disability is before the court, the court needs, for the purpose of protecting his interests, full control over any settlement compromising his claim. In my view, the making and re-making of the compromise rule were valid exercises of the rule-making power under the Judicature Acts, which is now contained in s 99 of the Supreme Court of Judicature (Consolidation) Act, 1925 ... The compromise rule is the vital one here ... The settlement, so far as it related to the £9,250, in which the infant was interested, was only a proposed settlement until the court approved it. Either party could lawfully have repudiated it at any time before the court approved it. It had no validity by virtue of the parties' agreement in the August settlement. That which might have given it validity would have been an order made by the master with the effective consent of the parties ...'

[16] That authority is in my judgment decisive upon the present appeal, certainly with regard to the basis on which the matter was decided below. The fact that agreement here was reached pursuant to the express provisions of Pt 36 can make no possible difference. The judge's reasoning simply cannot stand in the light of *Dietz*'s case, to which his attention was not drawn.

[17] In the course of argument we considered whether the impact of *Dietz*'s case and, more particularly, the effect of para (1) of CPR 21.10 could be escaped by reference to the agreement in the present case being for a partial rather than complete settlement of the claim, ie the settlement of an issue (liability) and not the whole claim. Certainly the most obvious reading of para (2) of the rule is that 'the settlement of the claim' there referred to is a reference to the final settlement

of the whole claim. The claimant would hardly otherwise be issuing proceedings under CPR Pt 8; rather he would be seeking approval within an ordinary CPR Pt 7 action. Nor to my mind is this point necessarily destroyed by the reference in para (1) of CPR 21.10 to the unapproved settlement not being valid 'so far as it relates to the claim by [or] on behalf of ... the child'. The use of that phrase is to distinguish the child's claim from such other claim as may be joined with it (as the infant's claim was joined with the mother's claim in *Dietz*'s case itself). Paragraph (1) also I have no doubt, was drafted essentially without thought for partial settlements.

[18] The real difficulty with the argument, however, becomes apparent when examining its consequences. If CPR 21.10 is really to be construed as having no application to partial settlements, then it would follow that, provided only one aspect of a claim remained in contention (perhaps only a minor head of damage in a high value case) the court's approval would not be required at all. Take this very case and assume that quantum were to be contested: the 80:20 liability split never needed approval. (I recognise, of course, that the requirement for the court's approval in any event ceases once, as here, the claimant reaches his or her majority but that cannot affect the argument. We are here discussing the application of the rule during the claimant's minority and plainly it would be intolerable were the requirement for the court's approval to be escaped merely because some issue remains to be agreed.) The rule need not be and accordingly should not be construed so as to produce this absurd result.

[19] It inescapably follows from all this that, regrettable though it might seem, the defendant here was entitled to renege on his agreement as he did, for good reason or none, and must therefore succeed upon this appeal.

[20] Before parting from the case, however, I would add the following footnotes. (i) It may well be, as Mr Korn for the claimant suggests, that those acting for child claimants in future will on occasion think it prudent to issue proceedings (presumably under Pt 7 rather than Pt 8) to obtain the court's approval for any partial settlement of the claim lest, as here, the defendant otherwise seeks to repudiate it. The need for this appears not hitherto to have been appreciated. *Dietz*'s case itself, of course, was concerned with a final settlement agreement and the impact of the decision on partial settlements may not have been apparent even to those acquainted with the case. (ii) Mr Korn further submitted that a consequence of applying *Dietz*'s case is that r 21.10, a rule designed for the protection of vulnerable people (children and patients), becomes instead a loophole to be exploited against them. Had the liability agreement reached here in April 2000 been between adults it would, of course, have been enforceable. Mr Korn submits that the rules could and should provide, consistently with the general law concerning minors, that settlement agreements prior to court approval are voidable at the option of the child (not, as was held in *Dietz*'s case open to repudiation by either party). That said, a compromise rule materially the same form as CPR 21.10(1) has stood now for many years and opportunities to change it have not been taken. Whether it should now be altered must be for consideration by others. Meantime it is clearly desirable that *Dietz*'s case (and perhaps also this case which illustrates *Dietz*'s inescapable application to partial settlements too) be brought more clearly to the profession's attention. Most suprisingly it is not referred to either in the White Book (*Civil Procedure*) or the Green Book (*Civil Court Practice*). (iii) Once a child claimant reaches adulthood, a settlement agreement which until then, on the authority of *Dietz*'s case, has been invalid, can, it seems to me, unless and until repudiated, be

treated as an offer and accepted by either side. (iv) The doctrine of estoppel (in one form or another) may perhaps be available to a party who has acted to his detriment in reliance on a settlement agreement which the other party then seeks to repudiate. No such argument, however, was addressed to us on the present appeal (indeed, the point having surfaced in one of the defendant's skeleton arguments was later expressly abandoned). This, therefore, is no occasion to explore its possibilities. *a* *b*

[21] Those, I repeat, are just footnotes. They cannot affect the outcome of this appeal. For the reasons previously given I conclude that the settlement agreement reached here was invalid, that the defendant was accordingly entitled to repudiate it as he did, and that his appeal must accordingly be allowed.

JONATHAN PARKER LJ. *c*

[22] I agree.

THOMAS LJ.

[23] I also agree.

Appeal allowed. *d*

Dilys Tausz Barrister.

Kerr v Department for Social Development

[2004] UKHL 23

HOUSE OF LORDS

LORD STEYN, LORD HOPE OF CRAIGHEAD, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY AND BARONESS HALE OF RICHMOND

18 MARCH, 6 MAY 2004

Social security – Funeral payment – Process of determination of claim – Necessary information relating to conditions of entitlement or exceptions to entitlement not known – Whether claim payable – Social Security (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987, SR 1987/150, reg 6.

The claimant was the eldest of four siblings who had had no contact with one another for over 20 years before the death of one of the claimant's younger brothers. The claimant was traced by the police, agreed to take on responsibility for the funeral and became liable for the expenses. The undertakers filled out a form for the claimant to sign to claim reimbursement by means of a funeral payment under the Social Security Contributions and Benefits (Northern Ireland) Act 1992. The governing regulations were the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987. Under reg 6[a] of the 1987 regulations a funeral payment would be made to a claimant, inter alia, in receipt of certain qualifying benefits (including housing benefit) who had accepted responsibility for funeral expenses (the responsible person) and who fell within certain other criteria. Paragraphs (3) and (4) of reg 6 disentitled the responsible person where other immediate adult family members of the deceased were not entitled to qualifying benefits, and para (6) disentitled him where the deceased had one or more close relatives and if on comparing the nature and extent of any adult close relative's contact with the deceased and the nature and extent of the responsible person's contact, any such close relative was in closer contact with the deceased than the responsible person, or was in equally close contact but had not been awarded a qualifying benefit or possessed more capital than a specified amount. The form completed by the undertakers correctly stated that the claimant received housing benefit, but wrongly showed that the deceased had no surviving parents, and no other sons or daughters. Having received the claim, the Social Security Agency discovered that, according to obituary notices, the claimant was also survived by his father and another brother and two sisters, one living abroad. They asked the claimant for an explanation and he replied promptly. His father's circumstances were in fact such as did not affect the claim made by the claimant. The agency then asked whether any of the claimant's siblings were in receipt of relevant benefits. The claimant promptly replied that he did not know. His claim was then refused for incorrect reasons relating to his father. Some further inquiries were made by which the agency discovered that the 'sister' living abroad was in fact the claimant's niece which meant that the only relevant close relatives for the purpose of reg 6(6) were the claimant's brother and sister living in the Belfast area. The agency did not review its decision and made no further inquiries which might have enabled it to discover whether the brother or sister were on qualifying

a Regulation 6 is set out at [44], below

benefits. The matter went on appeal. The Social Security Appeal Tribunal decided that it had been reasonable for the claimant to accept responsibility for the funeral, however, they also decided that the other brother and sister had equal contact with the deceased for the purposes of reg 6(6) and that the burden of proof lay on the claimant to establish they were in receipt of qualifying benefits. As the claimant had failed to do that, they rejected his claim. The Court of Appeal in Northern Ireland agreed that the brother and sister were 'in equally close contact' with the deceased but decided, by a majority, that the burden of proof as to the siblings' benefits and capital status lay on the department. The Department for Social Development appealed. The issues before the House of Lords were (i) what the nature of the process involved in the determination of a claim was; and (ii) what happened if, at the end of the process, relevant facts were simply not known. The department contended, in relation to issue (ii) that all the elements, including those in reg 6(6), were conditions of entitlement, so that a claimant had to bear the consequences of ignorance.

Held – (1) The process involved in the determination of a claim for reimbursement by way of a funeral payment was a co-operative process of investigation in which both the claimant and the department played a part. The department knew what information it needed to have in order to determine whether the conditions of entitlement had been met. The claimant, generally speaking, was able to, and had to, supply that information. But where the information was available to the department rather than the claimant, then the department had to take the necessary steps to enable it to be traced. Following that approach, it would rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. If each partner in the process had played their part and there was still ignorance about a relevant matter then, generally speaking, it should be determined against the one who had not done all they reasonably could to discover it. A claimant had to the best of his or her ability to give such information to the adjudication officer as he reasonably could, in default of which a contrary inference might always be drawn. The same applied to information which the department might reasonably be expected to discover for itself. In the instant case the claimant was not to blame for the way in which the undertakers filled in the form for him, and once the omissions had been pointed out to him, he had given the department all the information he had had. That was sufficient to rule out his father but not to enable the department to determine whether his brother or sister were more suitable. But such information was available to the department, which needed only a name and date of birth to enable it to trace whether benefits were being paid. Yet the department never asked the claimant for that information despite making further inquiries of him which revealed that it should have been asked. In those circumstances the department could not use its own failure to ask questions which would have led to the right answer to defeat the claim (see [1], [2], [18]–[20], [37], [58], [62]–[65], below).

(2) Where everything which could have been done had been done but there were still things unknown, and a particular matter related to the conditions of entitlement, the claimant would have to bear the consequences of the collective ignorance of a matter which was material to the claim. However, where ignorance of a matter related to an exception to those conditions, then the department bore the burden and had to pay the claim. Paragraphs (3), (4), and (6) of reg 6 were worded in terms of exceptions rather than qualifying conditions, and it followed, in

the instant case, that the department should bear the burden of the collective ignorance and pay the claim. The appeal would therefore be dismissed (see [1], [2], [20], [36], [37], [66]–[69], [71], below).

Notes

Regulation 6 of the Social Security (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987, SR 1987/150, is in material part identical to reg 7 of the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, SI 1987/481.

For funeral payments see 44(2) *Halsbury's Laws* (4th edn reissue) para 230.

For the Social Fund Maternity and Funeral Expenses (General) Regulations 1987, see *Halsbury's Statutory Instruments* (2003 issue) 144.

Cases referred to in opinions

Irving v Minister of Pensions 1945 SC 21, Ct of Sess.

Nimmo v Alexander Cowan & Sons Ltd [1967] 3 All ER 187, [1968] AC 107, [1967] 3 WLR 1169, HL.

R v Medical Appeal Tribunal (North Midland Region), ex p Hubble [1958] 2 All ER 374, [1958] 2 QB 228, [1958] 3 WLR 24, DC; *affd* [1959] 3 All ER 40, [1959] 2 QB 408, [1959] 3 WLR 456, CA.

R v Secretary of State for Social Services, ex p Child Poverty Action Group [1989] 1 All ER 1047, [1990] 2 QB 540, [1989] 3 WLR 1116, CA.

Rees v Hughes [1946] 2 All ER 47, [1946] KB 517, CA.

Cases referred to in list of authorities

Constantine (Joseph) Steamship Line Ltd v Imperial Smelting Corp Ltd, The Kingswood [1941] 2 All ER 165, [1942] AC 154, HL.

Jones v Dept of Employment [1988] 1 All ER 725, [1989] QB 1, [1988] 2 WLR 493, CA.

MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] UKHL 6, [2001] 1 All ER 865, [2003] 1 AC 311, [2001] 2 WLR 377.

Padfield v Minister of Agriculture, Fisheries and Food [1968] 1 All ER 694, [1968] AC 997, [1968] 2 WLR 924, HL.

R v Deputy Industrial Injuries Comr, ex p Moore [1965] 1 All ER 81, [1965] 1 QB 456, [1965] 2 WLR 89, CA.

R v Turner (1816) 5 M & S 206, 105 ER 1026, [1814–23] All ER Rep 713.

R (on the application of Begum) v Social Security Comrs [2002] EWHC 401 (Admin), [2002] All ER (D) 18 (Feb).

Appeal

The Department for Social Development appealed with permission of the House of Lords' Appeal Committee given on 17 February 2003 from the decision of the Court of Appeal (Northern Ireland) (Carswell LCJ and Kerr J, McCollum LJ dissenting) on 4 July 2002 allowing the appeal of the claimant Thomas Frank Kerr by way of case stated from a decision of the Chief Social Security Commissioner for Northern Ireland (JAH Martin QC) dated 15 May 2001 upholding the decision of a Social Security Appeal Tribunal dismissing the claimant's claim to be entitled to a social fund payment of £1,172.58 in respect of funeral expenses incurred on the death of his brother. The facts are set out in the opinion of Baroness Hale of Richmond.

Declan Morgan QC and *Paul Maguire* (instructed by the *Treasury Solicitor* acting as agents for the *Solicitor from the Department of Finance and Personnel*, Belfast) for the department. a

Bernard McCloskey QC and *Paul McLaughlin* (instructed by *Elliott Duffy Garrett*, Belfast) for the claimant.

Their Lordships took time for consideration. b

6 May 2004. The following opinions were delivered.

LORD STEYN.

[1] My Lords, I have read the opinion of my noble and learned friend Baroness Hale of Richmond. I agree with it. I would also dismiss the appeal. c

LORD HOPE OF CRAIGHEAD.

[2] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Baroness Hale of Richmond. I agree with it, and for all the reasons which she has given I too would dismiss the appeal. d

[3] As the appeal was brought to resolve issues about burden of proof on which the Court of Appeal in Northern Ireland were not unanimous and because I do not wholly agree with my noble and learned friend Lord Scott of Foscote's analysis of it, I should like to add a few brief observations of my own about the system which has given rise to this case and the inquiry that has to be undertaken to give effect to it. e

THE SYSTEM

[4] Regulation 6 of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987, SR 1987/150, as amended, sets out in elaborate detail the circumstances in which a funeral payment may be made under s 134(1)(a) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (the Benefits Act) to meet the funeral expenses for which the claimant or his partner has accepted responsibility. The system which applies in Northern Ireland is in all relevant respects the same as that which enables payments to be made under s 138(1)(a) of the Social Security Contributions and Benefits Act 1992 for funeral expenses in Great Britain. There are, in effect, a series of filters through which the claim must go before the payment may be made. This is because it is a means-tested benefit. It is a pre-condition of payment that the claimant or his partner ('the responsible person') has at the date of the claim an award of one or more of the benefits mentioned in reg 6(1)(a). That pre-condition has to be borne in mind as an essential part of the background. Once the responsible person has passed this test, he is within the class of persons who is entitled to benefit from the social fund. f g h

[5] If the responsible person was the partner of the deceased at the date of his death the position is quite straightforward: see reg 6(1)(e)(i). There are no further filters that have to be gone through. That is the case, too, if the deceased was a child and the circumstances mentioned in reg 6(1)(e)(ii) apply. The position is more complicated where the responsible person was either a parent, son or daughter (an 'immediate family member'), a brother or sister or brother or sister-in-law (all included in the definition of the expression 'close relative') or a close friend of the deceased: see the definitions of 'immediate family member' j

and 'close relative' in reg 2(1). The scheme is designed to filter out claimants in these three categories whose cases were not thought to be appropriate for the receipt of a means-tested funeral payment from the social fund.

'CLOSE CONTACT'

[6] The filters which are applied at this stage start with the rule which reg 6(5) lays down for determining whether it is reasonable for an immediate family member, a close relative or a close friend to accept responsibility for meeting the expenses of a funeral. The question of reasonableness is to be determined by the nature and extent of that person's contact with the deceased. I agree with Lord Scott that it is not said to be essential that the person's contact with the deceased be 'close' contact or that it be a recent contact. If the reasonableness test is satisfied, the application of the next filter which is set out in reg 6(6) involves comparing the nature and extent of the 'contact' which the responsible person had with the deceased with the nature and extent of the 'contact' of any other close relative. The word that is used to indicate the purpose of making this comparison is the word 'close'. The assumption appears to be that, so long as there was some contact at some stage, however slight, a comparison can be made of the closeness of that contact. If the responsible person has the closest contact, no further filters are applied.

[7] But a close relative who was in closer contact with the deceased defeats the responsible person's claim. And the responsible person's claim is defeated on financial grounds if neither the close relative with equally close contact or his partner has been awarded a relevant benefit or (assuming that they have such an award, otherwise they would have defeated the responsible person's claim on the first of these two alternatives) if they possess more capital than the responsible person and his partner and that capital exceeds the prescribed amount. The details are set out in reg 6(6). No time limit is set for an examination of the issue of close contact.

[8] As I have already noted, the assumption, which appears to be inherent in the definition of the expression 'close relative' in reg 2(1), is that a close relative must have had 'contact' with the deceased of some kind at some time, however slight, even if that was many years ago and that it is possible to examine the question how 'close' it was. That, after all, is what 'contact' involves—the state or condition of touching, as the *Shorter Oxford English Dictionary* defines it. The word 'was' is used in reg 6(6), without any qualification as to how recent or how distant in time the contact was before the deceased died.

[9] I regret therefore that I must part company with Lord Scott at this stage. He says that the concept of one person being 'in close contact' with another person directs attention to a current state of affairs. I respectfully agree with this proposition. But I do not think that it follows that the state of affairs during which there was contact must have existed at the time of the deceased's death. Regulation 6(6) assumes that where there is 'contact' the question of 'closeness' is put in issue, however slight or remote in time that may be. I do not find anything in the regulation to indicate that the contact must have been current at, or immediately before, the date of the deceased's death. The period of time during which a comparison of the nature and extent of the contact is to be undertaken is not specified. The conclusion which I would draw from this is that there is no restriction as to the time of this contact. In my opinion the first question which the adjudicator must ask himself is whether the relevant person had any 'contact' with the deceased at all at any time. If he did, the question of

the relative 'closeness' of that contact in comparison with the contact of the responsible person can and must be asked and answered.

[10] The social fund is maintained under the control and management of the Department for Social Development (the department), and payments out of it are made by the department: s 146(2) of the Social Security Administration (Northern Ireland) Act 1992 (the Administration Act). It is in two parts: a regulation-based part, to which s 134(1)(a) of the Benefits Act refers, and a discretionary part from which payments to meet other needs may be made under s 134(1)(b). A claim must be made to obtain a benefit out of the regulation-based part, and it requires investigation to determine whether or not the claimant is entitled to that benefit. The broad aim of the system for funeral payments is to enable a claimant to obtain this benefit out of the regulation-based part of the social fund under s 134(1)(a) of the Benefits Act, provided he makes his claim in the time and in the manner prescribed in the regulations: see s 1(1) of the Administration Act. The department must ensure that there is no misuse of public funds. But the procedures should not be allowed to stand in the way of payment of the benefit to the claimant if he is entitled to it.

THE INQUIRY

[11] It is obvious that the filters that I have described raise issues of fact on which a decision will have to be taken. They give rise to questions which the claimant may not be in a position to answer without help from the department. That is most likely to be so where the issue is whether a close relative who was in equally close contact has been awarded a relevant benefit or, if he has such an award, he has more capital than the claimant which exceeds the prescribed amount. The department accepts that it may use its own records for this purpose: s 3 of the Social Security Act 1998, which extends to Northern Ireland: see s 87(4)(b). But it will need to be provided with sufficient information to enable it to trace and identify the close relative or his partner, if he has one. The full name and date of birth will be sufficient for that person's national insurance number to be identified, and the claimant can normally be expected to be in a position to supply this information.

[12] On the other hand an assessment of the closeness of contact is likely to depend entirely on the information which the claimant supplies to the department. He will have an opportunity of supplying that information in response to the questions that are set out in Pt 4 of the application form. But he may need to be guided if the information which he gives falls short of what is needed for the assessment. Further questions may be put to him by the department in the exercise of its power under reg 7 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987, SR 1987/465, before the claim is submitted to an adjudication officer under s 18 of the Administration Act. The adjudicator too can put questions to him before the claim is adjudicated.

[13] The position may however be reached when, despite best endeavours on both sides, the information which is needed to resolve the issues bearing on the question of entitlement is not available. The claimant may not be able to give enough information to the department to enable it to provide the missing details by searching its own records. The regulations say nothing about where the onus of proof lies. The situation may be contrasted with that which arose in *Irving v Minister of Pensions* 1945 SC 21, where the Court of Session was dealing with appeals against decisions of Pensions Appeal Tribunals relating to claims for pensions in respect of death or disablement by war injuries. Article 4(1) of the

Royal Warrant concerning Retired Pay, Pensions, etc dated December 1943 (Cmd 6489) provided that in no case was there to be an onus on any claimant to prove that the disablement or death of a member of the military forces was attributable to or aggravated by war service and that the benefit of any reasonable doubt should be given to the claimant. Lord Justice Clerk Cooper said (at 29):

> 'In every issue of disputed facts between two parties, the onus of proof must inevitably be either on the one hand or the other, and the result of the provision I have quoted is that the onus of proof is on the Minister.'

[14] But it can at least be said that a claimant under s 134(1)(a) of the Benefits Act is not in the same position as a litigant. His position is similar to that described by Diplock J in *R v Medical Appeal Tribunal (North Midland Region), ex p Hubble* [1958] 2 All ER 374 at 379–380, [1958] 2 QB 228 at 240. The claim to benefit in that case was a claim to receive money out of insurance funds fed by contributions from all employers, insured persons and the Exchequer. The procedure for determining whether the claimant is entitled to a disability benefit was said to be more like an inquest than an action. The social fund with which we are concerned in this case is, of course, non-contributory. It is maintained out of funds paid into it by the department. The claimant does not have the same rights as an insured person. Nevertheless the position of the department is not to be regarded as adverse to that of the claimant. In this case too the process is inquisitorial, not adversarial.

[15] In this situation there is no formal burden of proof on either side. The process is essentially a fact-gathering exercise, conducted largely if not entirely on paper, to which both the claimant and the department must contribute. The claimant must answer such questions as the department may choose to put to him honestly and to the best of his ability. The department must then make such inquiries as it can to supplement the information which the claimant has given to it. The matter is then in the hands of the adjudicator. All being well, the issue of entitlement will be resolved without difficulty.

[16] But there some basic principles which may be used to guide the decision where the information falls short of what is needed for a clear decision to be made one way or the other. (1) Facts which may reasonably be supposed to be within the claimant's own knowledge are for the claimant to supply at each stage in the inquiry. (2) But the claimant must be given a reasonable opportunity to supply them. Knowledge as to the information that is needed to deal with his claim lies with the department, not with him. (3) So it is for the department to ask the relevant questions. The claimant is not to be faulted if the relevant questions to show whether or not the claim is excluded by the regulations were not asked. (4) The general rule is that it is for the party who alleges an affirmative to make good his allegation. It is also a general rule that he who desires to take advantage of an exception must bring himself within the provisions of the exception. As Lord Wilberforce observed, exceptions are to be set up by those who rely on them: see *Nimmo v Alexander Cowan & Sons Ltd* [1967] 3 All ER 187 at 199, [1968] AC 107 at 130.

[17] If therefore the claimant and the department have both done all that could reasonably have been expected of them; the issue of fact must be decided according to whether it was for the claimant to assert it or for the department to bring the case within an exception. For this purpose reg 6 divides itself into two parts. The facts referred to in paras (1) and (2), read with para (5), are for the claimant to assert. The facts referred to in para (3), read with para (4), and

para (6), read with para (7), are in the nature of exceptions—the phrase 'shall not be entitled' is used in paras (3) and (6)—which must be set up by the department.

CONCLUSION

[18] The facts of this case, as Lady Hale has explained, show that the claimant cannot be blamed for the lack of information in the handling of his claim. His claim was refused because the department misunderstood the facts disclosed by an incorrect entry in the 'Belfast Telegraph'. When the error was discovered, it was for the department to ask the questions that needed to be answered if they were to discover the financial circumstances of the claimant's equally close relatives. But the questions were not asked, so the claimant never had an opportunity of answering them.

[19] We do not know whether the claimant would have been able to give the information that would have been needed by the adjudicator to resolve this issue. But it was not suggested that the case should be remitted to the adjudicator for further inquiries to be made. In these circumstances I agree that the funeral benefit claimed should be paid.

LORD SCOTT OF FOSCOTE.

[20] My Lords, I have had the advantage of reading in advance the opinion of my noble and learned friend Baroness Hale of Richmond. I agree with it and with the reasons she has given for dismissing the appeal. I would, however, dismiss the appeal also for the additional reason referred to briefly by my noble and learned friend in [70], below. In short, the facts of the case do not, in my opinion, justify the conclusion that there was any 'close relative' of the deceased who was 'in equally close contact with the deceased'.

[21] The facts of the case have been fully set out by my noble and learned friend and I need not repeat them save as may be necessary to make my opinion on the 'equally close contact' point intelligible. The claimant, Mr Kerr, was the eldest of a family of five siblings. The deceased, Hugh Kerr, was a younger brother of the claimant. The siblings who survived Hugh were the claimant, another brother, Billy, and a sister. There was also a niece who lived in Canada. Theirs was the reverse of a united family. The five siblings had had no contact with one another for over 20 years before the death of Hugh on 19 July 1999. After Hugh's death the police requested local undertakers to take away the body from the house where it had been found. They, the police, traced the daughter of Hugh Kerr's deceased partner. She gave them the name of the claimant who, on being contacted by the police, accepted responsibility for his brother's funeral. The undertakers made the arrangements accordingly and, having duly buried the deceased, submitted their bill to the claimant. The claimant, a man of very limited means and in receipt of benefit, managed to pay off the bill by instalments over a period of years. As my noble and learned friend has explained, the question for the House is whether he is entitled to reimbursement by means of a funeral payment under s 134(1)(a) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (the Benefits Act).

[22] The relevant provisions of the Benefits Act and of the regulations made thereunder have been fully set out by my noble and learned friend. Entitlement to a 'funeral payment' is dealt with in reg 6 of the Social Fund (Maternity and Funeral Expenses) (General) Regulations 1987, SR 1987/150, as amended (see [44], below). The first requirement is that the claimant (referred to as 'the responsible person') is in receipt of a qualifying benefit. The claimant in the

present case satisfies this requirement. He was in receipt of a qualifying benefit. The next requirement relevant to the case is that the claimant be a close relative of the deceased and that 'it is reasonable for the responsible person to accept responsibility for [the funeral] expenses' (see reg 6(1)(e)(iv)). A brother is a 'close relative', as defined, and it was held by the social security appeal tribunal that 'it was not unreasonable for the claimant to have accepted responsibility'. They explained:

> 'The claimant was the eldest and while he had no contact apparently for 20 years or so they were brothers and had known each other growing up.'

[23] My Lords, the basis on which the tribunal accepted that it had been reasonable for the claimant to accept responsibility for the expenses of his younger brother's funeral was not that they were in close contact with one another. They had been estranged for over 20 years. But they were brothers, they had grown up together and the claimant was the eldest of the siblings. That was the basis on which the tribunal came to the conclusion that it was reasonable for the claimant to have accepted responsibility. The conclusion has not been challenged on appeal, but in any event it was, in my opinion, a proper conclusion for the tribunal to have reached for the reasons they gave. It is of some relevance that para (5) of reg 6 says that the question whether it is reasonable for a claimant to have accepted responsibility for meeting the expenses of a funeral 'shall be determined by the nature and extent of that person's contact with the deceased'. It is not expressed to be essential that the contact be a 'close' contact or a recent contact.

[24] Paragraph (6) of reg 6 is a disqualification provision. A claimant for a funeral payment who succeeds in meeting all the other requirements of reg 6 will, none the less, be disqualified if the case falls within para (6). The paragraph provides:

> '... where the deceased had one or more close relatives and the responsible person is a person to whom paragraph (1)(e) ... (iv) applies, if on comparing the nature and extent of any close relative's contact with the deceased and the nature and extent of the responsible person's contact with the deceased, any such close relative was—
>
> (a) in closer contact with the deceased than the responsible person;
>
> (b) in equally close contact with the deceased and neither that close relative nor his partner, if he has one, has been awarded a benefit to which paragraph (1)(a) refers; or
>
> (c) in equally close contact with the deceased and possesses, together with his partner, if he has one, more capital than the responsible person and his partner and that capital exceeds ... [figures are then set out],
>
> the responsible person shall not be entitled to a funeral payment under these Regulations ...'

[25] The first two conditions of para (6) are satisfied. The deceased did have one or more close relatives, namely his brother Billy and his sister, as well as the claimant. And the claimant, the responsible person, was a person to whom para (1)(e)(iv) applied. That being so para (6) directs a comparison to be made of the nature and extent of the contact with the deceased of each of these 'close relatives' with the nature and extent of the claimant's contact with the deceased. The purpose of the comparison is to ascertain whether the case comes within one or other of the three subparagraphs. None of the other siblings was 'in closer

contact with the deceased' than the claimant. So sub-para (a) did not apply. But were any of the siblings 'in equally close contact with the deceased'? If so, sub-paras (b) and (c) would be potentially applicable. Argument in this case has concentrated on sub-para (b), not sub-para (c), and I shall do likewise.

[26] The appeal tribunal held that sub-para (b) was applicable. Their reasoning was expressed as follows:

> '... reg 6(6) prevents a claim succeeding if the evidence suggests the other brothers and sisters had *equal contact* with the deceased and are not in receipt of a relevant benefit. The evidence indicates that it cannot be established one had more contact than the other. The evidence is that all the brothers and sisters drifted apart over the preceding 20 years. The most that can be said is that they had *equal contact* or perhaps more accurately an equal amount of lack of contact. On the evidence it certainly cannot be established the claimant had more contact. He himself has argued he had no contact. On the basis that the contact between the brothers and sisters as close relatives of the deceased was *equal* the next question is whether they were in receipt of a relevant benefit ...' (My emphasis.)

[27] In this passage the tribunal have re-written the statutory language. The question asked by sub-para (b) (and by sub-para (c)) is whether the close relative and the claimant were 'in equally close contact'. The tribunal re-formulated the question so that it became a question whether the close relative and the claimant had 'equal contact'. This re-formulated question is not the statutory question. The significance of the adjective 'close' is ignored. So is the significance of the preposition 'in'.

[28] The social security commissioner, on appeal, upheld the decision of the tribunal. On the point at issue in relation to sub-para (b), having cited the relevant passage from the tribunal's decision, the commissioner said this:

> '25. I conclude that the tribunal decided that no one had "closer contact" than the claimant but the other siblings were in "equally close contact" or had "an equal amount of contact", which constitutes, in the particular circumstances of this case, a finding of "equally close contact".
>
> 26. It is understandable that the tribunal did not describe any of the relationships as close but this merely reflects the appropriate approach in the context of the evidence in this case. It does not appear to be an error of law.'

So the commissioner held explicitly what the tribunal had held implicitly, namely, that the statutory requirement of being 'in equally close contact' simply meant having had 'equal contact'.

[29] In the Court of Appeal, Lord Carswell CJ (as he then was) expressed his agreement with the proposition that 'an equal amount of lack of close contact can constitute equally close contact within the meaning of regulation 6(6)' (see [2002] NI 347 at 352).

[30] My Lords, I must respectfully dissent from this construction of sub-para (b). In my opinion, both a literal construction and a purposive construction are inconsistent with it. As to a literal construction, some meaning must be attributed to the adjective 'close'. Underlying the question whether A's contact with X was an 'equally close contact' when compared with B's contact with X is the assumption that B's contact with X was a close one. If B's contact with X was not a close one, the question cannot be asked, or, if asked, cannot be answered. The premise of the question is simply absent. The comparison contemplated by sub-para (b) (or by

sub-para (c)) cannot be made. And the concept of being 'in close contact' with someone is not the same as the concept of having had close contact with that person. They are two quite different things.

[31] As to a purposive construction, the purpose of the disqualifying provisions of sub-paras (a), (b) and (c) is to bar a responsible person from claiming a funeral payment where there is some other person equally closely related to the deceased and whom, on comparing their income and capital and taking into account the nature and extent of the other person's contact with the deceased, it would be reasonable to have expected to meet the funeral expenses (see [43], below, of Lady Hale's opinion which I would respectfully adopt). But none of the claimant's siblings had had contact with the deceased of a nature and extent that made it reasonable to expect them to meet the deceased's funeral expenses. The comparisons directed by sub-paras (b) and (c) are based on the assumption that the responsible person was in close contact with the deceased. No doubt in the vast majority of cases that would be a correct assumption. In the present case, however, it is an incorrect assumption. The claimant accepted responsibility for his brother's funeral expenses not because he was in close contact with his brother—he was not in contact with him at all—but because he was the eldest sibling, they had grown up together and he felt a sense of responsibility accordingly. And that was the basis on which the tribunal concluded that it had been reasonable for him to accept responsibility. In a case like the present the comparison directed by sub-para (b) not only cannot be drawn on a literal construction but has no statutory purpose to serve.

[32] In my opinion, there are two preliminary questions to be asked in relation to each of the three subparagraphs of reg 6(6). The first is whether the deceased and the responsible person were 'in close contact' with one another. The second is whether the deceased and the relevant close relative were 'in close contact' with one another. The concept of one person being 'in close contact' with another person is a familiar one. It directs attention to a current state of affairs. Everyone must, from time to time, have been asked the question 'Are you in close contact with [X]'? The question is not usually a difficult one to answer although the answer may sometimes be equivocal, eg 'No. We simply exchange Christmas cards', or 'No but I usually see him at family funerals'. Answers of this sort evidence a degree of contact but nothing that could be described as 'close contact'.

[33] If the answers to these preliminary questions are that neither the responsible person nor the other close relative was 'in close contact' with the deceased, or if the answers are that the responsible person was 'in close contact' with the deceased but the close relative was not, then, in either case, no further question needs to be asked. None of the subparagraphs would be applicable.

[34] If the answers to the questions are that the close relative was in close contact with the deceased but the responsible person was not, then sub-para (a) would be applicable. The requirement that the close relative 'was ... in closer contact with the deceased than the responsible person' would be satisfied. But if the close relative was not 'in close contact' with the deceased, there seems to me to be no ground for expecting him to meet the funeral expenses for which the responsible person had made himself liable. The case would not, in my opinion, fall within the statutory purpose of sub-para (a).

[35] If the answers to the two preliminary questions are that both the responsible person and the close relative were 'in close contact' with the deceased then sub-para (a) or sub-paras (b) and (c) might be applicable. Whether

sub-paras (b) and (c) were applicable would depend on whether the responsible person and the close relative were 'in equally close contact' with the deceased. This would be a question of fact and degree to be answered by keeping in mind the statutory purpose of the subparagraphs, namely, to ascertain whether there was a close relative whom it would be reasonable to expect to meet the deceased's funeral expenses. If the answers to the preliminary questions were that neither the responsible person nor the close relative was in 'close contact' with the deceased, or, a fortiori, if neither was in contact with the deceased at all, then the subparagraphs would have no part to play. I emphasise that the question is not whether they had had close contact with the deceased in the past. The question is whether they were 'in equally close contact' with him at the time of his death.

[36] In the present case, on the facts as found by the tribunal and not now in dispute, the claimant was not, and had not been for 20 years, in contact with the deceased. Their past boyhood and adolescent contact could not possibly justify their being described in 1999 as being in 'close contact'. None of the other siblings' contact with the deceased was any closer. Their lack of any close contact was equal. None was in contact with the deceased at all. That being so sub-paras (b) and (c), as well as sub-para (a), were in my opinion inapplicable. I would, for this reason too, in addition to the reasons given by Lady Hale with which I am in full agreement, dismiss this appeal.

LORD RODGER OF EARLSFERRY.

[37] My Lords, I have had the privilege of considering the speech to be delivered by my noble and learned friend, Baroness Hale of Richmond, in draft. I agree with it and, for the reasons she gives, I too would dismiss the appeal.

BARONESS HALE OF RICHMOND.

[38] My Lords, Thomas Kerr, a disabled man of 61, living on benefits, has paid the funeral expenses of his younger brother Hugh. He also has another younger brother, Billy, and a younger sister, Jean. None of them have been in touch with one another, or with the deceased, for 20 years. Is Thomas entitled to a funeral payment under s 134(1)(a) of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 (the Benefits Act)? Although a Northern Ireland case, equivalent legislation applies throughout the United Kingdom.

BACKGROUND

[39] We all have an interest in securing the decent burial of a dead body. It is disrespectful, as well as a hazard to public health, if this is not done in a prompt and seemly manner. Hence there is a common law obligation, 'in the nature of a public duty', to arrange for this: see *Rees v Hughes* [1946] 2 All ER 47 at 49, [1946] KB 517 at 523. The obligation rests primarily upon the executors of the deceased but may fall upon others, including any householder where the body lies. The expenses can always be recovered from the deceased's estate, if he has one.

[40] Local authorities have long had a statutory duty to step in if no suitable arrangements are made. But the 'fear and humiliation of a pauper's funeral' led to the development of private insurance schemes in the nineteenth century. Later, funeral expenses were included amongst the hazards covered by the post-war national insurance scheme. But the value of the death grant declined in real terms until by 1982 it covered only about 10% of the cost of a simple funeral. It was decided, therefore, to replace it with a means-tested grant from the new

Social Fund established in 1987. In the words of Professor Anthony Ogus, in annex D to the 14th Report of the Social Security Advisory Committee (2001), p 61, para 12: 'The purpose of the scheme is to help those on income-related benefits and some tax credits who have good reason for taking responsibility for a funeral but who have insufficient funds to cover the costs.'

[41] Section 134(1)(a) of the Benefits Act permits the payment out of the Social Fund of the amounts prescribed to meet funeral expenses in the circumstances prescribed. Although the section is phrased permissively, the criteria prescribed in the regulations are phrased in terms of entitlement. The decision-making process is also that for benefits to which claimants are entitled, rather than that for discretionary payments out of the Social Fund. The entitlement criteria have been refined several times, broadly with a view to ensuring that if a person receiving the relevant benefits has taken on responsibility for the funeral expenses, it was reasonable for him to do this and there was no more suitable family member who was not on benefit to do so. The regulations have become more and more complex. Not surprisingly, this has led to difficulties in establishing whether or not the person who has taken responsibility is indeed the most appropriate person. The issue in this case is how that should be done. Is it for the claimant to show that there is no more suitable family member or is it for the Department for Social Development to show that there is? And what is to be done in a case where neither the claimant nor the department knows?

THE EVOLUTION OF THE PRESENT ENTITLEMENT REGULATIONS

[42] Under the original Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987, SR 1987/150, reg 6(1), a funeral payment was made where four conditions were met: (a) the claimant or his partner was in receipt of a qualifying benefit; (b) the claimant or one of his family took responsibility for the costs of the funeral; (c) the funeral took place in the United Kingdom; and (d) the claim was made within the specified period (subject to reg 7 which provided for certain deductions from the payment and regs 8 and 9 which provided for the effect of capital). Not surprisingly, there was evidence that some families took care to ensure that responsibility for arranging the funeral was undertaken by someone in receipt of a qualifying benefit: awards rose from 37,000 in 1988/1989 to 72,000 in 1993/1994.

[43] Hence in 1994, reg 6(1)(b) was amended with a view to ensuring that the person who had accepted responsibility for the funeral costs was so closely connected with the deceased that it was reasonable for him, rather than a more closely connected family member, to do so: see the Social Fund (Maternity and Funeral Expenses) (General) (Amendment) Regulations (Northern Ireland) 1994, SR 1994/68, reg 3. The new reg 6(1)(b) required that claimant had taken responsibility for the funeral costs and either (i) was the partner of the deceased, or (ii) where the claimant or his partner was a close relative it was reasonable for him to accept that responsibility *and* there was no other person who was equally or more closely related to the deceased whom, on comparing their income and capital and taking into account the nature and extent of the other person's contact with the deceased, it was reasonable to expect to meet the costs, or (iii) if neither applied, it was reasonable for the claimant to accept responsibility in view of the extent of his relationship with the deceased. This obviously involved a judgment about the nature and closeness of family relationships which Professor Ogus described as 'intrusive, undignified and ... impracticable', 14th Report, annex D, p 63, para 17.

[44] Regulation 6 was further amended by the Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations (Northern Ireland) 1997, SR 1997/155, which refined this basic approach. Regulation 6 reads as follows:

'**Entitlement**

6.—(1) Subject to paragraphs (2) to (7), regulation 7 and to Parts IV and V, a social fund payment (referred to in these Regulations as a "funeral payment") to meet funeral expenses shall be made only where—

(a) the claimant or his partner (in this Part referred to as "the responsible person"), at the date of the claim for a funeral payment has an award of income support, income-based jobseeker's allowance, working families' tax credit, disabled person's tax credit or housing benefit;

(b) the funeral takes place—(i) in a case where the responsible person is a person to whom paragraph (1A) applies, in an EEA State; (ii) in any other case, in the United Kingdom or, providing the deceased was normally resident in Northern Ireland, in the Republic of Ireland, and for the purposes of this sub-paragraph, "EEA State" means a State which is a contracting party to the Agreement on the European Economic Area signed at Oporto on 2nd May 1992 as adjusted by the Protocol signed at Brussels on 17th March 1993;

(c) the deceased was ordinarily resident in the United Kingdom at the date of his death;

(d) the claim is made within the prescribed time for claiming a funeral payment; and

(e) the claimant or his partner accepts responsibility for those expenses and—(i) the responsible person was the partner of the deceased at the date of death, (ii) in a case where the deceased was—(aa) a child and there is no absent parent or there is an absent parent who, or whose partner, had an award of a benefit to which sub-paragraph (a) refers current as at the date of death, the responsible person was the person or the partner of the person responsible for that child for the purposes of Part IX of the Social Security Contributions and Benefits (Northern Ireland) Act 1992 as at the date of death, or (bb) a still-born child, the responsible person was a parent of that still-born child or the partner of a parent of that still-born child as at the date when the child was still-born, or (iii) in a case where the deceased had no partner and head (ii) does not apply, the responsible person was, subject to paragraphs (3) and (4), an immediate family member of the deceased and it is reasonable for the responsible person to accept responsibility for those expenses, or (iv) in a case where the deceased had no partner and heads (ii) and (iii) do not apply, the responsible person was, subject to paragraphs (3) and (4), either—(aa) a close relative of the deceased, or (bb) a close friend of the deceased, and it is reasonable for the responsible person to accept responsibility for those expenses.

(1A) This paragraph applies to a person who is—

(a) a worker for the purposes of Council Regulation (EEC), No.1612/68 or (EEC) No.1251/70;

(b) a member of the family of a worker for the purposes of Council Regulation (EEC) No.1612/68;

(c) in the case of a worker who has died, a member of the family of that worker for the purposes of Council Regulation (EEC) No.1251/70; or

(d) a person with a right to reside in the United Kingdom pursuant to Council Directive No. 68/360/EEC or No. 73/148/EEC.

(2) For the purposes of paragraph (1)(e)(iii) and (iv), the deceased shall be treated as having had no partner where the deceased had a partner at the date of death and—

(a) no claim for funeral expenses is made by the partner in respect of the death of the deceased; and

(b) that partner dies before the date upon which the deceased's funeral takes place.

(3) Subject to paragraph (4), the responsible person shall not be entitled to a funeral payment where he is an immediate family member, a close relative or a close friend of the deceased and—

(a) there are one or more immediate family members of the deceased;

(b) neither those immediate family members nor their partners have been awarded a benefit to which paragraph (1) (a) refers; and

(c) any of the immediate family members to which sub-paragraph (b) refers was not estranged from the deceased at the date of his death.

(4) Paragraph (3) shall not apply to disentitle the responsible person from a funeral payment where the immediate family member to whom that paragraph applies is—

(za) a person who has not attained the age of 18;

(a) a person who has attained the age of 18 but not the age of 19 and who is attending a full-time course of advanced education as defined in regulation 61 of the Income Support Regulations or, as the case may be, a person aged 19 or over but under pensionable age who is attending a full-time course of study at an educational establishment;

(b) a member of, and fully maintained by, a religious order;

(c) being detained in a prison or young offender's centre and either that immediate family member or his partner had been awarded a benefit to which paragraph (1)(a) refers immediately before that immediate family member was so detained; or

(d) a person who is regarded as receiving free in-patient treatment within the meaning of the Social Security (Hospital In-Patients) Regulations (Northern Ireland) 1975 [SR 1975/109] or, as the case may be, the Social Security (Hospital In-Patients) Regulations 1975 [SR 1975/555] and either that immediate family member or his partner had been awarded a benefit to which paragraph (1)(a) refers immediately before that immediate family member was first regarded as receiving such treatment.

(5) In a case to which paragraph (1)(e)(iii) or (iv) applies, whether it is reasonable for a person to accept responsibility for meeting the expenses of a funeral shall be determined by the nature and extent of that person's contact with the deceased.

(6) Except in a case where paragraph (7) applies, in a case where the deceased had one or more close relatives and the responsible person is a person to whom paragraph (1)(e)(iii) or (iv) applies, if on comparing the nature and extent of any close relative's contact with the deceased and the nature and extent of the responsible person's contact with the deceased, any such close relative was—

(a) in closer contact with the deceased than the responsible person;

(b) in equally close contact with the deceased and neither that close relative nor his partner, if he has one, has been awarded a benefit to which paragraph (1)(a) refers; or

(c) in equally close contact with the deceased and possesses, together with his partner, if he has one, more capital than the responsible person and his partner and that capital exceeds—(i) where the close relative or his partner is aged 60 or over, £1,000, or (ii) where the close relative and his partner, if he has one, are both agreed under 60, £500, the responsible person shall not be entitled to a funeral payment under these Regulations in respect of those expenses.

(7) Paragraph (6) shall not apply where the close relative who was in closer contact with the deceased than the responsible person or, as the case may be, was in equally close contact with the deceased—(a) had not attained the age of 18 at the date of death; and (b) was the only close relative (not being a person who had not attained the age of 18) to whom any of sub-paragraphs (a) to (c) of paragraph (6) applies.'

[45] Thus a distinction is drawn between an 'immediate family member' and a 'close relative'. An immediate family member is defined in reg 2(1) as 'a parent, son or daughter'. A close relative is defined as—

'a parent, parent-in-law, son, son-in-law, daughter, daughter-in-law, step-parent, step-son, step-son-in-law, step-daughter, step-daughter-in-law, brother, brother-in-law, sister or sister-in-law ...'

THE HISTORY OF THE PRESENT CLAIM

[46] Hugh Kerr died on 19 July 1999 aged 58. His partner had died shortly before and Melville & Co, a local undertaker, had made the funeral arrangements. The police asked them to take Hugh's body away. From their records they found the name of the partner's daughter and she gave them Thomas Kerr's name as next of kin. Thomas Kerr, then aged 61, was the deceased's older brother. He was traced by the police and agreed to take on responsibility for the funeral. Melville & Co filled out the claim form for a funeral payment for him to sign. They correctly ticked the boxes showing that Thomas was in receipt of housing benefit (one of the passport benefits for a funeral payment) and was the brother of the deceased. They wrongly ticked the box showing that the deceased had no other surviving parents, sons or daughters. The funeral went ahead on 27 July 1999 and Thomas became liable for the expenses. Indeed, we were told that he has since paid them, albeit with great difficulty over a long period and with the help of a friend.

[47] Having received the claim, the Social Security Agency discovered that, according to obituary notices in the 'Belfast Telegraph', Hugh was also survived by his father, also Hugh, another brother Billy, and sisters Jean and Diane. On 4 August 1999 they asked Thomas for an explanation. He promptly replied, apologising and explaining that his father had been an in-patient in hospital since May 1999 and because of his condition had not been told of the death. 'I being the eldest son had to make the funeral arrangements with Melville & Co.' They had sent their representative to his home and he had explained that the rest of the family were estranged from Hugh because of his addiction to alcohol. They had not been in touch with one another for more than 20 years. He did not go to the funeral because of his disability.

[48] The agency wrote again on 9 August 1999 asking whether any of the other siblings was on any of the relevant benefits. Again Thomas replied promptly saying that he did not know, because the family had been estranged for 20 years or more. Diane lived in Canada, Billy and Jean somewhere in the Belfast area, but apart from a Christmas card from Canada he had had no contact with them.

[49] A file note on 16 August records the view that as Diane lived in Canada she could not be in receipt of qualifying benefits. Hence the claimant was not eligible for the payment. A decision was made to refuse the claim. The ground stated in the decision letter of 17 August was that it was unreasonable for the claimant to have taken responsibility for the funeral because there was an immediate family member who was not estranged from the deceased and was not awarded a qualifying benefit. This reason was not correct, because the only immediate family member was the father. His existence would have disentitled the claimant under reg 6(3), were it not for reg 6(4), which provides that the claimant is not disentitled under reg 6(3) if the immediate family member is, among other things, a hospital in-patient.

[50] However, some further inquiries were made, because the file records a telephone conversation on 2 September 1999 with the undertakers, who explained how they had learned of the claimant's existence, and a statement from the claimant on 8 September, explaining that Diane in Canada was a niece, not a sister. Hence the only relevant 'close relatives' for the purpose of reg 6(6) were brother Billy and sister Jean, who were living in the Belfast area. Nevertheless, the decision was not reviewed. Nor were any further inquiries made which might have enabled the department to discover whether or not Billy and Jean were on qualifying benefits.

[51] Instead, the matter went on appeal. The social security appeal tribunal decided that it had been reasonable for the claimant to accept responsibility for the funeral: he was the eldest and while he had had no contact for 20 years or so they were brothers and had known each other growing up. However, the tribunal also decided that the other brother and sister had 'equal contact or perhaps more accurately an equal amount of lack of contact' with the deceased. It was not known whether they were in receipt of a relevant benefit. The burden of proof lay on the claimant to establish this. So he failed. The tribunal recognised that this might cause hardship in a case such as this where the claimant knew nothing of his brother and sister's circumstances. This may be why the legal member of the tribunal granted leave to appeal to the social security commissioner. The commissioner, however, reached the same conclusion.

[52] The Court of Appeal in Northern Ireland agreed that the brother and sister were 'in equally close contact' with the deceased, but the majority reversed the decision on the ground that the burden of proof as to their benefits and capital status lay on the department (see [2002] NI 347). They relied on two principles of construction: first, 'the orthodox principle ... that exceptions etc, are to be set up by those who rely upon them'; and second, the principle that where a matter requiring proof is particularly within the knowledge of one party and it would be unduly onerous for the other to have to prove it, the burden lies on the former. Regulation 6(6) was an exception, and relevant facts were peculiarly within the knowledge of the department. McCollum LJ dissented. In his view the appellate process was inquisitorial not adversarial, but the claimant had to provide all the information necessary to enable the determination of his claim. This he had not done and so he should fail.

THIS APPEAL

[53] The department now appeals against the decision of the majority. The issue as originally stated was whether the regulation created a burden of proof and if so on whom and in what respects did it lie. The department's case was that the claimant had to prove all of the conditions, including those in reg 6(6) which were there to prevent abuse. However, the department agrees that the administration of the benefits system is an inquisitorial rather than an adversarial process in which strict notions of the burden of proof may be inappropriate. Mr Declan Morgan QC, on its behalf, re-phrased the issue as—

> 'whether, in respect of reg 6(6), the conditions of entitlement are such that, in the absence of direct evidence or material from which inferences can be drawn that there is no other suitable responsible person, the claimant must fail.'

Thus, it was argued, these are still conditions of entitlement rather than exceptions, and the claimant must provide the material to establish them. Granting the benefit without this basic information would be open to abuse, more probably through inadvertence or lack of application—failing to take the trouble to find out the true position—rather than dishonesty; the department recognises that this is unlikely to deter people who are minded to exploit the benefits system in this way.

[54] The primary submission of Mr Bernard McCloskey QC, on behalf of the respondent claimant, is that the majority of the Court of Appeal was right for the reasons they gave. His secondary submission is that the burden of proof has no function at all in the processing and determination of a claim for funeral expenses. The department has ample weapons in its armoury to discover the facts necessary to determine the claim. Some of those facts are peculiarly within its own knowledge. If, after all proper inquiries are made, there is no evidence that the disqualifying conditions in reg 6(6) exist, then the claimant should succeed.

[55] There are now, therefore, two issues. (1) What sort of process is involved in the determination of a claim? (2) What happens if, at the end of the process, relevant facts are simply not known?

THE NATURE OF THE PROCESS

[56] The benefits system is necessarily enormously complex. This was true even in the early days, when it was mainly based on flat rate contributory benefits, and means-tested benefits were seen as a safety net but not the norm. It has become even more so with increasing attempts to target benefits upon the most needy. The history of funeral payments sketched above is a good illustration of this trend. The general public cannot be expected to understand these complexities. Claimants should not be denied their entitlements simply because they do not understand them. It has been a consistent objective of social security administration over the years to devise user-friendly forms and procedures to enable the benefits agencies to discover whether or not a claimant is entitled to benefit.

[57] The claimant must generally start the ball rolling with a claim form. The general rule is that no one is entitled to benefit unless he has made a claim in the prescribed manner: see s 1(1) of the Social Security Administration (Northern Ireland) Act 1992 (the Administration Act). Regulations may provide for the manner in which claims are made: see s 5(1)(a). The regulations provide that claims must be made in writing either on the approved form or in some other

written form which the department may accept: see reg 4(1) of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987, SR 1987/465. Great efforts have been made to devise claim forms which, although lengthy, are clearly set out in plain language and designed to elicit all the basic information the department needs to discover whether or not the claimant is entitled to the benefit in question. Errors and omissions on his part are not fatal. If a claim is defective it can be referred back to the claimant: see reg 4(7). It can also be amended at any time up to the determination: see reg 5(1). Regulations may also provide for requiring any information or evidence needed for the determination of the claim or any question arising in connection with the claim to be furnished by such person as may be prescribed in the regulations: see s 5(1)(h) of the Administration Act. The 1987 regulations provide that every claimant has a duty to furnish such certificates, documents, information and evidence as may be required of him: see reg 7(1). In certain circumstances, the claimant's partner or employer has a similar duty: see reg 7(2) and (3). Claimants must also attend in person for this purpose if reasonably required to do so: see reg 8(2).

[58] Clearly, therefore, the system places the burden upon the department of asking the right questions and upon the claimant of answering them as best he can. There is no express sanction for failure to comply with regs 7 or 8, but regulations could provide for this to be a criminal offence were it to become a problem: see s 107 of the Administration Act. If it later turns out that benefit has been paid which should not have been paid because of a misrepresentation or failure to disclose a material fact, whether innocent or fraudulent, the benefit may be recovered: see s 69(1) of the Administration Act. Making a statement or representation which is known to be false, or producing any document or information which is known to be false, is a criminal offence: see s 106 of the Administration Act.

[59] Once the department has the information it requires, then under the process which was in force at the time of this claim, the claim is passed to an adjudication officer for determination: see s 18(1) and (6)(e) of the Administration Act. There was no express provision for the adjudication officer to make further inquiries, but it is common ground that he could do so: see *R v Secretary of State for Social Services, ex p Child Poverty Action Group* [1989] 1 All ER 1047, [1990] 2 QB 540, and commissioner's decision R(IS)4/93, para 13. This is supported by the Social Security (Adjudication) Regulations (Northern Ireland) 1995, SR 1995/293, (the Adjudication Regulations), reg 2(1)(a), which provides that the procedure in connection with the consideration and determination of any claim or question shall be such as the department or the adjudicating authority shall determine.

[60] The claimant can appeal from the adjudicator's decision to a social security appeal tribunal: see s 20(1)(b) of the Administration Act. The tribunal chairman may either of his own motion or on application—

> 'give ... directions ... for the just, effective and efficient conduct of the proceedings and may direct any party to provide such further particulars or to produce such documents as may reasonably be required.' (See reg 2(1)(aa) of the Adjudication Regulations.)

[61] Ever since the decision of the Divisional Court in *R v Medical Appeal Tribunal (North Midland Region), ex p Hubble* [1958] 2 All ER 374, [1958] 2 QB 228, it has been accepted that the process of benefits adjudication is inquisitorial rather than adversarial. Diplock J as he then was said this of an industrial injury benefit claim:

'A claim by an insured person to benefit under the Act is not truly analogous to a lis inter partes. A claim to benefit is a claim to receive money out of the insurance funds ... Any such claim requires investigation to determine whether any, and if so, what amount of benefit is payable out of the fund. In such an investigation, the Minister or the insurance officer is not a party adverse to the claimant. If analogy be sought in the other branches of the law, it is to be found in an inquest rather than in an action.' (See [1958] 2 All ER 374 at 379, [1958] 2 QB 228 at 240.)

[62] What emerges from all this is a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced.

[63] If that sensible approach is taken, it will rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof. The first question will be whether each partner in the process has played their part. If there is still ignorance about a relevant matter then generally speaking it should be determined against the one who has not done all they reasonably could to discover it. As Mr Commissioner Henty put it in decision CIS/5321/1998: '... a claimant must to the best of his or her ability give such information to the AO as he reasonably can, in default of which a contrary inference can always be drawn.' The same should apply to information which the department can reasonably be expected to discover for itself.

[64] That is the position on the facts of this case. It is not suggested that the claimant was in any way to blame for the way in which the undertakers had filled in the form for him. There is clearly a risk that undertakers who are anxious to be assured of their fees will not fill the forms in as diligently as they should. They run the same risk of entitlement not being shown as the claimant does in such circumstances. However, once the omission of his father, brother and sister was pointed out to the claimant, he gave the department all the information he had about them. This was sufficient to rule out the father as a more suitable person. It was not sufficient to enable the department to determine whether or not the brother or sister was more suitable. Assuming (for the sake of this argument) that all the siblings did have 'equally close contact' with their brother Hugh for the purpose of reg 6(6)(b) and (c), it was not known whether either of them was more suitable, either because they were not receiving any of the qualifying benefits or because even if they were receiving such benefits, they had capital above the prescribed limit.

[65] But the department freely acknowledges that such information is available to it. All it needs is a name and a date of birth, from which it can trace the National Insurance number, which in turn should enable it to discover whether benefits are being paid. In many cases, if there is a claim, the department can also discover whether or not the claimant has capital. Section 3(1) and (2) of the Social Security Act 1998 makes it clear that the relevant departments are able to use the information relating to social security which they hold for any purposes connected with their functions in relation to social security. Yet the department never asked the claimant for this information. Indeed, the section of the claim

form asking for details of other relatives does not ask for dates of birth (perhaps it will do so as a result of this case). Nor did the department seek this information from the claimant despite making further inquiries of him which revealed that it should have been asked. In those circumstances, the department cannot use its own failure to ask questions which would have led it to the right answer to defeat the claim.

THE CONSEQUENCES OF IGNORANCE

[66] This will not always be sufficient to decide who should bear the consequences of the collective ignorance of a matter which is material to the claim. It may be that everything which could have been done has been done but there are still things unknown. The conditions of entitlement must be met before the claim can be paid: see s 1(1) of the Administration Act. It may therefore become relevant to ask whether a particular matter relates to the conditions of entitlement or to an exception to those conditions. In this case, the department argues that all the elements, including those in reg 6(6), are conditions of entitlement, so that the claimant must bear the consequences of ignorance. The claimant argues that the conditions of entitlement are laid down in reg 6(1), supplemented where relevant by paras (2) and (5). Paragraphs (3) and (4), which go together, and para (6) are exceptions.

[67] The structure and wording of the regulation support the claimant's case. Conditions (a), (b), (c) and (d) in reg 6(1) are clearly established. The claimant qualifies as a 'close relative' under condition (e)(iv)(aa) but this also requires that it be reasonable for him to accept responsibility. Under reg 6(5) the question 'whether it is reasonable for a person to accept responsibility for meeting the expenses of the funeral shall be determined by the nature and extent of that person's contact with the deceased'. The tribunal decided that it was reasonable for the claimant, as the eldest son who had grown up with his brother, to accept that responsibility, despite the fact that they had not been in contact with one another for many years. That conclusion is not challenged in this appeal, in my view rightly. For the reasons given earlier, there is a strong public interest in encouraging families to take responsibility for the speedy and seemly burial of their deceased relatives.

[68] Regulation 6(3) provides that the person who has made himself responsible 'shall not be entitled' if there is a more appropriate immediate family member. That this is a disentitling provision is made clear by reg 6(4), which states that 'Paragraph (3) shall not apply to *disentitle* the responsible person' (my emphasis) in the circumstances there set out. In the same way, reg 6(6) provides that if there is a close relative who is either in closer contact or in equally close contact and not receiving benefits or having capital, the responsible person 'shall not be entitled' to the payment. These paragraphs are therefore worded in terms of exceptions rather than qualifying conditions. If anything, this interpretation is supported by the legislative history given earlier, as the existence of a more suitable relative was added as an exception or qualification to the basic rule.

[69] This, therefore, is a case in which the department should bear the burden of the collective ignorance and pay the claim.

FINALLY

[70] A curious feature of the present case is that the disqualifying conditions in reg 6(6)(b) or (c) depend upon the claimant and any other close relative being 'in equally close contact with the deceased' when in reality none of them was in

contact with him at all. How can a lack of contact be described as 'close'? This wording is different from that in reg 6(5), which simply refers to the 'nature and extent' of the claimant's contact with the deceased. This might well include contact which was long ago. It is harder to see how 'was ... in equally close contact' can cover contact which ended 20 years earlier. However, I would prefer to express no view on this issue, which arose during the hearing before us, as in my view there are two good reasons to uphold the decision of the Court of Appeal although not precisely the same as theirs.

[71] I would therefore dismiss this appeal.

Appeal dismissed.

Dilys Tausz Barrister.

Slamon and another v Planchon

[2004] EWCA Civ 799

COURT OF APPEAL, CIVIL DIVISION
PETER GIBSON, RIX AND LONGMORE LJJ
12 MAY, 25 JUNE 2004

Landlord and tenant – Leasehold enfranchisement – Resident landlord exception – Whether continuity of interest required to satisfy resident landlord exception – Leasehold Reform, Housing and Urban Development Act 1993, s 10.

The claimants held long leases of two flats in a converted house. A third flat was occupied by the mother of the defendant freeholder. At the time of the conversion of the house, and for some years earlier, the defendant had been the legal and beneficial co-owner of the house together with her sister. The freehold of the house had therefore been held on trust at the time of the conversion. The sisters subsequently transferred the house into their mother's sole name. Eight days later, the mother executed a deed, declaring that she held the house on trust for the defendant. The house was transferred into the defendant's sole name 18 months later. The claimants subsequently sought to acquire the freehold of the house under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993 (as amended by the Commonhold and Leasehold Reform Act 2002). The defendant did not admit the claimants' right to enfranchise, relying on the resident landlord exception. Section 10(1)[a] of the 1993 Act set out the conditions for the applicability of that exception, including the requirements that the same person had owned the freehold of the premises since before the conversion of the premises into flats (para (b)), and that he, or an adult member of his family, had occupied a flat contained in the premises as his only or principal home throughout the period of 12 months ending with that time (para (c)). Section 10(4) provided that, 'Where the freehold of any premises is held on trust', sub-s (1) applied as if the requirement in para (b) were that the same person had had an interest under the trust (whether or not also a trustee) since before the conversion. At trial, there was no dispute that the mother's occupation of her flat satisfied the requirements s 10(1)(c), but the parties were divided over whether the defendant could bring herself within s 10(1)(b) and/or s 10(4). The judge held that the words 'Where the freehold ... is held on trust' in s 10(4) meant 'is at any time held on trust'; that s 10(4) was not an alternative test to s 10(1)(b) but rather supplementary to it; and that s 10 was therefore to be interpreted as requiring that the same person had owned the freehold of the premises or had had an interest under the trust (whether or not also a trustee) since before the conversion of the premises. On that basis, he found for the defendant. The claimants appealed.

Held – For the purposes of s 10 of 1993 Act, the interest relied upon had to be continuous. There was no indication in s 10 that the interests could be mixed with each other to result in a continuous whole. The words 'at any time' were not to be read into s 10(4). The trust test in that provision did not merely supplement the basic test in s 10(1)(b) during any period within the relevant period when the freehold was held on trust. It supplanted, rather than

a Section 10, so far as material, is set out [6], below

supplemented, the requirement in para (b). There had to be continuity on the part of the freeholder or, if the freehold were held on trust, on the part of the person having an interest under the trust. In the instant case, there was continuity of neither kind. Accordingly, the appeal would be allowed (see [32], [34]–[37], [40], [41], [43]–[46], below).

Notes

For premises with a resident landlord, see 27(2) *Halsbury's Laws* (4th edn reissue) para 1410.

For the Leasehold Reform, Housing and Urban Development Act 1993, s 10, see 23 *Halsbury's Statutes* (4th edn) (2004 reissue) 915.

Appeal

The claimants, John Slamon and Richard Ward, appealed with permission of Judge Wakefield from his order in the Central London County Court on 14 November 2003 dismissing their proceedings for the enforcement against the defendant, Nicole Diane Planchon, of their alleged right to acquire, under the provisions of the Leasehold Reform, Housing and Urban Development Act 1993, the freehold of a house known as 50 Woodsome Road, London NW5. The facts are set out in the judgment of Rix LJ.

Michael Pryor (instructed by *Bircham Dyson & Bell*) for the claimants.

Daniel Bromilow (instructed by *Avadis & Co*) for the defendant.

Cur adv vult

25 June 2004. The following judgments were delivered.

RIX LJ (giving the first judgment at the invitation of Peter Gibson LJ).

[1] This appeal concerns the exception in favour of a 'resident landlord' built into the collective enfranchisement provisions of the Leasehold Reform, Housing and Urban Development Act 1993 as amended by the Commonhold and Leasehold Reform Act 2002.

[2] The claimants are long leaseholders of two flats in a house known as 50 Woodsome Road, London NW5 (the house). They seek to acquire the freehold of the house pursuant to s 22 of the 1993 Act. The defendant is the freeholder of the house. Her mother is the occupier of a third flat in it. The defendant seeks to resist collective enfranchisement of the house in reliance on the resident landlord exception set out in ss 4(4) and 10 of the Act. She relies on her mother's occupation over the year prior to the claimants' notice under the Act, together with her own interest in the freehold of the house over a long period stretching back to before the time of its conversion into flats.

[3] It is common ground that, subject only to the adequacy of the defendant's interest in the freehold over the period back to the house's conversion, the conditions for the application of the resident landlord exception are met. This appeal concerns the remaining dispute about the adequacy of that interest: does it meet the particular requirements of the statutory test? The issue turns on a pure point of statutory interpretation.

[4] At trial Judge Wakefield decided that issue in favour of the defendant. The claimants appeal.

THE ACT

[5] Section 1 sets out the basic right of collective enfranchisement (the right) conferred on qualifying tenants to acquire the freehold of the premises in which their flats are situated at a price to be determined in accordance with the provisions of the Act. Section 3 describes the premises to which that right applies, eg self-contained buildings in which the qualifying tenants hold at least two flats and at least two-thirds of the total number of flats (as here the claimants hold two out of the three flats in the house). Section 3, however, is made subject to s 4, which lists premises excluded from the right. Section 4(4) contains the exception relevant to this case, the resident landlord exception:

> 'This Chapter does not apply to premises falling within section 3(1) if the premises are premises with a resident landlord and do not contain more than four units.'

[6] Section 10 is headed 'Premises with a resident landlord' and sets out the relevant conditions for the applicability of this exception. As amended in 2002 it provides:

> '(1) For the purposes of this Chapter any premises falling within section 3(1) are premises with a resident landlord at any time if—(a) the premises are not, and do not form part of, a purpose-built block of flats; (b) the same person has owned the freehold of the premises since before the conversion of the premises into two or more flats or other units; and (c) he, or an adult member of his family, has occupied a flat or other unit contained in the premises as his only or principal home throughout the period of twelve months ending with that time ...
>
> (4) Where the freehold of any premises is held on trust, subsection (1) applies as if—(a) the requirement in paragraph (b) were that the same person has had an interest under the trust (whether or not also a trustee) since before the conversion of the premises, and (b) paragraph (c) referred to him or an adult member of his family.'

[7] The Act provides for the service of a notice in which the qualifying tenants make their claim upon the reversioner (s 13) and for the reversioner's counter-notice (s 21). Section 1(8) defines 'the relevant date' in relation to any claim to exercise the right to collective enfranchisement as 'the date on which notice of the claim is given under section 13'. Section 10(1) might well have referred to 'the relevant date' but does not. Nevertheless it is common ground that the s 10(1) requirements of continuous ownership and 12 months' occupancy have to be met as of a period ending with the giving of the s 13 notice.

THE NOTICES

[8] The claimants, who are long leaseholders of the ground and second/third floor flats, served their notice addressed to the defendant on 6 November 2002. The proposed purchase price was £1,500 on the basis that the defendant would require a leaseback of the third flat, which was on the first floor of the house. If a leaseback was not required the proposed purchase price was £175,000.

[9] The defendant's counter-notice dated 9 January 2003 did not admit the claimants' right to enfranchise, and relied on the resident landlord exception. The counter-notice specified her mother's occupation of the first floor flat for the 12 months' prior to the claimants' notice. There is no dispute about that. Indeed, the judge found that the mother has lived at the house since about 1982 and

has lived there ever since, although in different parts of it. It was to emerge, however, that there was a dispute about whether the defendant could bring herself within s 10(1)(b) and/or s 10(4) relating to the necessary continuity of the reversioner's interest since before the time of conversion.

THE FACTS RELATING TO THE DEFENDANT'S INTEREST IN THE HOUSE

[10] The defendant, Nicole Planchon, has since 9 September 1999 subject to the two long leases been the legal and beneficial owner of the house. She had previously held the whole beneficial interest under a declaration of trust made by her mother on 7 April 1998. On 9 September 1999 her mother transferred to her the legal title as well, and she became the registered proprietor. She remained so at the date of the claimants' notice under the Act.

[11] The history of the defendant's (and her family's) interest in the house is as follows.

[12] The defendant has two siblings, a brother Neil and a sister Dana. Her mother's name is Linda. The mother and her three children appear to have been the relevant family unit. On 18 July 1980 the house was bought and, it seems, taken in the name of the defendant's mother, brother and sister, although it appears from the judgment below that only the brother and sister may have been registered as proprietors on 4 August 1980. At that time the defendant was a minor. It appears to have been the intention at the time of purchase that the three siblings, including the defendant, should share in the ownership of the house. At any rate on 4 December 1980 a declaration of trust was signed by the mother, brother and sister (the trustees) recording that the house was transferred to them on 18 July 1980 as beneficial joint tenants but that they had agreed to sever the joint tenancy and to hold the house as tenants in common in equal shares. The deed said that as from 18 July 1980 the trustees would hold the house on trust to sell and to hold the net proceeds of sale in trust for the trustees as tenants in common in equal shares. Moreover the mother declared that she held her share in the house on trust for the defendant.

[13] So at least from 18 December 1980 the defendant held a one-third beneficial interest in the house under a trust. But she was not at that time a legal proprietor of the house.

[14] In 1982 the defendant came of age and thereafter on 6 July 1984 the freehold title was transferred into the names of the defendant and her sister. I am not sure what her beneficial interest would have been at that time, but I suppose it would have been a half. Whatever it was, the defendant was then both a legal and beneficial co-owner of the house.

[15] The judge found that the conversion work started after 1980 but before 1984, but was not completed until 1987 at the earliest or 1991 at the latest. The judge took the completion of the conversion works as the relevant time for the purpose of the statutory test of 'since before the conversion', and it has not on this appeal been submitted that he was wrong to do so. Thus at the time of conversion the defendant was a legal and beneficial co-owner of the house. Moreover, at this time, because there were co-owners, the freehold of the house was necessarily 'held on trust' (to refer to the words in s 10(4)).

[16] Following the transfer in July 1984 there was no change to the defendant's interest in the house until 30 March 1998, when the two sisters transferred the house into their mother's sole name 'in consideration of natural love and affection'. Both sisters appear at that time to have been living in the United States, for the defendant's signature is witnessed in California, and her sister's

signature in Indiana. In the meantime the 125-year lease on the ground floor flat had been created for a term commencing on 29 September 1996 by an instrument dated 16 October 1996.

[17] On 7 April 1998, that is to say eight days after the transfer of the house by the daughters to the mother on 30 March 1998, the mother executed a further declaration of trust. The deed was executed by both the defendant and her mother: in it the defendant was described as the 'donor' and the mother as 'trustee'. It referred to the 'conveyance of even date with this deed' (presumably a reference to the transfer in fact dated 30 March). Under the deed the mother declared that she held the house on trust for the defendant. So, as stated above, as of this date the defendant was beneficially entitled under trust to full ownership of the house, but its registered legal title was in the mother. Also, as stated above, on 9 September 1999 the house was transferred into the defendant's sole name, so that she now became the sole legal and beneficial owner of it. In the meantime, the other long lease had been granted, in respect of the second/third floor flat, on 12 October 1998, also for a term of 125 years from 29 September 1996. The mother's evidence explains that the reason for the transfer of the house into her name was for the purpose of selling that long lease.

[18] Looking therefore at the whole of the relevant period from before the conversion down to the date of the claimants' notice, it would seem that the defendant both began and ended that period as a legal and beneficial owner of the freehold of the house (although only a part-owner at the beginning of that period), but also that in the middle of that period, namely from 30 March 1998 until 9 September 1999, she had at most only a beneficial interest on trust. There is also a question mark whether for the eight days from 30 March to 7 April 1998 she had any beneficial interest at all.

THE SUBMISSIONS

[19] On behalf of the claimants, here the appellants, Mr Michael Pryor submits that the changes in the defendant's interest over the relevant period are fatal to her attempt to bring herself within the resident landlord exception. He says that it is necessary to look back from the date of the notice to the date of conversion and find continuity of interest. If, at the date of the notice, the freehold of the relevant premises 'is held on trust', then it is s 10(4) which applies and the defendant must show that the same person, that is to say herself, has 'had an interest under the trust' since before the conversion. If, on the other hand, the freehold is not held on trust at the date of the notice, then it is s 10(1)(b) that applies and the defendant must show that the same person, that is to say herself, 'has owned the freehold' since before the conversion. On the facts, Mr Pryor submits that the defendant can meet neither test. First, as at the date of the notice, the freehold was not held on trust and therefore s 10(4) simply does not apply. Secondly, although the relevant test is therefore to be found in s 10(1)(b), the defendant cannot fulfil it because there is no continuity in her ownership of the freehold due to the break in her registered ownership between 30 March 1998 and 9 September 1999. Thirdly, even if for these purposes it were permissible, which he says it is not, to have regard to her purely beneficial interest over that 18-month period, and even on the assumption that her beneficial interest bridged the eight-day gap between 30 March and 7 April 1998, her interest under the trust during those 18 months was not an interest under the same trust as for the earlier period between conversion and 30 March 1998. Fourthly, there was nothing at

all which could bridge the gap of those eight days when the defendant had no interest at all in the house.

[20] On behalf of the defendant, on the other hand, Mr Daniel Bromilow submits that this argument, which failed before the judge, is an altogether overly schematic approach to the statutory test of continuity of ownership. The obvious purpose of the requirement of continuity was to prevent new owners buying into a freehold for purely investment purposes in order to defeat the right to collective enfranchisement merely by showing a 12-month occupancy of the premises. This purpose was all the clearer when regard is had to the fact that under the original 1993 form of the statute the requirement of continuity of ownership did not exist. To support that purpose, however, there was no need to adopt a test of continuity as rigid as that involved in Mr Pryor's submissions. On the other hand, the purpose of the resident landlord exception would itself be undermined if those submissions were accepted. Homes within a family unit were often held in trust: every case of joint tenancy or of a tenancy in common involved the freehold being held on trust. If Mr Pryor's submissions were correct, then whenever a survivor inherited the whole property, or a property was put by a parent into trust for his or her children, or whenever there was a variation in the trust on which a family home was held, there was likely to be a breakdown in the required continuity: whereas the essence of all such arrangements was that the relevant freehold was always held within the family. The judge was therefore right to see s 10(4) as being not an alternative test to s 10(1)(b), but as being supplementary to it. The proper interpretation of s 10, and that which best promoted or least undermined the purposes of the statute, was that adopted by the judge, viz:

> 'the same person has owned the freehold of the premises or has had an interest under the trust (whether or not also a trustee) since before the conversion of the premises into two or more flats.'

[21] In response to this reliance on the statute's purpose as a guide to its interpretation, Mr Pryor has acknowledged that his submissions answer no policy and create anomalies, but argues that, in a situation where the statute promotes both collective enfranchisement and a limited exception in favour of resident landlords, there is no reason to prioritise the exception over the underlying purpose. All that can be said is that a test has been adopted which is no doubt a compromise and which attempts to be fair to both interests, but which has to be applied according to its terms.

THE JUDGMENT BELOW

[22] The judge was impressed by the argument that Mr Pryor's approach created unacceptable anomalies. 'Why', he asked—

> 'should a person who has been a beneficiary under a trust since the date of conversion, and has then become the absolute owner and acquired the freehold by the relevant date, be denied the benefit of s 10?'

Even so, he said that he had at first been of the view that the wording of s 10(1) and (4) were 'too clear to admit any construction other than the one contended for by the claimants'. But in the end he preferred the defendant's submission: since the legislation was in a sense expropriatory, it should be read if possible in a way which favours the landlord. And it was possible: the words 'Where the

freehold ... is held on trust' meant 'is at any time held on trust', leading, he concluded, to the interpretation which I have cited two paragraphs above.

[23] As for Mr Pryor's alternative answer that, even so, s 10(4) allowed of only one trust ('under the trust'), the judge regarded this as 'too technical'. As for the eight-day point, the judge had already said that he regarded the defendant as being a beneficial owner of at any rate a share in the house down to 7 April 1998, from which time she became the beneficial owner of it all.

THE EARLIER VERSIONS OF THE ACT

[24] The earlier versions of s 10 were consulted to see if they threw any light on the issue. In its original form in 1993 there was no condition requiring continuous ownership from the time of conversion. Even the 12 months' occupancy requirement could be met by a new freeholder, if he or an adult member of his family occupied the flat within 28 days of his acquisition, by taking into account the occupancy of the previous freeholder (s 10(2), repealed in 2002). For these purposes the original s 10(1) (which laid down the 12 months' occupancy test) and the original s 10(2) (which extended the test in favour of the new freeholder) simply spoke of the 'freeholder': and the original s 10(4) (substituted in 2002 by the current version) provided as follows in relation to the concept of beneficial ownership under trust:

> '(4) Where the freehold interest in any premises is held on trust, subsections (1) and (2) shall apply as if, in paragraph (b) of each of those subsections, any reference to the freeholder were instead a reference to a person having an interest under the trust (whether or not also a trustee).'

[25] In this context it would seem that the only purpose of s 10(4) was to make clear that a 'freeholder' included a beneficial owner of any interest under a trust. It was not intended to limit the application of the 12 months' occupancy test. Section 10(6) also at that time contained a definition of 'freeholder' as 'the person who owns the freehold of the premises'.

[26] Section 10 was amended in 1996 by the Housing Act 1996. For present purposes the only change of relevance was that in place of 'freeholder' with its definition there was substituted the concept of 'a relevant person' with its own definition contained in a new s 10(4A). Thus sub-ss (4) and (4A) then provided:

> '(4) Where the interest of a relevant person in any premises is held on trust, subsections (1) and (2) shall apply as if, in paragraph (b) of each of those subsections, any reference to a relevant person were instead a reference to a person having an interest under the trust (whether or not also a trustee).
>
> (4A) For the purposes of this section a person is a relevant person, in relation to any premises, if he owns the freehold of the whole or any part of the premises.'

Again, the trust provisions are not intended to limit, but to clarify and if anything extend, the concept of a freeholder/relevant person.

[27] In 2002 sub-ss (2), (3) and (4A) were repealed and sub-ss (1) and (4) were remodelled and substituted in their present form. The additional requirement of continuous ownership back to a time before conversion was introduced.

DISCUSSION AND CONCLUSION

[28] Like the judge, I am troubled by the anomalies which Mr Pryor's submissions on behalf of the claimants engender. Mr Pryor had no explanation

for them, he accepted that they were anomalies. At first, however, he did not accept that they were as frequent as might appear, but, since all cases of joint tenancy and tenancy in common would involve trusts, he did in the end recognise that they would arise more often than he had initially suggested. It seems to me that such forms of tenancy, and indeed declarations of trust in general, whereby the legal and beneficial interests of premises are separated, are frequently found within families. It must follow that where there is a lengthy period between conversion and the date of a notice under the Act, as of course there may well be, there is considerable scope for situations to arise whereby, although the legal and beneficial ownership of a home has always remained within a family, there have been changes which would make it hard to show an unbroken interest of one or other of the kinds revealed in Mr Pryor's scheme.

[29] The question arose of how a simple example of a husband and wife joint tenancy followed by the widow's sole legal and beneficial interest on her survivorship would fare under the scheme. Mr Pryor submitted that it would survive the test of continuity under s 10(1)(b) because, although at an earlier period the freehold was held on trust, that period was irrelevant since s 10(4) only applied where the freehold was held on trust at the time of the notice. Provided, therefore, the entire legal and beneficial interest had come into the widow's hands by the time of the notice, she could say that she was the freeholder throughout the relevant period, even though that period extended back through a time when her beneficial interest was held under trust and shared with her husband. Mr Pryor had to accept, however, that in the case of a counter-example, for instance where the freehold is owned from before the conversion by, say, a man who later marries and transfers it into his and his wife's joint names, so that at the time of the notice it is held on trust, there would be no resident landlord within the exception.

[30] Each counsel submitted, it seemed to me correctly, that the statute could easily have provided in a plain and obvious way for the construction that the other counsel was contending for. Therefore, there was no guidance from that direction.

[31] Mr Pryor submitted that the judge was wrong to say that because the statute was in a sense expropriatory, therefore it should be read, if reasonably possible, in a way which favours the landlord. He pointed out that to do so would run against the grain of the statute, which was admittedly expropriatory. Alternatively, as I have indicated above, he submitted that the purposes of the statute and of the exception cancelled each other out: the text should therefore be read neutrally, without any presumption. It seems to me that justice should be done, if possible, to the logic of the statute as a whole. Seeing that the right of collective enfranchisement is made subject to the exception in favour of a resident landlord, I remain impressed by the anomalies which Mr Pryor's construction creates. If I could find my way to construe the section in the way in which the judge has done, I would take it: for I do not see why a freehold which has remained within a family for the relevant period should not have been intended to be within the exception. That point is underlined by the provisions which enable the requirement of occupancy to be fulfilled by either the freeholder or a close adult member of his family (see s 10(5)). I would go so far as to say that I do not think that the present case, where, if the eight-day gap is left out of account, the defendant has had a beneficial interest in the freehold, albeit not the same beneficial interest, over the whole relevant period, was intended to be one where the exception did not apply. The pedigree of s 10(4) suggests that that provision is not meant to limit the concept of continuous ownership.

[32] Ultimately, however, and with reluctance, I have not found it possible to adopt the judge's approach. It is not what the statute says or can fairly be made without distortion to say. The language of sub-s (1), against which sub-s (4) has to operate, emphasises that the point of view for assessing the 'same person' question of continuity is that time ('at any time') which is contemporaneous with the notice of the right to enfranchise: because sub-s (1)(c) speaks of 'the period of twelve months ending with that time'. That remains the case even though the language of the statute might well have referred directly, but does not, to 'the relevant date', which s 1(8) defines as the date of the s 13 notice. It is from that time, the time of the notice, backwards to a time before conversion, that the same person must own the freehold. In the absence of sub-s (4), it might have been left to the courts to hold that the test of ownership of the freehold was met by a person who held a beneficial interest in the premises throughout the relevant period, whether or not under trust and whether or not the legal title was owned as well. However, sub-s (4) states that where the freehold is held on trust, the sub-s (1) requirement applies 'as if' the sub-s (1)(b) requirement were (the special and different test) that the same person should have held an interest under the trust over the relevant period. That is not consistent with the trust test merely supplementing the basic test during any period within the relevant period when the freehold is held on trust. The trust test supplants, rather than supplements, 'the requirement in paragraph (b)'.

[33] If, however, the section had been written in terms which would permit the trust provision to play a merely supplementary role, I would not have been impressed by Mr Pryor's point about different trusts, which is founded on the word 'the' in the phrase 'under the trust'. I would have regarded that as merely a convenient way of referring to a trust interest in the case of a freehold held on trust. If there had been more than one trust, with the same person holding an interest under each, I would have regarded that as within the words 'under the trust'. In other words, I would not see why the singular could not import the plural. Nor do I think I would have been impressed by the eight-day point: for, even if there had been uncertainty as of 30 March 1998 until the declaration of trust on 7 April 1998, nevertheless, when one goes backwards in time from the relevant date of the notice to the time of conversion, one can see that, under the declaration of trust of 7 April 1998, the defendant had been intended to hold a beneficial interest in the house during those intervening eight days. If, therefore, I had been able to adopt the judge's solution or that pressed on the court by Mr Bromilow on behalf of the defendant, I do not think that Mr Pryor's subsidiary and alternative arguments would have made a critical difference. As it is, those questions do not arise.

[34] In conclusion, I would allow this appeal, set aside the judge's order, and invite the parties to agree the consequential orders sought by the claimants, failing which I would hear the parties on those orders.

LONGMORE LJ.

[35] Rix LJ has set out the statutory provisions. The critical provision is s 10(1) of the Leasehold Reform, Housing and Urban Development Act 1993 which requires the 'same person' to have owned the freehold of the premises since before the conversion. Section 10(4) then provides that where the freehold is held on trust, s 10(1) is to apply as if the requirement were that the same person has had an interest under the trust since before the conversion. There must

therefore be continuity on the part of the freeholder or, if the freehold is held on trust, on the part of the person having an interest under the trust.

[36] In the present case there is continuity of neither kind. Before the conversion was completed in (at latest) 1991, the freeholders were Dana and the defendant. The defendant ceased to be the freeholder on 30 March 1998. It is true that she became the freeholder again on 9 September 1999 and remained the freeholder on 6 November 2002 but continuity was lost.

[37] Before the conversion was completed, the defendant had a beneficial interest under a declaration of trust of 4 December 1980. Once the defendant's mother became the freeholder on 30 March 1998 (or, at any rate, eight days later on 7 April 1998), the defendant had the sole beneficial interest under a further declaration of trust of the latter date, but that ceased when she became the freeholder on 9 September 1999. Continuity of interest under the trust then ceased and thus continuity of such interest was lost. Since, moreover, there were in fact two separate declarations of trust, the defendant's interest in 'the trust' for the purpose of s 10(4) could be said to have only begun on 7 April 1998 which is too late.

[38] The judge was able to avoid this conclusion by saying first that, because the legislation was expropriatory, it should be read, if reasonably possible, in a way which favours the landlord and then saying that sub-ss (1) and (4) should be read together as if they read—

> 'the same person has owned the freehold of the premises or has had an interest under the trust ... since before the conversion of the premises into two or more flats.'

[39] I agree that the legislation is expropriatory but, since it is clearly intended to be, Parliament's intention is liable to be flouted if the legislation is to be construed favourably to the landlord save in a case of genuine ambiguity. Save in such cases of ambiguity it is inappropriate for the court to favour the landlord rather than the tenant or, indeed, the tenant rather than the landlord.

[40] The way the judge has read the legislation seems to me to be contrary to the sense of s 10 as enacted. On a proper reading, whatever interest is relied on has to be continuous; there is no indication that the interests can be mixed with each other to result in a continuous whole.

[41] The consequence of this construction has become more stark since 2002 when, for the first time, the resident landlord (or a member of his family) had to have been resident since before the conversion. It is possible that Parliament did not appreciate this in 2002 but, whether it did or not, that cannot affect the true construction of the provisions of the Act as now amended. I agree with Rix LJ that the appeal must be allowed.

PETER GIBSON LJ.

[42] I share the judge's unease at a construction which gives rise to the two 'anomalies' which he has identified as arising, being circumstances in which a landlord is not a resident landlord for the purposes of the Leasehold Reform, Housing and Urban Development Act 1993, viz (1) freehold held by a bare trustee for a beneficiary for part of the period between the date of conversion and the relevant date and by the beneficiary for the remainder of the period, and (2) freehold held by the trustee for A for life, remainder to A's son, for part of that period and on A's death by the son. Those examples seem to me not so much anomalies as surprising consequences of the construction which, as the judge

acknowledged, was what the clear words of s 10(1) and (4) suggested. One is entitled to wonder what was the intention of Parliament in so providing.

[43] However, the duty of the court is to give effect to the intention of the legislature as ascertained from the language used and I do not think it permissible to arrive at a construction other than what the clear statutory words dictate either by leaning in favour of the landlord or by mixing interests when it is plain that the interest relied on had to be continuous since before the conversion. It was not open to the judge to write into s 10(4) the words 'at any time' (particularly when the words are found in s 10(1)), nor to rewrite s 10(1)(b) in the way he suggests is its meaning when read with s 10(1)(a).

[44] To revert to the intention of Parliament, it can only be assumed from the statutory language that Parliament intended a simple test: at the relevant date either own the freehold from before the conversion or be a beneficiary under the same trust since before the conversion. It would surely have been obvious to Parliament that so unsophisticated a test would give rise to consequences such as those identified by the judge. Nevertheless, that is the test which was enacted and the courts must give effect to it.

[45] On the facts of this case there was no such continuity of interest. The defendant faces the further difficulty that there were two separate declarations of trust.

[46] I too would allow the appeal, and agree with Rix LJ's proposals regarding consequential orders.

Appeal allowed.

Melanie Martyn Barrister.

Sawkins v Hyperion Records Ltd

[2004] EWHC 1530 (Ch)

CHANCERY DIVISION

PATTEN J

10–14, 17 MAY, 1 JULY 2004

Copyright – Musical work – Originality – Existing composition – Whether performing edition of existing composition capable of vesting copyright in editor – Copyright, Designs and Patents Act 1988, ss 1(1), 3(1).

The claimant was an acknowledged world authority on a baroque composer. He had prepared a new edition of one of the composer's works and agreed with the conductor of a choral and orchestral ensemble to prepare new editions of three more works for proposed performance and recording by the defendant company. The claimant registered the new editions with the bodies who licensed the performing and mechanical recording rights in copyright music on behalf of the copyright owners. The defendant's policy was not to pay copyright royalties in respect of musical works which were deemed to be out of copyright by virtue of their age. It refused to sign an agreement prepared by the claimant containing a term to the effect that he was the owner of the copyright subsisting in the four musical scores and imposing various restrictions. A dispute over the copyright position continued up to the recording date. The copyright issues remained unresolved. The recording took place and a compact disc was produced and marketed by the defendant. The claimant brought proceedings seeking an injunction to prevent infringement of copyright and an inquiry as to damages on the basis that he was the author of original musical works within s 1(1)[a] of the Copyright, Designs and Patents Act 1988. Section 3(1)[b] of the 1988 Act defined 'musical work' as 'a work consisting of music'. The primary issue before the court was whether the production of a new performing edition of the score of an existing composition was capable of vesting in the editor copyright in the musical work, as recorded in the score which was produced. The defendant contended, inter alia, that unless an edition included the composition of new music in the form of musical notes on the score, no copyright could exist in the edition as a musical work; that the claimant's work had been essentially transcription; and that the corrections made could have been made in any event by players in rehearsal.

Held – A claim to copyright in a new version of a musical work was not to be rejected simply because the editorial composer had made no significant changes to the notes, whether by correction or addition. That was too rigid a test, and not one which properly respected the reality of what music was. Where the material produced was based on an existing score, the test was whether the new work was sufficiently original in terms of the skill and labour used to produce it. In the

a Section 1, so far as material, provides: '(1) Copyright is a property right which subsists in accordance with this Part in the following descriptions of work—(a) original literary, dramatic, musical or artistic works, (b) sound recordings, films or broadcasts, and (c) the typographical arrangement of published editions.'

b Section 3, so far as material, is set out at [51], below

instant case, to make the works playable, the claimant had transposed from the source material the common notation, and where necessary, had corrected it and recreated missing parts. It was no answer to say that corrections and additions could or would have been made by players in rehearsal; the claimant had spared them that effort by the use of his own skill and labour. Accordingly, each of the claimant's editions was an original musical work. The scores produced by the claimant were the only ones used for the recording, and infringement of the claimant's copyright was made out, save in the case of one of the pieces which, given the size of the movement recorded in relation to the work as a whole, did not involve an infringement. The claim would, accordingly, be allowed in part (see [57], [58], [64]–[67], [70], [83], [86], below).

Notes

For originality, and for dramatic and musical works and adaptations, see 9(2) *Halsbury's Laws* (4th edn reissue) paras 64, 72–73.

For the Copyright, Designs and Patents Act 1988, ss 1, 3 see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 408, 410.

Cases referred to in judgment

Austin v Columbia Gramophone Co Ltd [1917–23] MCC 398.

Francis Day & Hunter Ltd v Bron (t/a Delmar Publishing Co) [1963] 2 All ER 16, [1963] Ch 587, [1963] 2 WLR 868, CA.

Godfrey v Lees [1995] EMLR 307.

Hadley v Kemp [1999] EMLR 589.

Interlego AG v Tyco Industries Inc [1988] 3 All ER 949, [1989] AC 217, [1988] 3 WLR 678, PC.

Ladbroke (Football) Ltd v William Hill (Football) UK Ltd [1964] 1 All ER 465, [1964] 1 WLR 273, HL.

MacMillan & Co Ltd v Cooper (1924) 40 TLR 186, PC.

Redwood Music Ltd v Chappell & Co Ltd [1982] RPC 109.

Stuart v Barrett [1994] EMLR 448.

University of London Press Ltd v University Tutorial Press Ltd [1916] 2 Ch 601.

Wood v Boosey (1868) LR 3 QB 223, Ex Ch.

Cases referred to in skeleton arguments

Autospin (Oil Seals) Ltd v Beehive Spinning (a firm) [1995] RPC 683.

Black v Murray & Sons (1870) 9 M 341, Ct of Sess.

Dicks v Brooks (1880) 15 Ch D 22, CA.

Hutchison Personal Communications Ltd v Hook Advertising Ltd [1995] FSR 365.

Pro Sieben Media AG v Carlton UK Television Ltd [1999] 1 WLR 605, CA.

Ramsden v Dyson (1866) LR 1 HL 129.

Solar Thomson Engineering Co Ltd v Barton [1977] RPC 537, CA.

Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Trustees Co Ltd [1981] 1 All ER 897, [1982] 1 QB 133, [1981] 2 WLR 576.

Warwick Film Productions Ltd v Eisinger [1967] 3 All ER 367, [1969] 1 Ch 508, [1967] 3 WLR 1599.

Claim

Lionel Sawkins brought proceedings seeking an injunction to prevent infringement of copyright and an inquiry as to damages against Hyperion Records Ltd in relation to a compact disc produced and marketed by Hyperion

under the title *Music for the Sun King* consisting of recordings of certain works by Michel-Richard de Lalande in editions prepared by Dr Sawkins. The facts are set out in the judgment.

Andrew Norris (instructed by *Peter Carter-Ruck & Partners*) for Dr Sawkins.
Jacqueline Reid (instructed by *Wiggin & Co*, Cheltenham) for Hyperion.

Cur adv vult

1 July 2004. The following judgment was delivered.

PATTEN J.

INTRODUCTION

[1] Michel-Richard de Lalande was born in 1657. In 1683 he was one of four composers assigned to the chapel of Louis XIV at Versailles. There he became the principal court composer both under Louis XIV and under Louis XV, and he remained in that position until his death in 1726.

[2] His principal compositions at Versailles were sacred music in the form of grands motets. By the middle of the seventeenth century these were an established form of accompaniment for the mass and the principal type of sacred music composed for the French court. A grand motet typically comprises a number of sections divided into passages, some for vocal soloists and others for small ensembles of singers and chorus. They also contain orchestral interludes.

[3] Until comparatively recently Lalande was principally known for some 300 short movements described as 'Symphonies pour les soupers du roi'. These works (as their title suggests) were played at public suppers held at Versailles during the reigns of both Louis XIV and Louis XV. Few of Lalande's grands motets had been revived in performance and the evidence is that until the 1970s none of the motets had been published in full score in what Dr Sawkins, the claimant, regarded as modern performing editions. Dr Stanley Sadie, the distinguished musicologist and editor of the *New Grove Dictionary of Music and Musicians*, who gave expert evidence, had prepared performing editions of some works by Lalande for a recording in 1957 and there had been a handful of other editions, including one in 1964 by JF Paillard of *La grande pièce royale*. But the claimant says that he wished to prepare editions of the best of Lalande's works in full score which met modern critical criteria.

[4] Dr Sawkins is acknowledged to be a world authority on Lalande. In 1996 the French government made him a Chevalier de l'Ordre des Arts et des Lettres, an award which is given to both French and non-French artists and writers who have distinguished themselves by the contribution they have made to the promotion and dissemination of the arts in France and in the wider world. In 2001 he was advanced to the senior rank of an officer of that order. In 1990 and again in 2001 he was invited to act as conseiller artistique for a festival of music by Lalande held in Versailles and Paris. This involved him in advising on the choice of works to be performed at the concerts and in preparing a substantial commemorative book for each festival, as well as the programme notes and texts for each concert.

[5] As one would expect, most of Dr Sawkins's life has been connected with music. He was born in Australia in 1929 and moved to England in 1958. His musical education began as a child, when he attended classes at the New South Wales State Conservatorium of Music and sang with the Conservatorium choir.

He had a particular interest in choral music and acted as a church organist and choirmaster at St Andrews Cathedral in Brisbane. In 1958 he came on a scholarship to study at the Royal School of Church Music and decided to remain in England. From 1959 he was the choirmaster and organist of Holy Trinity parish church in Beckenham, where he founded in 1963 the Beckenham Summer Choral Festival. In 1966 he joined the Roehampton Institute as a lecturer of music and became senior lecturer there in 1969. In 1983 he was appointed principal lecturer. Whilst at Roehampton in 1971 he took a sabbatical year, during which he studied renaissance and baroque music at Nottingham University under Professor Dennis Arnold, who he says directed him towards the music of Lalande. In 1985 he took early retirement from the Roehampton Institute in order to concentrate on his research into French baroque music and to make time to give lectures and workshops on Lalande. This also enabled him to devote more time to the preparation of new editions of his work.

[6] Under the guidance of Professor Arnold he had developed a strong appreciation for European (particularly French) baroque music and became especially interested in the grands motets of Lalande, whose works at the time were largely neglected. His promotion of Lalande's work began with various performances of his work which he conducted in London and overseas and by his encouraging others to do likewise. At the same time he began to research extensively into Lalande and his musical predecessors, aided by bursaries from the French Centre Nationale de la Recherche Scientifique and subsequently from the Winston Churchill Trust. This enabled him to visit all known sources of Lalande's music in the libraries and collections in which they were held.

[7] In his witness statement Dr Sawkins says (and can fairly say) that he has devoted a considerable amount of his working life and also his retirement to Lalande and that he has an extensive knowledge of his musical works and style unrivalled by any other musicologist. He has since 1975 written extensively on Lalande and has had published numerous articles in various books and journals. He has also from time to time presented a number of papers and conducted workshops on Lalande and other French baroque composers at various conferences and symposia held throughout the world. He is a contributor to eight leading musical dictionaries and catalogues in the United Kingdom, France and Germany and has also been contracted by the Oxford University Press to prepare the thematic catalogue of Lalande's works, which includes over 3,000 musical examples prepared under his supervision. This is not a complete account of the contribution which Dr Sawkins has made, but it suffices to give an indication of the depth and quality of his expertise and of his standing as an expert on Lalande.

[8] In October 2001 the defendants, Hyperion Records Ltd (Hyperion), made a recording of four works by Lalande. They were the grands motets *Te Deum laudamus* and *Venite, exultemus*; the *Panis Angelicus* from the grand motet *Sacris solemniis*; and the orchestral piece, *La grande pièce royale*. The works were performed by Ex Cathedra, a choral and orchestral ensemble with a particular reputation for the performance of French baroque music. It was conducted by Mr Jeffrey Skidmore.

[9] Dr Sawkins's case is that during 2001, at about the time when he was approached to organise the festival of Lalande music at Versailles, he discussed with Mr Skidmore the possibility of a concert by Ex Cathedra either at the festival or in England of works by Lalande, and the possibility also of a recording, using scores prepared by Dr Sawkins. The recording would take place in October 2001

and would be used for the production of a compact disc (CD) which would be sold under the Hyperion record label. The possibility of a recording had been discussed as long ago as 1999, and in 2000 Dr Sawkins had sent to Mr Skidmore summaries of various works, including the *Sacris solemniis*, which he considered might be suitable for the recording. It was ultimately agreed that Dr Sawkins would prepare two new editions of the *Venite, exultemus* and the *Sacris solemniis* for the recording and that Ex Cathedra would also use an existing edition previously prepared by him of the *Te Deum*. Subsequently it was decided that Dr Sawkins would also prepare a further edition of *La grande pièce royale* due to his (and, he says, Ex Cathedra's) dissatisfaction with the existing Paillard version. His evidence (which on this is not really disputed and which I shall come to in more detail later in this judgment) is that he worked on the editions from about mid-2000 and completed them in time for the recording. He estimates that he spent approximately 300 hours on each of the four works.

[10] The editions were completed by August 2001, when copies were sent to Mr Skidmore. Dr Sawkins followed his usual practice of registering the three new editions with the Performing Right Society (PRS) and the Mechanical Copyright Protection Society Ltd (MCPS), who license the performing and mechanical recording rights in copyright music on behalf of the copyright owners. On the front page of each of the editions there is the usual assertion of copyright, with the date of the work and the name of the claimant.

[11] The events leading up to the recording are contentious and I will need to come to them in more detail later in this judgment, but what is not in dispute is that in September 2001 Hyperion received from Dr Sawkins, via Ex Cathedra, what was described as a recording hire agreement containing a term to the effect that he was the owner of the copyright subsisting in the four scores and imposing restrictions on what use could be made of the copyright works. The response of Hyperion was to agree that it would credit Dr Sawkins with the authorship of the editions on the CD, but would not be prepared to pay to him any royalties in respect of the copyright works. It refused to sign the agreement and returned it to him. This led to solicitors' correspondence and to an attempt on the part of Ex Cathedra to mediate in the dispute between Dr Sawkins and Hyperion. The primary concern of Mr Skidmore and those at Ex Cathedra was to ensure that the recording went ahead. Dr Sawkins says that he relied to a large extent on assurances given to him by Mr Skidmore and Mr John Pulford, the chairman of Ex Cathedra, that the copyright position would be sorted out with Hyperion, but it is evident that by the date of the recording that had not occurred. The dispute continued right up until the recording date, during which time Dr Sawkins provided Ex Cathedra with copies of his scores, for which he was paid a hire charge. He says that he did not give Ex Cathedra authority to grant a licence to Hyperion to reproduce his works in a recording, but that he was prepared to allow the recording session itself to go ahead, in the hope that the copyright issues would be resolved. In the end they were not. The recording took place and subsequently the CD was produced and marketed under the title *Music for the Sun King*. Dr Sawkins says that this constitutes an infringement of his copyright and also of his moral right to be identified as the author of the copyright works. He seeks an injunction to prevent infringement and an inquiry as to damages.

[12] Hyperion's principal defence to the claim is that Dr Sawkins is not the author of a musical work within the meaning of s 3 of the Copyright, Designs and Patents Act 1988. I was told by Mr Simon Perry, the director and majority shareholder of Hyperion, that the policy of his company is never to pay copyright

royalties in respect of musical works which are deemed to be out of copyright by virtue of their age. The central issue for me to determine in this action is whether the production of a new performing edition of the score of an existing composition is capable of vesting in the editor copyright in the musical work, as recorded in the score which is produced. Hyperion also rely on an alleged licence from Ex Cathedra to record the four Lalande pieces and assert that the claimant in any event either acquiesced in the use of the editions for the purposes of making the recording or alternatively is estopped from relying upon his alleged copyrights to prevent exploitation of the recordings. There is also an issue as to whether or not the performances recorded by Hyperion were in fact of the precise transcriptions provided by Dr Sawkins. These issues turn on the evidence of the events leading up to the recording, which I will come to later in this judgment.

COPYRIGHT IN A MUSICAL WORK?

[13] At the start of his evidence Dr Sawkins explained what his intentions were in creating the new performing editions of the works that were to be recorded. He accepted that his aim was, so far as possible, to reproduce faithfully Lalande's work. It was put to him that the more successful he was at doing this, the more likely it was that he would have produced something close to what the composer had himself originally created. Dr Sawkins accepted the thrust of the question, but emphasised that the determination of whether he as editor had succeeded in producing an edition close to the composer's original intentions was largely guesswork, based on his own knowledge and experience. He could not be certain that what he had produced was what the composer originally intended at all points. What he has done is to use the source material to create what he believes to be an accurate reflection of the composer's own intentions. But the process of editing was also designed to produce a playable edition of the works which would not waste time in rehearsal or during the recording session and which would resolve any ambiguities in the original source material. Although the extant scores often contained most, if not all, of the relevant information, Dr Sawkins said that it needed decoding. He did not accept that his role as editor involved little more than the reproduction in a modern format of the music derived from and set out in the sources. He said that it was not as simple or straightforward as the suggestion put to him. No single source was sufficient to transcribe an accurate and playable version of the music, and the job of the editor was to draw on several sources in order to produce a score and a series of parts which would be playable. The work obviously did involve the transcription of the music from the original scores into modern notation, but that was not the whole story. Even in the case of the *Te Deum*, where the composer's autograph score survives and was used as the primary source, there were what Dr Sawkins described as 'shorthands' all over the score. These needed to be interpreted for the benefit of the performers.

[14] I shall come a little later to the detail of the editing in relation to the works that were recorded, but it was apparent from Dr Sawkins' evidence that his work as an editor did not (and was not intended to) include what might be termed the recomposition of the works in question. He accepted, when it was put to him, that he had not composed what might commonly be described as an arrangement of the music. He preferred to describe them as adaptations. In some instances individual notes were missing or inaccurately recorded, and often flourishes and other performing indications had to be added or corrected. One

particular omission from much of the original source material, which featured significantly in the evidence, was the absence of any figuring. In relation, for example, to the *Sacris solemniis*, even an earlier edition of the full manuscript score (the Cauvin edition) omitted the figuring from all the choruses and some of the other movements. Dr Sawkins said that the figuring in relation to the bass line of a baroque work of this kind was the foundation of the work. Basse continue (meaning continuous bass) is, as Mr Guy Protheroe, the defendants' expert, explained, a feature of most music of the baroque period. It consists of a bass line only, which is to be played on instruments such as the cello, viola da gamba, double bass or bassoon. Another chord-playing instrument such as an organ or harpsichord also plays the bass line, but adds the chords above it, which are drawn from and match the music in the lines above. In order to save this player from having to read all the orchestral parts to work out what chords to play, composers developed what came to be described as a figured bass. This involved placing figures either above or below the notes in the bass line, although the modern practice (followed by Dr Sawkins) is to place them below. Where there is no figure under a note, the convention is that this denotes the most common chord, which Mr Protheroe describes as a root-position chord: ie a triad with a root note, the third above and the fifth above. When (for example) the figure 6 appears, this means that instead of the top of the chord being the fifth note, it is to be the sixth.

[15] Dr Sawkins said that he derived most of the figuring from the other sources, where it was correct and compatible with the full score. Both Dr Sawkins and Mr Protheroe were agreed that the figured bass is intended to give the chord-player guidance, but not to provide what might be described as a complete and inflexible code. The figuring does not always tell the keyboard player what is the complete chord and Dr Sawkins's practice in producing the editions was to reproduce what he described as the minimum possible in order to avoid accidents. It acts in effect as a shorthand for reading the other orchestral and voice parts above the bass line and for playing the harmonies. The performer still has to use his own skill and experience to play what he considers to be the appropriate notes, but Dr Sawkins accepted that this was a skill which nowadays is usual in the case of anyone who is adept or experienced at playing baroque music. One way of assisting the keyboard player is to fully realise the figured bass, and in earlier editions that was occasionally done. But both Dr Sawkins and the experts told me that the practice is now very rare, largely because of the increase in the number of skilled players of baroque music. A fully realised figured bass is also restrictive, and most experienced players prefer to realise the figured bass themselves during performance. Dr Sawkins said that the aim of a modern editor is usually, even when providing a realisation of the figured bass, to give the simplest possible realisation and not to write in what he described as a lot of fancy detail. In the case of the editions which are the subject matter of this claim, no attempt was made by Dr Sawkins to realise the figured bass at all. This was in contrast, for example, to the Paillard edition of *La grande pièce royale*, where there is a full realisation of the figured bass line. The inclusion of the figuring without any realisation leaves the keyboard player with a considerable amount of freedom to play what he considers to be tasteful and useful. Those were the adjectives used by Dr Sawkins. In the present case this is what in fact happened during the recording session. It is evident from the score used by the basse continue player (Dr Ponsford) that he has added his own figuring in a number of places to that provided on Dr Sawkins's edition. Dr Sawkins said that a lot of

what Dr Ponsford had added was not strictly necessary in order to read the music, but simply acted as an aide-mémoire to ensure that during the recording session he did not accidentally play the wrong chord.

[16] In order to understand the task undertaken by Dr Sawkins it is necessary to say something about the state of the source material. Only a very little of Lalande's manuscript work survives. His manuscript scores were offered to the French Royal Library immediately after his death, but could not be purchased due to lack of funds. Lalande's widow, who survived her husband by almost 50 years, hired out copies of her husband's work for various concert performances, and Dr Sawkins suggests that much of the material was either mislaid or simply wore out as a result of use. It may also have been destroyed during the French Revolution. The only complete score that survives of any work by Lalande in his own hand is the composer's working score of the *Te Deum*. Not surprisingly, this contains many corrections and alternatives which require editing before the work can be performed. It is, I think, common ground between the experts that it would not have been possible for Ex Cathedra or any other group to use the manuscript score of the *Te Deum* as a performing edition.

[17] The absence of most of the original manuscript scores means that any editor of a Lalande work has to consult a variety of manuscripts and printed sources dating from the late seventeenth and early eighteenth centuries, the originals of which are distributed amongst a number of libraries. Most of these libraries are in France, but material is also contained in libraries in Austria, Belgium, Germany, Italy, Sweden and the United States. Dr Sawkins says that he has, over time, worked in more than 50 libraries worldwide where Lalande material can be found. Where possible, he worked from the original material, but in many cases it was necessary to look at copies held on microfiche. Much of this groundwork has been carried out by Dr Sawkins over many years, during the course of which he has acquired copies of some of the scores, including the manuscript score of the *Te Deum*. But he does not retain copies of all the sources of all the works. Therefore, in preparing the performing editions of the four works in question here, he had to travel to look at the sources in their various locations and to make a decision about what material to use in preparing the final editions. He did, however, acquire or retain copies of the source material which he decided to use, and he prepared the editions by assembling the score based on the source material, using a keyboard and computer. He worked from a printout of a film of whatever principal source he had chosen and inputted the score note-by-note, line-by-line and movement-by-movement through an electric piano and a Musical Instrument Digital Interface connection, which translates the music played onto the page through the music software. This facility allows the result to be played back at each point, to check for any mistakes in the source, and when the principal source used is defective in some respect, then the problem has to be resolved, for example by the addition of a note or the provision of figuring for the bass line.

[18] Dr Sawkins says in his witness statement (and none of this was disputed) that he kept a running list of all editorial amendments made to the chosen sources and of any unresolved queries. If the editorial process detected a problem in the principal source, it was then usually necessary to check the other available sources to determine what had caused the difficulty. Sometimes this was due to the copyist or engraver having written in the wrong clef or having repeated or missed out a bar, but on other occasions the problem was down to the composer having changed his mind and crossed out or bleached out his first attempt at the

relevant part of the score. Some of the crossings-out would have to be restored in the new edition to create a coherent performable result. This process obviously took a considerable time.

[19] Once Dr Sawkins was satisfied that the correct musical material had been entered onto the prepared scores, the next stage was to lay out the music onto a printed page so as to make each score as readable as possible, whilst at the same time avoiding unnecessary page-turns. This part of the process of course adds nothing to the content of the edition, but does require a detailed understanding of music engraving and is, I am sure, a lengthy and painstaking business. Once it is done, the next task is to extract from the full score a choral score for the use of the choir and parts for each instrument in the orchestra. These extracted parts must then be checked against the full score to ensure that nothing has been omitted. At this stage in the process Dr Sawkins's practice was also to check again the background material for each score, to ensure that nothing had been omitted or required to be revised. At the end of the editorial process the scores were then prepared for printing. Full scores were printed for the conductor, solo singers, keyboard players and record producers; choral scores for the choir; and individual orchestra parts for the relevant players. As I said earlier in this judgment, Dr Sawkins estimates that the total time involved in the preparation of the new edition of each work was 300 hours.

[20] It will be apparent from the process that I have just described that the process of editing undertaken by Dr Sawkins combines the scholarship and knowledge derived from a long and detailed study of the composer's music with a certain amount of artistic inventiveness. Lalande was apparently an inveterate reviser of his own works, so that more than 30 of his 77 grands motets survived in more than one version. It was therefore necessary for Dr Sawkins to establish a chronology of such revisions and then to decide which of the versions to use. In the case, for example, of the *Te Deum*, there are apparently at least four versions which have survived and others of which the existence is known. In his witness statement he says that he has had to use what he describes as his palaeographic and creative musical skills, coupled with his knowledge of the period and the composer's style, to compose the individual parts which are now missing but are thought to have existed. In the case, for example, of *La grande pièce royale*, Dr Sawkins took the view that it was probable that the work was intended to have five orchestral parts, only three of which survive in the source material. Therefore in preparing his edition of that work he composed some parts for the viola in respect of 153 of the work's 268 bars.

[21] This process of restoration is described by him as one of making informed assumptions, and he says that it calls for originality as well as the musicological investigation and work of the kind already outlined. The composition of the missing parts is carried out with the aim of reproducing the composer's original intentions based on the editor's understanding of his musicality, as derived from a detailed study of other works where the full scores survive. It is none the less, within those parameters, a creative process.

[22] Against this general background I now turn to consider what Dr Sawkins claims to have done in relation to the four specific works which are the subject of the performing editions in issue. I can begin with what is in many ways the most contentious, namely *La grande pièce royale*.

LA GRANDE PIÈCE ROYALE

[23] This was the first score to be printed in readiness for the recording session. It was sent to Mr Skidmore in February 2001, together with the orchestral parts. *La grande pièce royale* is an orchestral suite with six linked movements, which dates from about 1695. It is scored for strings, oboes and continuo and includes some solos for the bassoon. There are four sources for the work, all of which are in the Bibliothèque Nationale de France and were consulted by Dr Sawkins. The earliest (dated 1695) is F-PnF533. This presented Dr Sawkins with problems of legibility caused by the ink having soaked through from one side of the folio to the other on certain pages. It was, however, possible for him to see from the ink colour what has been written on each side of the paper. The other difficulty relating to this source is that it gives no specification of the instruments to be used, no figures to the bass line and very little ornamentation. The second source (F-Pn582) comprises a set of four part-books dating from about 1703. The two other sources (F-Pn581 and VM73077) are two collections of Lalande symphonies put together after his death and are the sources on which Dr Sawkins's edition is largely based. Dr Sadie described them as more precisely written and informative, and they include guidance on instrumentation and figures for the bass. The source material indicated to Dr Sawkins that the work was originally performed with second violins and violas or two groups of violas. These parts were missing and Dr Sadie suggests in his report that in Lalande's time they would have been supplied by his assistants. Dr Sawkins therefore, as part of his editing, composed the missing viola parts. As mentioned earlier in this judgment, they take up 153 of the work's 268 bars. In addition to this, he considered that it was necessary to make some 34 of what he described as editorial interventions, to suggest which instruments might play in those places where even the most detailed of the sources (F-Pn581) failed to make that clear. Many of the editorial additions to this work were made to provide the performers with clear instructions as to when and when not to play.

[24] In the case of this edition all the figuring was derived from the original sources and Dr Sawkins was content to adopt it. The bulk of the work related to the creation of the new viola passages and the other performing indications which I have mentioned. Dr Sadie in his report describes the addition by Dr Sawkins of the viola parts as enriching the musical texture of the work in a suitable and stylish way. These inner parts are in his opinion original and exclusive to the edition and were, he says, faithfully played on the CD based on the recording session. They substantially affect the way in which the music is perceived and Dr Sadie's view is that the score does not represent a copy of the Lalande work, but rather a new and original realisation of it.

[25] The defendants accept (in contrast, they say, to the other three works in issue) that the edition of *La grande pièce royale* does include significant recomposition in the form of the viola parts. For the reasons which I shall come to in more detail later, the degree of recomposition involved would normally be sufficient to give rise to copyright in the published work. However, this is challenged in the present case on the basis that the new viola parts are not original but were copied (whether intentionally or not) from the earlier Paillard edition.

[26] This allegation is based on the analysis carried out by Mr Protheroe of the similarities between the Paillard edition and Dr Sawkins's work. The Paillard edition also included two extra instrumental parts. In the Paillard edition the music is laid out on seven staves with separate woodwind parts. Paillard has added a second violin part and only one viola. In the claimant's edition two violas are used and Dr Sawkins has laid out the score in what he describes as authentic

eighteenth century fashion, partly on three and partly on four staves, which are supplemented by the original scoring directions where these survive. So, for example, where in Dr Sawkins's edition the word 'tous' is used to indicate that all the instruments should play, Paillard has written a separate stave for the individual instruments involved. As I mentioned earlier, he has also realised the figured bass.

[27] In his report Mr Protheroe sets out in some detail the results of his analysis of the two versions. He makes the general comment that the additional parts in the Paillard edition are more elaborate than those provided by Dr Sawkins. He then breaks up the parts into sections. In relation to bars 1 to 25 he expresses the view that the extent of the similarity between the Sawkins and the Paillard passages is limited, and such similarities as do exist could be the result of coincidence. However, in relation to the next passage which he concentrates on (bars 54 to 105) there is, he says, a much greater degree of similarity. Most of the notes in the Sawkins edition, in terms of both pitches and rhythms, are the same as those in one or other of the two Paillard parts. In bars 102 to 103 the same phrase appears, an octave lower in Sawkins than in Paillard for a few notes, and also briefly in bars 72 to 73 for two notes. Out of 184 notes in the Sawkins edition, 160 coincide, he says, with notes in the Paillard edition.

[28] The next passage involving added violas which he considers is at bars 137 to 141. Mr Protheroe's view is that, whilst there are some similarities with the Paillard edition, they are not very extensive. The same goes for the next relevant passage, between bars 149 and 157. He says that he has no reason musically to assume that there was any copying in these phrases. The same comment is made in relation to the short sections of added parts in Dr Sawkins's edition which appear between bars 181 to 184, 189 to 192 and 226 to 235. However, in relation to the passages between bars 163 to 170, 197 to 201 and 208 to 211, a much greater degree of similarity is noted. In the passage between bars 163 and 170 Mr Protheroe says that every note in both of the Sawkins parts is matched directly by those in the Paillard parts, except for one, and that most of the rhythms are also similar. Out of 31 notes in the Sawkins edition, 29 coincide with Paillard. In relation to bars 197 to 201 only three notes in Paillard are not the same in Sawkins, and out of 24 notes in the Sawkins edition, 23 coincide with those in Paillard. In relation to bars 208 to 211, out of the 13 notes in the Sawkins edition, 12 coincide with notes in the Paillard edition.

[29] The final section reviewed by Mr Protheroe is the passage from bars 237 to 267. In the Sawkins edition this consists of a single unison viola line. Mr Protheroe says that the similarities between the Sawkins and the Paillard editions are very extensive, with almost every note in the Sawkins viola part corresponding to one or other of the two Paillard parts. Out of 134 notes in the Sawkins edition, 125 coincide with notes in the Paillard edition. Based on these similarities Mr Protheroe expressed the view in his report that the majority of the added viola parts in the Sawkins edition appear to be derived or copied directly from the Paillard edition. This is strenuously denied by Dr Sawkins. In his witness statement he says that the entire concept of his edition is different from that of Paillard and that one is not derived from the other. The Paillard edition was an arrangement for a modern orchestra in the style fashionable at the time, whereas Dr Sawkins has attempted to create an edition in accordance with the musical conventions of the eighteenth century. He also said that the viola parts added by him are generally plainer and simpler, although he acknowledged that during the last 30 bars of the music there are what he describes as some

serendipitous similarities. This is largely due to the limitations imposed by the need for the inner parts to agree harmonically with the existing outer parts. Paillard was of course subject to the same limitations and it was therefore almost inevitable that similarities between the two editions would occur.

[30] Dr Sawkins and both experts were cross-examined at some length about this issue. Dr Sawkins accepted that he had conducted the Paillard edition, but did not like it. He had two copies of the score and a full set of parts, which he had purchased from United Music Publishers Ltd some years earlier. He had also lent his editions to Ex Cathedra and it was, I think, as a result of this that Mr Skidmore expressed his own unhappiness with the quality of the Paillard edition. Dr Sawkins contested the degree of similarity alleged in Mr Protheroe's report. Much of the controversy centred on a table contained in the report which, on the basis of an analysis between the notes in the two editions, produces percentages of similarity for the relevant passages ranging between 87% and 96%. Dr Sawkins accepts that the table accurately records the numbers of identical notes in the passages which Mr Protheroe selected, but criticises this treatment as unrepresentative and unfair. He makes the point, which to some extent Mr Protheroe acknowledged in his report and went on to accept in cross-examination, that in many places the possibilities for the editor were extremely limited. The music in the already existing score largely dictated the composition of the inner parts. His point, however, was that the passages which he wrote were not based on or copied from the Paillard edition, but were derived by his own efforts from those outer parts. This point was also made by Dr Sadie in his report, where he addresses directly the allegation of copying. He says that the actual notes and their dispositions in Dr Sawkins's edition are different from Paillard's, except in so far as the harmony predicates what notes can be used in any particular chord and where the harmonic and contrapuntal implications of the original text demand that two bars be written in a particular way. An example that was put to Dr Sadie in cross-examination, based on one of the passages selected in Mr Protheroe's report as an example of copying, was the passage which appears at bar 59. It was put to Dr Sadie by Miss Reid on behalf of the defendants that at bar 59 the editor had a number of options and was not required to use exactly the same notes. He was asked whether it would have been technically possible to have used a lower octave. He agreed that it would have been technically possible, but that this would have produced a very disagreeable sound. The possibilities were therefore extremely limited in terms of harmony. His general view was that in relation to the passages identified by Mr Protheroe there was very little freedom of choice, if one wanted to stay faithful to Lalande's likely intentions and to produce something that was musically acceptable.

[31] The issue which I have to decide is whether the similarities which exist between the Sawkins and the Paillard versions are due to some form of copying or whether they simply resulted from Dr Sawkins, as part of his independent work, coming to a similar conclusion as to what the dynamics of the existing score permitted him to do. I believe that it was the latter. Having heard Dr Sawkins give his evidence and having taken into account the expert evidence, and in particular the limited freedom which I think both experts ultimately accepted the editor had, I am not satisfied that there was any attempt made by Dr Sawkins to copy the Paillard edition, whether consciously or unconsciously. I regard and find that the added viola parts included by Dr Sawkins in his edition of this work were the product of his own skill and labour, unaided by the Paillard edition.

TE DEUM

[32] The *Te Deum* was composed in 1684, but was later reduced by Lalande to about 70% of its original length. This involved making use of some of the original material, but included a substantial amount of recomposition. By the time of the death of Louis XIV in 1715 the work had again been expanded and new material added. Lalande continued to revise the work over a period of more than 40 years. The source material available to Dr Sawkins consisted of seven manuscript scores, two sets of orchestral parts, a volume of extracts and the posthumous printed edition of 1729, copies of which exist in different libraries and in various private collections. Dr Sawkins concentrated on five versions of the work (each of which he says was interesting in its own right) but he chose as the primary source and the basis of his edition F-Pn, H400D, because it is a score in Lalande's own hand. It also shows the various changes made to the work during the composer's later years. Dr Sawkins says that it was particularly valuable to him as an editor, because it contains much more information about how the work was performed than do the other extant versions. Of particular note is the fact that the composer marked the duration of each movement on the score, which allows the modern performer to calculate the exact tempo that the composer intended. This allowed Dr Sawkins, as part of his editing, not only to put in the tempi for the *Te Deum* in accordance with the composer's own original instructions, but also to suggest the appropriate tempi for the other works which he edited, based on the sort of tempi that Lalande recommended in this case.

[33] In his witness statement Dr Sawkins says that, in all, he made 1,139 corrections to the score of the *Te Deum* and completed or corrected the Latin text in relation to 284 bars, usually in several of the five voice parts. Six hundred and seventy two of the corrections related to the figured bass, of which 319 were not derived from the other source material but were the result of his own interventions, either to correct mistakes or to enhance the performers' comprehension of the chords to be played by adding extra figures. He says that he also made 141 corrections and recompositions of the musical text. This includes the notes for the violas in the second and third stave in bar 46 of *Et rege eos*, which is on p 65 of his edition, together with the notes in the same staves in the three concluding bars on p 66 of the edition. In the autograph score there is no music in these bars for the viola parts, and Dr Sawkins decided that the composer had simply forgotten to put these in because of earlier cuts that he had made.

[34] Although he describes a number of the additional or corrected notes as 'petites notes' which can be regarded almost as a form of ornamentation, Mr Protheroe does not take serious issue with the elements of correction and recomposition claimed by Dr Sawkins in relation to the notation of the work. His real point in relation to these changes is that many of them are relatively minor and would be likely to be added in during performance in any event. He doubts whether some of the alterations would be noticed by most listeners. Similarly, in relation to the figuring of the basse continue, Mr Protheroe's principal point is that the additional or corrected figures add nothing new, as he puts it, to the musical work. This is because (as already explained earlier) the figures act simply as shorthand descriptions of the musical material already contained in the score. I shall return to this point when I come to consider the question of copyright later in this judgment. The only factual issue raised by Mr Protheroe was the absence of any figures in the conductor's score. This is in contrast to the score used by Dr Ponsford, who played the basse continue part on the organ during the

recording session. Dr Sawkins was asked about this and said that what may have happened was that Mr Skidmore had an earlier version of the score, on which the figuring was not included. That explanation was not really challenged and I am content to accept it.

[35] The other matter dealt with at some length in Mr Protheroe's report is the question of ornamentation. Ornamentation is apparently one of the most characteristic features of French baroque music and refers to the decoration of passages in the score by adding what are known as trills on notes. Very often two notes are linked together and the first note acts as a long beginning to the trill on the second note. Dr Sawkins said that this was the most common form of ornamentation and was commonly designated by a cross on the score. Sometimes the composer would use a cross with a slur, which was a more specific indication of a trill on the second note. In the summary of the editorial changes prepared by Dr Sawkins most of the ornamentation is attributed to the manuscript score, yet in the introductory preface to the edition Dr Sawkins records that some additional ornaments and directions are derived from later versions of the work, notably the Cauvin manuscript (F-V, Ms Mus 226). In his report Mr Protheroe says that he has not examined the ornamentation which Dr Sawkins has attributed to the manuscript score, but that in relation to the ornaments identified as originating from himself, many of these are to be found in the Cauvin manuscript. On this basis he says he is led to believe that it is highly likely that Dr Sawkins consulted this source for this purpose in the preparation of the edition. He gives a number of examples of this, the detail of which it is, I think, unnecessary for me to go into. When Miss Reid originally asked Dr Sawkins in cross-examination whether he had incorporated anything from the Cauvin manuscript (in particular, any ornamentation) when preparing the edition, he said that he had not. He said that he was familiar with the Cauvin source and consulted it, but that he did not collate information from it. The source that he did collate information from was primarily the autograph manuscript. What eventually emerged was that Dr Sawkins accepted that in producing his edition of the *Te Deum* in 1984 he did base a number of the ornamentations on the Cauvin source. However, when he came to update the edition for purposes of the recording session in 2001, this ornamentation remained unchanged, and it was therefore unnecessary for him to resort to the Cauvin source for purposes of adding ornamentation. All that he needed to do when he went through the scores using the computer program was to satisfy himself that the ornamentation conformed to what he wished musically to achieve. However, in preparing the summaries of his editorial changes for purposes of this litigation, he accepts that a number of the items of ornamentation for which he has claimed credit are likely to be referable to the Cauvin edition.

[36] The position about the source of the ornamentation may in fact be more complicated than this. As Dr Sadie pointed out, Mr Protheroe, in attributing ornamentation to the Cauvin manuscript, may have misinterpreted the source abbreviations contained in Dr Sawkins's list of editorial changes prepared for this litigation. There the source is often identified as H, which is in fact a reference to the reduced score version printed by Hué in 1729. This point was not fully explored with Dr Sawkins and in any event it does not detract from Mr Protheroe's main submission, which is that much of the ornamentation in the edition is derived from one or other of the existing sources.

[37] Mr Protheroe's conclusion regarding Dr Sawkins's work on his edition of the *Te Deum* is that almost all of it falls into the categories of what he describes as transcription and the provision of performance suggestions and instructions and, with the exception of a small amount of additional notation, does not comprise original material. That comment has of course to be read, in relation to the figured bass, as subject to Mr Protheroe's general view that the figures all derive from the notation which already existed. He does, however, agree with Dr Sadie that Ex Cathedra (or for that matter any other ensemble specialising in baroque music) would not have been able to have performed the works in a recording session using any of the original sources.

SACRIS SOLEMNIIS

[38] Although Dr Sawkins prepared an edition of the whole of the *Sacris solemniis* which was used by Ex Cathedra in concert performances, only one movement was included in the recording. This was the *Panis Angelicus*, the sixth movement. The *Sacris solemniis* was first composed in 1709 and survives in two versions: a manuscript full score which is part of the Cauvin collection and is housed in the Bibliothèque Municipale de Versailles; and a later short score version of about 1720, also engraved by Hué. Dr Sawkins used both versions in preparing his edition and both are reflected in it.

[39] Dr Sawkins says in his witness statement that although the Cauvin version was copied later, it clearly represents an earlier version of the work and contains many errors. The absence of the viola parts from the Hué edition meant that he had to resort to the Cauvin for those movements and to use the Hué for the movements where the complete scoring existed. These were mainly the passages for solo voices and include the *Panis Angelicus*.

[40] Because only this movement was included in the recording, Mr Protheroe has confined his comments to it. If one does that, then Dr Sawkins's editorial input is quite limited. We are dealing with only two pages of music, containing only six claimed editorial interventions. These include the direction (lentement) taken from Cauvin, coupled with a speed direction of 48 beats per minute which is Dr Sawkins's recommendation to the conductor, but which was not in fact followed in the recording. Mr Skidmore took things more slowly at 30–36 beats per minute.

[41] There is a change to the bass line figuring for bar 484, where a 6 with a flat sign is shown. Dr Sawkins has attributed this to the Hué edition and no corresponding marking exists in the Cauvin manuscript. Mr Protheroe repeats his point that this adds nothing to the music, because the notes exist already in the melody lines above. The other two interventions claimed by Dr Sawkins are both classified as items of correction and recomposition of the musical text. The first occurs in bar 502, where on the last crotchet in the Cauvin manuscript there is the pitch G in the bass line. Dr Sawkins has corrected this by reference to the Hué edition, where the pitch A appears. In bar 505, on the fourth quaver, Dr Sawkins has added a sharp to the pitch C which is not in the Cauvin version, but does appear in Hué. Mr Protheroe says that Dr Sawkins is therefore adding nothing to the work which was not in either of the sources used. He considers that the editing of the *Panis Angelicus* also falls within the category of transcription, with the addition of one or two performance suggestions. There is no new music.

[42] Dr Sadie has commented more widely on the edition of the *Sacris solemniis*. Taking the edition as a whole, he says that Dr Sawkins has to conflate

a two sources and therefore to work with both versions throughout. The Cauvin edition has (as Dr Sawkins said) a considerable number of errors in it, particularly in the choral music, and is unfigured. It is clear from the summary which Dr Sawkins has provided that the figures he has supplied come mainly from the Hué edition, with a number of additions of his own. Dr Sadie accepts that the editorial contribution of Dr Sawkins in the *Sacris solemniis* is less extensive than in b the *Te Deum* and *La grande pièce royale*, but it is not, in his opinion, simply a substantial copy of the original.

VENITE, EXULTEMUS

[43] The first version of this work was composed in 1701. It is a large-scale choral and orchestral work in eight movements, which lasts some 26 minutes in c the recording made. The three main sources are: a manuscript full score of 1700–02 held in the Bibliothèque municipale de Versailles; a second full score version in the Cauvin collection, also housed at Versailles, which dates from about 1715; and a reduced score engraved and printed by Hué between 1729 and 1734. The copyist of the manuscript full score was probably a contemporary of d Lalande, but the Cauvin edition is the only one which contains all the instrumental parts.

[44] It is apparent from Dr Sawkins's editorial summary that he relied mainly on the Cauvin and Hué editions. The former contained, he said, a number of errors and he lists some 747 corrections made, including 659 to the figured bass, of which 134 were not derived from any of the sources. He also made 27 changes e in the form of corrections and recompositions of the musical text. Dr Sadie says that the sources for this work are in general quite accurate and, because they are different copies of the same version of the music, conflicts in the musical text are not a problem. There were a small number of wrong notes to be corrected and the figuring had to be added and supplemented to ensure clarity. He concludes f that the editorial changes and additions are not far-reaching, but are large in number. Overall it is less than for the other three works, but it still required skilled and specialist editorial work.

[45] Dr Sawkins accepted that most of the work on the *Venite* related to the figuring for the bass line. He did not have to compose any additional music or parts as such, but corrected a number of wrong notes. Mr Protheroe refers first g in his report to the tempi markings inserted by Dr Sawkins. Although obviously important, both experts accepted that performers will use different tempi (as occurred in this case) and that the tempi markings were therefore advisory and could not properly be regarded as part of the edition as such for copyright purposes. I can therefore pass over to the next category of intervention h considered by Mr Protheroe, which are the performance indications such as the insertion of the word 'doux' at bars 20 and 117. The marking 'Bc' (basse continue) and 'Tous' are also used to indicate respectively where the bass scoring is cut down and where (for example) the chorus is to sing at the same time as the baritone solo. Some but not all of these markings are derived from the sources, j but Mr Protheroe's only comment on them is that they add nothing in the way of new material to the musical work. They are to be classed simply as performing suggestions which are not intrinsic to the work.

[46] The next category comprises the editing of the figured bass. As already indicated, this accounts for 659 out of a total of 747 claimed interventions. Most are derived from the Hué edition or were added by Dr Sawkins himself. Dr Ponsford has, on his copy of the score, added a number of figures of his own

and, in a few cases, corrected the figures provided in Dr Sawkins's edition. Mr Protheroe estimates that Dr Ponsford has added 49 figures himself, but again his main comment is that all the figuring of the bass line is derived from the notes in the lines above and adds nothing new to the work.

[47] The other main editorial area falls under Dr Sawkins's heading of correction and recomposition. This relates to the 27 corrected notes. Some of the corrections are said by Mr Protheroe to be obvious and to be dictated by the notes on either side: eg the C sharp in bar 52. Mr Protheroe says that in every case the corrections are of small errors in the score which are clearly stylistically wrong. He considers that most of these would have been picked up in rehearsal in any event. They certainly tidy up the music, but they are not in themselves, he says, significant. In summary, Dr Sawkins' work on the *Venite* is also said to have been largely transcriptive in nature, with the addition of some performing indications.

[48] That, then, takes me to the two main questions which I have to decide. They are whether, through his efforts, Dr Sawkins has acquired copyright in the four editions as musical works and (if so) whether his copyright has been infringed by the recording made in October 2001 and the subsequent production and sale of the CD.

COPYRIGHT

[49] There is a clear distinction between the charge made for the hire of sheet music and the royalties (if any) payable to the copyright owner for the right to perform or reproduce the musical work. This point was made very clearly by Ms Sarah Faulder, the chief executive of the Music Publishers Association, who said that the distinction was well understood in the industry and that the payment of the hire charge would be generally understood not to carry with it any right to perform or record the work, if still under copyright. This was confirmed by Mr Perry, who said in his witness statement that negotiations about the hire fee have nothing to do with copyright royalties. If the work is in copyright, a royalty will be paid to the composer via the MCPS. However, as mentioned earlier, Hyperion has an established policy, based on its view of the law, that no separate copyright royalties will be paid to an editor or publisher who provides an edition of a composer whose work is out of copyright. The editor will be paid an editing fee for the provision of his edition, but no copyright royalties based on the work. Mr Perry sums the defendants' position up very neatly in his witness statement, where he says that Hyperion's firm view is that it is the composer's work which is recorded and not that of the editor. In support of this position he has produced a document published by the MCPS headed 'Editions—Arrangements' which differentiates between the cases where a copyright royalty is payable and those in which the editor is only entitled to what is described as an edition's fee. This suggests that arrangements of existing music involving the addition to or rearrangement of the work and transcriptions of a work composed for a single instrument into (eg) an orchestral work will qualify for a royalty. The same applies to editions of existing work which involve the completion of work left unfinished by the original composer (eg the last act of *Turandot*). Also included in this category are the realisation of the figured bass or the re-creation of substantial sections of the original score which are missing due to loss and damage to the original. But the assembly of an original work in its original form from various earlier editions based on scholarly research does not qualify for a

royalty unless it includes one or more of the items I have mentioned. In particular, performance suggestions such as tempi and phrasing do not qualify.

[50] It was of course for this reason that Mr Protheroe was asked to analyse the four editions, with a view to determining whether the work undertaken by Dr Sawkins involved any additions or alterations to the musical work. The premise on which the defence is based is in essence that unless the edition includes the composition of new music in the form of the notes on the score (and probably not merely the correction of wrong or unsatisfactory notes in the scores used), then no copyright would exist in the edition as a musical work. This is a point on which there is no clear and obvious authority and it has therefore to be approached as a matter of general principle.

[51] To succeed in this action Dr Sawkins has to establish that each of his editions is an original musical work within the meaning of s 1(1) of the 1988 Act. Section 3(1) of the 1988 Act defines 'musical work' as 'a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music'.

[52] Apart from the cases in which the musical work is commissioned on terms that the copyright belongs to the person placing the commission or where it is composed in the course of employment, the author of the work is the first copyright owner (s 11(1)), but copyright does not exist in the work unless and until it is recorded in writing or otherwise (see s 3(2)).

[53] Finally, infringement of copyright is governed by Ch II of the 1988 Act. The copyright owner has the exclusive right to copy and perform or play the work in public and his copyright is infringed by anyone who, without his licence, does any of those restricted acts (see s 16(1) and (2)). To infringe, however, the defendant must do the restricted act in relation to the work as a whole or to any substantial part of it (s 16(3)); in the case of infringement by copying, this means reproducing it in any material form (see s 17(2)).

[54] What the 1988 Act does not do is to define what is meant by music in the definition of a musical work, and it seems to me that this is what this case is really about. Aside from questions of originality and whether Dr Sawkins has expended sufficient time and effort of the kind necessary to obtain copyright according to established principles, the real issue which divides the parties is whether a musical work includes items such as the figuring of the bass, ornamentation and performance directions or is really limited for copyright purposes to the notes on the score, so that in the case of an existing work nothing less than significant rearrangement of, or significant additions to, the melody will create a new copyright in the edition as a musical work.

[55] Music is defined in the *Shorter Oxford English Dictionary* (3rd edn, 1973) vol II, p 1375 as '[s]ounds in melodic or harmonic combination, whether produced by voice or instruments'. Everyone is familiar with William Congreve's reference to music having charms to soothe the savage breast, which illustrates that as a matter of language music is the combination of sounds which the performers produce, rather than the notation on the score. This is reflected in the definition of a musical work in s 3 of the 1988 Act and its emphasis on the music as the essence of the copyright work. In Laddie, Prescott and Vitoria *The Modern Law of Copyright and Designs* (3rd edn, 2000) vol 1, p 81 (para 3.55), the editors state that—

> 'Music is primarily intended for appreciation by the ear. Hence whenever a question arises in the field of musical copyright, such as originality or

infringement, scholarly analysis may be useful, but the impact on the ear is ultimately more important: what it sounds like matters more than the notes which are written down.'

[56] This passage is based on the decision of Astbury J in *Austin v Columbia Gramophone Co Ltd* [1917–23] MCC 398, which concerned the alleged infringement of the plaintiff's copyright in the music of the opera *Polly*. This was written by John Gay as a sequel to *The Beggar's Opera* and was contained in a volume which comprised the opera in prose form, together with an appendix in which a number of simple airs were printed with an added bass. These were traditional tunes at the time and Gay composed none of the music. The opera remained unknown and unperformed until 1922, when the plaintiff, in collaboration with a lyricist, arranged and composed the music by altering and extending the existing tunes to fit the new lyrics. The opera was a great commercial success and the defendants wished to produce the best airs on gramophone records. The defendants' musical director picked out 20 tunes which he thought were likely to be the most popular, but the plaintiff had already reached agreement with another record company for the recording of parts of the opera as band music and refused to allow the defendants to use his work. They therefore decided to proceed without his consent and sent their musical director to the British Museum to copy from the original Gay edition the tunes which they had selected for recording, in the hope of avoiding any copying of the plaintiff's own music.

[57] The expert evidence indicated, and Astbury J held, that the defendants had deliberately harmonised the Gay material in essentially the same manner as the plaintiff had done, although they had not taken the actual notes used by him. They had imitated the plaintiff's work by using his methods of harmonisation so as to capture the impression made by his own music, on which the production's commercial success was based. This was held to be sufficient to amount to an infringement of his copyright. For present purposes what this case seems to me to illustrate is that questions of originality and infringement cannot be determined simply by a note-for-note comparison of the works in question. A musical work is a combination of melody and harmonies and, as Mr Skidmore said during his evidence, the use of different chords can make a piece of music sound very different. The notes are obviously essential, but they are not the sole determinants of what is heard.

[58] I am not therefore persuaded that one can reject a claim to copyright in a new version of a musical work simply because the editorial composer has made no significant changes to the notes, whether by correction or addition. It seems to me that this is too rigid a test and not one which properly respects the reality of what music is. The question to ask in any case where the material produced is based on an existing score is whether the new work is sufficiently original in terms of the skill and labour used to produce it. This is a test to be applied to any work (musical or otherwise) in which copyright is claimed, and the authorities cited to me are all familiar. In her written submissions Miss Reid relied upon the statement of *Laddie, Prescott and Vitoria* p 79 (para 3.48), in which a musical work is described as—

'in general the product of the mind of a human author which is intended to be performed by the production of a combination of sounds to be appreciated by the ear for reasons other than linguistic content, the originality of the work resulting from the exercise of substantial independent

> skill, judgment or creative labour expended on its creation as opposed to its mere interpretation.'

But the authors a little later make the point that the distinction between interpretation and composition is easier to state than to apply. In *Hadley v Kemp* [1999] EMLR 589 the issue was whether three members of the group Spandau Ballet were entitled to be treated as joint authors of the songs in which copyright was claimed. The songs had been composed at home by another member of the group who was a keyboard player and singer, but then played and learned by the claimants, who added their own interpretation to the performance. Park J held that their contribution as performers was not an original contribution to the creation of the songs. This was an application of the dictum of Blackburne J in *Godfrey v Lees* [1995] EMLR 307, who described the test of joint authorship in these terms (at 325):

> 'What the claimant to joint authorship of a work must establish is that he has made a significant and original contribution to the creation of the work and that he has done so pursuant to a common design. See, for example, *Stuart v Barrett* [1994] EMLR 448. It is not necessary that his contribution to the work is equal in terms of either quantity, quality or originality to that of his collaborators. Nor, in the case of a song, does it matter that his contribution is to the orchestral arrangement of the song rather than to the song itself.'

[59] Two points need to be made by way of qualification to this. The first (which was recognised in Park J's judgment) is that Blackburne J was not referring in the passage quoted to the degree of originality required in order to obtain copyright under what is now s 1(1)(a) of the 1988 Act. He was concerned only to describe the degree and nature of the contribution required in order to establish joint authorship. The second (and related) point is one which is made in the commentary on *Hadley v Kemp* in *Laddie, Prescott and Vitoria*: ie that in the case of musical works the distinction between interpretation and composition may be less likely to exist, the more detailed the notation becomes. Clearly the more comprehensive the instructions to the performers in the score are, the less room there will be for the performers to experiment or improvise. By the same token the composer may, by producing a detailed score of this kind, be able to convey to the audience a more precise version of the music he intended.

[60] The amount of skill and labour necessary to establish a copyright is not very large and is often expressed in negative terms ('not insubstantial'). Nor need it involve inventive thought, although the use of inventive thought is obviously likely to confirm the originality of the work. What, however, the work need not be is unique, and therefore in the case of a musical, just like a literary, work a rearrangement of an earlier work can easily give rise to a copyright. For this reason it is commonly more profitable to argue that there has been no infringement of the claimant's work, rather than to seek to establish that his work enjoys no copyright due to its own lack of originality. The test of infringement is whether the defendant has taken a substantial part of the claimant's own work. If that work is itself in large measure a copy of an earlier work, the test of infringement will obviously be more difficult to satisfy. The purpose of copyright is to protect from misappropriation the skill and labour of the author which is expended on the production of the original work. Anyone can copy the source material. The point is well summarised in the opinion of the Board given by Lord

Atkinson in *MacMillan & Co Ltd v Cooper* (1924) 40 TLR 186, which was concerned with copyright in textbooks containing excerpts from existing works with notes for students. Lord Atkinson said (at 188):

> '... it is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that labour, skill and capital should be expended sufficiently to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.'

[61] In *University of London Press Ltd v University Tutorial Press Ltd* [1916] 2 Ch 601 (a case about examination papers) Peterson J, in a well-known passage, described the requirement of originality in these terms (at 608–609):

> 'The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of "literary work," with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author. In the present case it was not suggested that any of the papers were copied. Professor Lodge and Mr. Jackson proved that they had thought out the questions which they set, and that they made notes or memoranda for future questions and drew on those notes for the purposes of the questions which they set. The papers which they prepared originated from themselves, and were, within the meaning of the Act, original. It was said, however, that they drew upon the stock of knowledge common to mathematicians, and that the time spent in producing the questions was small. These cannot be the tests for determining whether copyright exists. If an author, for the purposes of copyright, must not draw on the stock of knowledge which is common to himself and others who are students of the same branch of learning, only those historians who discovered fresh historical facts could acquire copyright for their works.'

In *Redwood Music Ltd v Chappell & Co Ltd* [1982] RPC 109 Robert Goff J applied this principle to various arrangements of a popular song, 'Zing'. It had been submitted to him that an arrangement of an existing work only attracted a separate copyright if it involved great skill and labour. After quoting the passage from the *University of London Press* case referred to above, he went on as follows (at 115–116):

> 'That passage was cited with approval in the House of Lords in *Ladbroke (Football) Ltd.* v. *William Hill (Football) Ltd* ([1964] 1 All ER 465 at 469, [1964] 1 WLR 273 at 277–278) per Lord Reid, where he stated that there was no dispute about the meaning of the term "original". It is on this basis, of course, that there may be copyright in works of a comparatively humdrum nature, such as straightforward translations; though of course such copyright may be of little value, because another such work may be produced without difficulty, without recourse to the copyright work. I should add that the decision in *Wood* v. *Boosey* (1868) LR 3 QB 223, relied on by Mr. Bateson,

a although decided before the Copyright Act 1911 and not therefore decided as a matter of construction of the statutory words "original work", is in my judgement consistent with the test proposed by Peterson J. The case was concerned with the question whether a piano reduction by Brissler of Nicolai's opera *The Merry Wives of Windsor* attracted a separate copyright in the arrangement, or whether the copyright in the piano reduction belonged b to the owner of the copyright in the original opera. In holding that the piano reduction was an independent composition in which the arranger, as author, owned the copyright, the Court of Exchequer Chamber considered the questions whether it was "a new and substantive work in itself" (at 229 per Kelly CB), or whether there was "something in the nature of authorship in Brissler" (at 233 per Bramwell B)—tests at least consistent with that now c adopted in relation to the statutory definition under the Acts of 1911 and 1956.'

[62] Faced with these authorities, Miss Reid principally relied on the decision of the Privy Council in *Interlego AG v Tyco Industries Inc* [1988] 3 All ER 949, [1989] AC 217. This raises the question as to what constitutes the right kind of skill and d labour required for copyright purposes. The case concerned toy building bricks manufactured by Lego in accordance with engineering drawings made for that purpose. The relevant issue for present purposes was whether new drawings made since 1972, which altered the original drawings in various minor respects but added new information addressed to the purchaser in the form of written e instructions, gave rise to a new and independent copyright. The Privy Council held that not every minor alteration created a new copyright and that skill, labour and judgment expended solely in the process of copying could not confer originality. There had to be some additional element of material alteration sufficient to make the work an original work. It was the quality rather than the quantity of the addition which merited protection. Lord Oliver of Aylmerton f said ([1988] 3 All ER 949 at 971–972, [1989] AC 217 at 262–263):

'Take the simplest case of artistic copyright, a painting or a photograph. It takes great skill, judgment and labour to produce a good copy by painting or to produce an enlarged photograph from a positive print, but no one would reasonably contend that the copy painting or enlargement was an "original" g artistic work in which the copier is entitled to claim copyright. Skill, labour or judgment merely in the process of copying cannot confer originality ... There must in addition be some element of material alteration or embellishment which suffices to make the totality of the work an original work. Of course, even a relatively small alteration or addition quantitatively h may, if material, suffice to convert that which is substantially copied from an earlier work into an original work. Whether it does so or not is a question of degree having regard to the quality rather than the quantity of the addition. But copying, per se, however much skill or labour may be devoted to the process, cannot make an original work. A well-executed tracing is the result of much labour and skill but remains what it is, a tracing. Moreover, j it must be borne in mind that the Copyright Act 1956 confers protection on an original work for a generous period. The prolongation of the period of statutory protection by periodic reproduction of the original work with minor alterations is an operation which requires to be scrutinised with some caution to ensure that that for which protection is claimed really is an original artistic work.'

[63] There can be no doubt that Dr Sawkins has applied to the task of editing the four editions under consideration considerable skill and labour based on his own expertise in respect of Lalande. The work was laborious and painstaking and extended over a considerable period of time. The defendants do not contest this and Mr Protheroe, on whose report their case is based, acknowledges the quality of Dr Sawkins's scholarship. His point (as already elaborated) is that Dr Sawkins, in his quest to create editions which follow as faithfully as possible what he believes Lalande would have intended, has not utilised the right kind of skill and labour. Instead of producing an original work he has to a very large degree reproduced the relevant contents of the source material. This, to use Mr Protheroe's word, is transcription (ie copying). It is not the creation of new music.

[64] I do not accept this. It is common ground that none of the works included in the CD recording could have been performed by Ex Cathedra using any of the earlier extant scores, except perhaps the Paillard edition of *La grande pièce royale*. To make the works playable Dr Sawkins has transposed from the source material the common notation and, where necessary, has corrected it. The early source material for *La grande pièce royale* has the viola parts missing. Dr Sawkins recreated these and, for the reasons already explained, I am satisfied that this did not involve copying from the Paillard edition. Absent this point, these recreated passages are sufficient in themselves to create a separate copyright in favour of Dr Sawkins in his edition of that work. In any event it contains a number of bars where the music differs from the Paillard edition.

[65] The *Te Deum* contains much less in the way of new composition, but the corrections and additions made to the notation were necessary in order to make the work playable. It is no answer to say that they could or would have been corrected by the players in rehearsal. That is not the test. They were in fact corrected by Dr Sawkins as part of his work and they represent the exercise by him of skill and judgment in relation to the choice of alternative notes. The same point can be made about the figuring to the bass line. The figured bass has not been realised, but Dr Sawkins has made over 600 corrections to the bass figuring, of which 319 were his own. Mr Protheroe seeks to categorise this work as not original or inventive, because it is derived from the melody and the lines above. But that misses the point. The work does not have to be inventive. It has to be original. If (as in this case) Dr Sawkins has constructed a figured bass designed to ensure that the correct harmonies are played, it is no answer that the performers could have, by their own efforts, achieved the same result. Dr Sawkins has spared them that effort by the use of his own skill and labour, and in so doing has produced an edition containing the harmonies which, in keeping with baroque music, are essential to its proper realisation and, in the form in which they appear, are not mere reproductions of an earlier version.

[66] Only one movement of the *Sacris solemniis* was performed and the *Panis Angelicus* is very short and contains only a handful of alterations. Viewed by itself, this has to be regarded as a more marginal case. If one ignores the speed directions which everyone seems to accept are not part of the music, then it leaves the corrected notes and one correction to the figuring. In qualitative terms these are important. The only question is whether they are too few in number. The scale of the editorial interventions is not sufficient to create a new copyright in favour of Dr Sawkins if the *Panis Angelicus* is looked at in isolation. But I would have been inclined to the view that Dr Sawkins does have copyright in his edition of the *Sacris solemniis* as a whole. If one approaches the matter in this way, then

the question is simply whether the use by Hyperion of the *Panis Angelicus* alone constitutes the taking of a substantial part of the claimant's work. Given the size of the movement in relation to the work as a whole, I do not consider that this did involve an infringement of the claimant's copyright.

[67] In the case of the *Venite* most of the work relates to the figured bass, although some 27 wrong notes fell to be corrected. These are said by Mr Protheroe to be obvious changes, but for the reasons already given this criticism is irrelevant to the question of copyright. If one ignores changes to the tempi markings and concentrates on the figured bass, then there are 659 corrections, of which 134 are not derived from the Hué source or elsewhere. Mr Protheroe estimates that the basse continue player (Dr Ponsford) added 49 figures of his own, but this is relevant only to the question of infringement. As already explained, I do not accept that changes or additions to the figured bass are not capable of adding qualitatively to the musical work and I consider that Dr Sawkins did therefore acquire copyright in his version of the *Venite*.

INFRINGEMENT

[68] As already explained, it is in relation to the question of infringement that the scale of the original material produced by the copyright author comes to be tested. The issue is whether Hyperion has appropriated for itself in the recording it made a substantial part of the claimant's own skill and labour expended on the creation of the original work. In so far as the editions contain (for example) notation which can be traced back unaltered to the original sources, then the test is not satisfied. It is to the original editorial input of Dr Sawkins that the inquiry has to be directed. The copyright work must be the source from which the infringing work is derived: see *Francis Day & Hunter Ltd v Bron (t/a Delmar Publishing Co)* [1963] 2 All ER 16, [1963] Ch 587.

[69] I can deal with this issue quite shortly. The evidence of Dr Ponsford is that the scores produced by Dr Sawkins were the only ones used for the recording. He says that he followed these editions when playing the works. This included the chords indicated by the figured bass, although he seems to have added some additional figures of his own. It was not put to him by Miss Reid that the claimant's editions were not used or that the scale of his own additions to the score meant that he had not performed Dr Sawkins's version of the work. His evidence was not contradicted by any other witness. Mr Skidmore accepted that the Sawkins editions were the only scores used. He also gave evidence about the ability of performers to interpret and depart from a score, but this evidence was given in general terms and not in relation to the specific recording session under consideration. It does not therefore assist me on the question of infringement.

[70] On the basis of Dr Ponsford's evidence, which I accept, the case of infringement is established except in relation to the *Panis Angelicus*, for the reasons already given. The evidence of the experts on this point is less reliable, because neither was present at the recording session and they have to address the question of infringement simply by listening to the CD. Nevertheless there is little in their evidence to contradict Dr Ponsford. Dr Sadie said that the overwhelming majority of editorial interventions marked up by Dr Sawkins were included in the performance. Mr Protheroe accepted that most of them had been included. In the case of *La grande pièce royale* only three items were omitted and these were only performing indications. The added parts were all performed. In the *Te Deum* all the bass figures were followed, together with all the corrected notes. Again the omissions were only performing indications and one item of

ornamentation. In the case of the *Venite* two figures out of 659 were omitted and one performing indication. It follows that infringement is made out in the case of three of the works.

CONSENT/ACQUIESCENCE

[71] The allegation that Dr Sawkins consented to the recording is put in three ways in the defence: (i) that Ex Cathedra were permitted to use the editions for the recording session and were therefore entitled to grant a sub-licence to Hyperion to record the relevant works; (ii) that Dr Sawkins himself granted an implied licence to Hyperion by accepting an editing fee of £1,267; and (iii) that faced with Hyperion's refusal to acknowledge his copyright or to pay a copyright royalty, Dr Sawkins allowed the recording session to go ahead and therefore was to be taken to have consented to the recording and the subsequent issue of the CD.

[72] In order to explain why none of these defences succeeds, it is necessary to outline the events leading up to the recording session. By June 2000 discussions were under way between Dr Sawkins and Mr Skidmore about which works might be included in a CD, and Dr Sawkins had provided his summaries of the works. At this time and until May 2001 the general manager of Ex Cathedra was Mr Justin Lee. His main concern was to find a record company which would produce the CD and meet all the recording costs. Prior to this Ex Cathedra had paid the recording costs itself and received royalties, but Mr Lee wanted to find a company which would meet the costs and pay Ex Cathedra for the recording, so that it was not dependent upon the success thereafter of the CD. He met Mr Perry and his late father in about May 2000. He cannot recall if he told them that Dr Sawkins would produce the editions, but he knew that Ex Cathedra had worked with him in the past and that he was a reliable source.

[73] Hyperion responded positively to the suggestion of a Lalande recording on these terms and only the question of fees remained to be resolved. On 15 June 2000 Mr Lee sent Mr Perry an email about the works to be included and raised the issue of an editor's fee. He asked Mr Perry what his normal arrangements with editors were and whether it was a one-off fee. He also said that he wished to tackle this issue early, because Dr Sawkins could be quite 'determined' on the question of fees and if necessary he would be able to approach another editor. Mr Perry said that he told Mr Lee that Hyperion would pay an editor's fee, but the amount needed to be agreed. Royalties were not mentioned and, as indicated, Hyperion was not willing in any event to pay a royalty. Mr Lee accepted that at no time, either in 2000 or until he left Ex Cathedra in May 2001, did Dr Sawkins have any direct negotiations with Hyperion. He also accepted that he probably did not tell Hyperion during this period that Dr Sawkins wanted copyright royalties and that, had he done so, Hyperion would have requested another editor.

[74] Dr Sawkins's concern in 2000 was to get the editions completed. In early 2001 he was hospitalised for a time, which delayed progress. He accepts that he did not at this stage say to Ex Cathedra that he would only produce the editions on the basis that he was paid a royalty. He said that he expected events to take what he described as an honourable and decent course, and that a royalty would be agreed and paid. For this reason he registered the three new editions with the MCPS and asserted copyright on the face of the editions themselves.

[75] By August 2001 the editions were complete and had for the most part been delivered to Mr Skidmore. Mr Lee had by now left Ex Cathedra, but no editor's fee had yet been agreed. Mr Perry said that he assumed from

Ex Cathedra's silence on this point that matters had been settled in accordance with Hyperion's usual policy. It was not until 11 September 2001 that Mr Skidmore sent him an email about the sleeve-notes, which confirmed that Dr Sawkins' editions were to be used. The question of the form of the sleeve-notes was not urgent and could be left until after the recording, but Mr Perry accepted that as of 11 September 2001 he knew that he needed to agree a fee.

[76] It is clear that Dr Sawkins had expected to hear from Hyperion by now. On 6 August 2001 he wrote to Mr Skidmore enclosing the scores of the *Venite* and said that there was still no word from Hyperion. On 21 August he sent to Mr Skidmore an estimate of the hire charges for the use of the scores. In the final paragraph of his letter he said this:

> 'I assume that Hyperion are aware that all three editions are registered with PRS and MCPS and will be eligible for the usual royalties unless they wish to make an offer in lieu.'

[77] By September Dr Sawkins had still heard nothing from Hyperion, but on 24 September they received from him a 'Recording Hire Contract' with a request to sign it and return a copy to him. This was the first direct contact between Dr Sawkins and Hyperion and it made clear to Hyperion that he was asserting copyright in the editions. The contract sets out a hire charge for the music of £1,350. Clauses 3 and 4 provided as follows:

> '3. The material is supplied solely for the above-mentioned recording. It must not be used for any other mechanical reproduction whatsoever, including silent or sound films, video, television, or radio transmission unless expressly agreed in writing in advance. Signature of this contract does not authorise Hyperion records or Ex Cathedra to sell on, or pass on the Matrix, nor to reissue such recording at a later date without further negotiation with Lionel Sawkins. All rights in this edition, including publication, performance and subsequent recordings by other parties are retained by Lionel Sawkins.
>
> 4. The Recording is notified to the Performing rights organisation of the country of recording, and the name of the copyright owner (Lionel Sawkins) is clearly stated on the recording packaging, the enclosed booklet and the recording itself.'

Ex Cathedra was also invoiced for the music hire charges.

[78] On 12 October Mr Perry responded to the recording hire contract in an email sent to Lucy Reid, who was the new general manager of Ex Cathedra. In his email he stated that portions of the contract were totally unacceptable to Hyperion and that the company was unwilling to pay any copyright fee. He went on to say that Hyperion's view was that the works of Lalande were out of copyright and that once the recording had been made, the right of the recording would belong to Hyperion. A copy of this email was sent to Dr Sawkins. It obviously caused much concern to Ex Cathedra. Their principal and, in reality, only objective was to get the recording done. The terms agreed with Hyperion were favourable to them and the recording would be important in raising their profile as an ensemble. Mr Skidmore sent an email to Dr Sawkins the following day, asking whether it would be possible for him to say to Hyperion that whatever negotiations took place, Ex Cathedra would be able to go ahead with the recording. Dr Sawkins told him in a letter sent on 15 October that he accepted that it was desirable that the recording should take place. Both

Ex Cathedra and Dr Sawkins wanted (although for different reasons) to produce a successful CD of Lalande's work. Dr Sawkins asked Mr Skidmore to negotiate with Hyperion and said that he would be prepared to consider an alternative to a royalty if Hyperion wished to offer this. The letter makes it clear, however, that Dr Sawkins rejected Hyperion's stated understanding of the copyright position.

[79] On the same day Mr Perry wrote direct to Dr Sawkins, agreeing to the hire fee but rejecting the claim to a royalty or other payment based on copyright in the editions. As in the earlier email, the right to release the recording in the form of a CD as its own property was also asserted. Dr Sawkins said he was shocked to receive this letter, but accepted that it made Hyperion's position clear. By now he had taken advice from Finers Stephens Innocent (solicitors) and on 17 October they wrote to Mr Perry in these terms:

> 'To date, notwithstanding Hyperion's wish to record the Works, no agreement has been reached between our client and Hyperion according to which our client has consented to Hyperion's use of his copyright material. In the circumstances, please be aware that any unauthorised use of our client's Works (and any infringement of his copyright therein) will entitle our client, at his discretion, to seek injunctive relief and/or damages amongst other remedies. Please accept this letter as notice that should Hyperion proceed on the basis outlined in your letter of 15th October 2001 addressed to our client, a copy of which is attached, we anticipate receiving instructions to fully protect our client's rights. Without prejudice to the foregoing, our client fully and unequivocally reserves his rights.'

[80] At this point Mr John Pulford also became involved. He was the chairman and a non-executive director of Ex Cathedra. He was contacted by Lucy Reid and told that there was a problem about the recording. He said that he became involved with a view to enabling the recording to proceed. To this end he telephoned Dr Sawkins and asked him whether there was any way in which the recording could go ahead. Dr Sawkins told him about his claim to a copyright royalty and Mr Pulford offered to mediate in the dispute with Hyperion. Dr Sawkins's evidence (which I accept) is that he believed that Mr Pulford would be able to resolve matters satisfactorily. Mr Pulford confirmed to me that he was not to act as an agent for either party in these discussions, but would simply take on the role of an honest broker. On 17 October he sent a fax to Mr Perry, in which he said that he had told Dr Sawkins that Ex Cathedra would buy out his right to royalties and that the earlier recording hire contract could therefore be amended by varying cl 4. This was copied to Dr Sawkins, who sent a fax to Mr Pulford in reply, stating that the proposal made to Hyperion did not fully comply with what he had agreed and that Hyperion in any event would need his consent in relation to film rights and the like. He did, however, send an amended invoice for the hire charges to Hyperion, which states as one of its terms that—

> 'Payment of this invoice relates to use for the above-mentioned recording and does not entitle the hirer to use the recording for any other mechanical reproduction whatsoever unless expressly agreed in writing in advance. Payment of this invoice does not entitle the hirer to sell on or pass on the Matrix, nor to reissue such recording at a later date without further negotiation with Lionel Sawkins. All rights in these editions as notified to

PRS Ltd and MCPS Ltd including publication, performance and subsequent recordings by other parties are retained by Lionel Sawkins ...'

[81] Mr Perry told Mr Pulford that he was not prepared to countenance any restriction on future reproduction rights, and the amended contract was never signed. However, Mr Pulford did not make contact with Dr Sawkins about this, nor did he make any attempt to follow up the suggestion that Ex Cathedra should buy out his right to a royalty. Mr Pulford accepted in cross-examination that this suggestion was made in an attempt to ensure that the recording went ahead, and it is clear to me that Ex Cathedra really played both sides off to ensure that the recording did proceed. Once it had taken place, Mr Pulford said that he took no further part in the matter. Ex Cathedra could then leave it to Hyperion and Dr Sawkins to sort out their differences themselves.

[82] It is clear that Dr Sawkins expected Hyperion to sign the contract as amended by Mr Pulford. When this had not occurred by 19 October, he told Mr Skidmore that the remaining recording sessions (which had begun that day) might be in danger. In the event he did not remove the music from the stands and allowed the recording to be completed. When asked about this, he said that it was because he thought that he was protected and could prevent the future use of the recording based on his copyright. He also believed that Mr Pulford was attempting to resolve the issue. When it eventually became clear that Ex Cathedra could not assist in this, he wrote to Mr Perry on 6 February 2002, before the CD was made, asking that his copyright be acknowledged and reaffirming his rights as set out earlier in the solicitors' letter.

[83] It is clear to me that both Dr Sawkins and Hyperion went into the recording session to some extent at cross-purposes. Due to Mr Pulford's intervention Dr Sawkins was led to believe that Hyperion would agree to the contract on amended terms which still preserved his right to control future reproduction of the recording. Mr Perry, on the other hand, had always made clear to Ex Cathedra his rejection of that position. But these circumstances make it impossible to spell out of the mere fact that the recording session was allowed to go ahead any licence or other agreement to the production by Hyperion of a CD, except upon payment of an appropriate copyright royalty. Dr Sawkins gave Ex Cathedra no authority to grant such a licence to Hyperion, nor is there any evidence that it did so. Once the recording session was over and they were paid, Ex Cathedra's involvement was at an end. The fee of £1,267 was paid, but the invoice makes it clear that this was not in payment for the grant of a licence to make further copies of the recording. Not only was no licence ever given of the kind alleged, but it is also apparent from the evidence that Hyperion never believed it had such a licence. Its position throughout was that Dr Sawkins had no relevant copyright to assert and that no licence was needed in order to produce the CD. Mr Perry never therefore sought a licence and was unwilling even to sign the amended contract put forward by Mr Pulford. These defences therefore fail and Dr Sawkins is entitled to judgment on his copyright claims in respect of *La grande pièce royale*, the *Te Deum* and the *Venite*.

MORAL RIGHTS

[84] Dr Sawkins also alleges that his moral right to be identified as the author of the work comprised in the editions has been infringed. The booklet enclosed with the CD contains the line: 'With thanks to Dr Lionel Sawkins for his preparation of performance materials for this recording.' Mr Norris submits that this is inadequate. It does not identify the claimant as the author of the musical

work, as required by s 77(1) of the 1988 Act. The reference to 'performance materials' is unclear and considerably understates what Dr Sawkins has in fact done. He also makes the point that where the author, in asserting his right to be identified under s 78, specifies a particular form of identification, then s 77(8) requires that form to be used. In this case the assertion of the right to be identified was made in the letter of 6 February 2002, in which Dr Sawkins said that the sleeve-notes must carry the legend: '© Copyright 2002 by Lionel Sawkins'. This has not been observed.

[85] I agree with these submissions. Although Dr Sawkins is named, he is not identified as the author of the copyright work. The sleeve has to clearly convey Dr Sawkins's authorship to all possible readers and not simply to those who might have some inside or particular knowledge of what to infer from the words that have been used. The fact is that there was no intention of identifying Dr Sawkins as the author of the musical work and the sleeve-notes do not do so. This part of the claim also succeeds.

CONCLUSION

[86] It follows that there will be judgment for the claimant in relation to his editions of *La grande pièce royale*, the *Te Deum* and the *Venite*, but not the *Panis Angelicus*. Absent agreement, I will hear counsel on the question of the form of relief to be granted and costs.

Claim allowed in part.

Pamela Hardisty Barrister.

Crossley v Faithful & Gould Holdings Ltd

[2004] EWCA Civ 293

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, DYSON AND THOMAS LJJ

24, 25 FEBRUARY, 16 MARCH 2004

Employment – Contract of service – Implied term – Whether implied term of contract of employment that employer would take reasonable care for economic well-being of employee.

The claimant was a long-standing senior employee and director of the defendant company. Under the terms of his contract of employment the claimant became a member of the defendant's group long-term disability insurance scheme (the scheme). So long as the claimant remained in the defendant's employment, he was entitled as of right to benefits under the scheme and after the termination of his employment with the defendant, benefits were payable at the discretion of the insurers. In late 1996 the claimant suffered a nervous breakdown. He went on sick leave in December, and never returned to work. His psychiatrist advised him to pursue an application for early retirement on mental health grounds and the claimant accepted that advice. In April 1997, on the advice of his consultant psychiatrist, he wrote to the defendant stating that he wished to pursue his application for early retirement. The defendant applied for benefits under the scheme on the claimant's behalf in early May. Thereafter discussions took place between the parties about the arrangements for the claimant's leaving. The defendant requested a letter from the claimant confirming the date of his retirement and the claimant sent such a letter, using a form of words provided by the defendant. The effect of the termination of the claimant's employment was that he ceased to be entitled to benefit under the scheme as of right. In the exercise of its discretion, the insurers paid benefit for a year after the claimant's date of retirement, but not thereafter. The claimant claimed damages against the defendant for breach of an implied term of his contract of employment to take reasonable care for his economic well-being (i) by asking him to submit a resignation letter knowing that he was applying for benefits under the scheme and that resignation would seriously prejudice his entitlement to such benefits; or (ii) by failing to warn him of the effect which resigning from his employment would have on his entitlement to benefits under the scheme. The judge dismissed the claim and the claimant appealed.

Held – No general duty on the part of an employer that he would take reasonable care of the economic well-being of his employees was to be implied into a contract of employment. Such an implied term would impose an unfair and unreasonable burden on employers. It was one thing to say that, if an employer assumed the responsibility for giving financial advice to his employee he was under a duty to take reasonable care in the giving of that advice, but it was quite a different matter to impose on an employer the duty to give his employee financial advice in relation to benefits accruing from his employment, or generally to safeguard the employee's economic well being, and there were no obvious policy reasons for doing so. Moreover, such an implied term was inconsistent with the approach adopted by the House of Lords. In the instant

case, the judge had been correct to find that the defendant had not assumed any responsibility in relation to the question whether the claimant should terminate his contract rather than remain as an employee on permanent sick leave and that the claimant could reasonably have been expected to be aware of the relevant provisions of the scheme. The appeal would therefore be dismissed (see [33], [42]–[44], [47], [49], [51], [54]–[56], below).

Scally v Southern Health and Social Services Board (British Medical Association, third party) [1991] 4 All ER 563 and *Spring v Guardian Assurance plc* [1994] 3 All ER 129 considered.

Notes

For an employer's obligations under a contract of employment generally, and for implication of terms into a contract of employment, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) paras 21–30, 74.

Cases referred to in judgments

Hagen v ICI Chemicals and Polymers Ltd [2002] IRLR 31.

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, [1964] AC 465, [1963] 3 WLR 101, HL.

Johnson v Unisys Ltd [2001] UKHL 13, [2001] 2 All ER 801, [2003] 1 AC 518, [2001] 2 WLR 1076.

Lennon v Metropolitan Police Comr [2004] EWCA Civ 130, [2004] 2 All ER 266.

Liverpool City Council v Irwin [1976] 2 All ER 39, [1977] AC 239, [1976] 2 WLR 562, HL.

Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq) [1997] 3 All ER 1, [1998] AC 20, [1997] 3 WLR 95, HL.

Outram v Academy Plastics [2000] IRLR 499, [2001] ICR 367, CA.

Reid v Rush & Tompkins Group plc [1989] 3 All ER 228, [1990] 1 WLR 212, CA.

Scally v Southern Health and Social Services Board (British Medical Association, third party) [1991] 4 All ER 563, [1992] 1 AC 294, [1991] 3 WLR 778, HL.

Spring v Guardian Assurance plc [1994] 3 All ER 129, [1995] 2 AC 296, [1994] 3 WLR 354, HL.

University of Nottingham v Eyett [1999] ICR 721.

Cases referred to in skeleton arguments

Aspden v Webbs Poultry & Meat Group (Holdings) Ltd [1996] IRLR 521.

Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642, [2003] 1 All ER (Comm) 140, [2003] 1 WLR 577.

Briscoe v Lubrizol Ltd [2002] EWCA Civ 508, [2002] IRLR 607.

Brompton v AOC International Ltd [1997] IRLR 639, CA.

Designers Guild Ltd v Russell Williams (Textiles) Ltd [2001] 1 All ER 700, [2000] 1 WLR 2416, HL.

Appeal

The claimant, Michael Victor Crossley, appealed with permission of Judge Langan QC from his decision on 30 June 2003 in the Leeds District Registry dismissing the claimant's claim for damages against the defendant, Faithful & Gould Holdings Ltd, his former employer, for damages for breach of implied terms of his contract of employment. The facts are set out in the judgment of Dyson LJ.

Antony White QC (instructed by *Ford & Warren*, Leeds) for the claimant.
John Cavanagh QC and *Daniel Oudkerk* (instructed by *Clyde & Co*, Guildford) for the defendant.

Cur adv vult

16 March 2004. The following judgments were delivered.

DYSON LJ (giving the first judgment at the invitation of Sir Andrew Morritt V-C).

[1] This is an appeal brought with the permission of the trial judge against the judgment of Judge Langan QC delivered on 30 June 2003 dismissing the claimant's claim for damages against the defendant, his former employer, for breach of implied terms of his contract of employment. The judge gave permission to appeal because it was recognised on both sides that the appeal raises 'difficult, and highly debatable, questions in a developing area of employment law'.

[2] The claimant was a long-standing senior employee and director of the defendant company. Under the terms of his contract of employment, if he was absent from work due to illness, he was entitled to be paid his full salary for up to six months absence in any period of six months, and thereafter such remuneration as the board of the defendant might in its discretion allow. By cl 13 of his contract of employment, the claimant became a member of the defendant's Group Long Term Disability Insurance Scheme (the scheme). The insurers were UNUM Ltd (UNUM). It is unnecessary to set out the details of the scheme. Suffice it to say that so long as the claimant remained in the defendant's employment, he was entitled as of right to benefits in the event that he was 'totally unable by reason of sickness ... to follow his Occupation'; and after the termination of his employment with the defendant, benefits were payable at the discretion of UNUM.

[3] At all material times, Richard Hall was the managing director of the defendant. He had, among other duties, overall responsibility for all types of insurance taken out by the defendant. He would not, however, ordinarily deal with an individual claim. David Ridley became acting chairman of the defendant in February 1996 and chairman one year later.

[4] Thomas Suffell was an insurance broker and director of Castlegate Insurance Brokers Ltd (Castlegate). Much of the defendant's insurance was arranged through Castlegate, including permanent health insurance under the scheme. If a claim was made under the scheme, Mr Suffell would act as intermediary between the defendant and UNUM. As well as dealing with the defendant, Mr Suffell was also adviser to a number of the directors on their individual pension arrangements. These directors included the claimant: he and Mr Suffell had known each other since about 1985.

[5] In February 1996, the shares in the defendant company were sold to WS Atkins Ltd (Atkins). On completion of the sale, it became a wholly-owned subsidiary of Atkins. As consideration for his shares, the claimant received £777,806 in cash and 444,298 new shares in Atkins. In February and March 1997 the claimant attended meetings with representatives of KPMG (accountants) to discuss means by which the shares could be sold without incurring a liability for capital gains tax (CGT).

[6] In late 1996, he had suffered a nervous breakdown and was advised by Dr Beaini, his consultant psychiatrist, to consider taking early retirement on

health grounds. He went on sick leave on 6 December 1996, and never returned to work. By late February 1997, the defendant realised that the claimant might be going to make a claim under the scheme. It was also during this period that Mr Suffell was made aware of the possibility that the claimant would make a claim under the scheme. In the week commencing 17 March, the claimant telephoned Mr Suffell and asked what needed to be done in order to make a claim. Mr Suffell replied that the defendant would have to contact UNUM.

[7] On 17 April 1997, the claimant saw Dr Beaini again. The doctor considered that there was no prospect of the claimant's recovering from his moderate to severe depression in the foreseeable future, and advised him to pursue an application for early retirement on mental health grounds. This advice was accepted by the claimant.

[8] On 21 April 1997, he spoke by telephone to Mr Hall, the defendant's managing director. There was a dispute at the trial between the claimant and Mr Hall as to what was said during this conversation. The claimant's account was that he asked Mr Hall whether he could make a claim under the scheme, and Mr Hall said that all he needed to do was to provide a letter stating that he wanted to retire on health grounds. Mr Hall denied that he would have told the claimant that he would not receive benefits under the scheme unless he retired. The judge (at [42]) concluded that Mr Hall had not made a request for a letter of retirement from the claimant for the purpose of obtaining benefits under the scheme. He found that, whilst the scheme might have been mentioned in the conversation, the discussion was primarily focused on the claimant's forthcoming departure from his post with the defendant.

[9] On 22 April 1997, the claimant wrote to Mr Hall:

> 'Further to our recent conversation I enclose a copy of my consultant's letter regarding my state of health. I had hoped that the lengthy break on sick leave would have enabled me to recover but I must now accept that I could not sustain a return to the pressures of work. After 21 years with Faithful & Gould it is not an easy decision but I now wish to pursue an application for early retirement upon health grounds and hope that you will be able to put the necessary wheels in motion.'

[10] On 29 April, the claimant completed a form seeking long-term disability benefit under the scheme. The application for benefit had to be made by the defendant and, at Mr Hall's request, the claimant completed much of the form. This was signed on behalf of the defendant on 2 May. On each form there was a question 'Has employment been terminated?', in answer to which the claimant ticked the box marked 'No'.

[11] During May and June, there were discussions between the claimant and Mr Ridley about the arrangements for the claimant's retirement. At first, Mr Ridley said that the company would pay the claimant's salary until 6 June (six months after he had stopped work). The claimant looked at his service agreement, and saw that the company had a discretion to continue paying his salary beyond that date. He pointed this out to Mr Ridley, who agreed to pay a further three months' salary, but required a letter from the claimant confirming that he would be retiring on 6 September. The claimant, therefore, wrote to Mr Ridley on 4 June:

> 'Following our recent conversation I confirm that I shall be retiring from Faithful & Gould upon 6th September 1997 upon health grounds. May I

thank you for the generous offer to pay my salary until that date (subject to insurance payments).'

[12] By a letter dated 28 July, Mr Hall wrote to the claimant:

'As we discussed, I enclose some words which should satisfy the requirements of Atkins Personnel Department but which should obviously be written in your own style. "Further to our recent conversation I confirm that because of continued ill health I shall be retiring with effect from 6 June 1997 both as an employee and as a director of Faithful & Gould Limited. I also confirm that I am happy to waive any notice period to which I am entitled. (Final paragraph written by you)". It would be best if you could date this letter prior to 6 June 1997.'

[13] Accordingly, shortly after 28 July, the claimant wrote a further retirement letter. This was backdated to 28 May, and included a paragraph which in all material respects corresponded precisely with Mr Hall's draft.

[14] The effect of the termination of the claimant's employment was that he ceased to be entitled to benefit under the scheme as of right, and became instead entitled to receive discretionary benefits. In the exercise of its discretion, UNUM paid benefit until June 1998, but not thereafter. The defendant would have been content for the claimant to remain on its books as an employee, albeit on indefinite sick leave, for the purposes of receiving benefit under the scheme.

[15] The judge found (at [66]) that Mr Hall (and, therefore, the defendant) knew that, if the claimant resigned from his employment, his right to benefits under the scheme would cease, and he would be dependent for benefits on the exercise by the scheme's insurer of its discretion in his favour.

THE NATURE OF THE CLAIMANT'S CASE

[16] In the court below, the claimant's case was presented on three alternative bases. Each was rejected by the judge. The claimant does not challenge the judge's decision on the first basis of claim (which was founded on the disputed telephone conversation between the claimant and Mr Hall of 21 April 1997). This was that Mr Hall had advised him that, in order to obtain benefits under the scheme, he needed to retire. But it is submitted by Mr Antony White QC on behalf of the claimant that the judge was wrong to reject both of the other bases of claim. These were that the defendant acted in breach of an implied term of the contract of employment requiring it to take reasonable care for the claimant's economic well-being (i) by asking him to submit a resignation letter knowing that he was applying for benefits under the scheme and that resignation would seriously prejudice his entitlement to such benefits; alternatively (ii) by failing to warn him of the effect which resigning from his employment would have on his entitlement to benefits under the scheme.

THE JUDGMENT

[17] In a careful judgment, Judge Langan QC reviewed what he described as 'the five key authorities'. These are *Scally v Southern Health and Social Services Board (British Medical Association, third party)* [1991] 4 All ER 563, [1992] 1 AC 294, *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296, *University of Nottingham v Eyett* [1999] ICR 721, *Outram v Academy Plastics* [2000] IRLR 499, [2001] ICR 367 and *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31. The judge concluded (at [63]) that the law has not reached a stage at which it can be said that there is implied in the contractual relationship of employer and

employee what has been called a 'portmanteau obligation' on the former to exercise reasonable care for the latter's economic well-being. He went on to say:

> 'In my judgment, what the courts have done in relation to duties to be imposed (additionally to the long established duty of trust and confidence) on employers in respect of matters other than health and safety is to proceed slowly on a case-by-case basis. What has been done is to imply a term where this is deemed necessary in respect of the particular contract (as was done in *Scally v Southern Health and Social Services Board (British Medical Association, third party)* [1991] 4 All ER 563, [1992] 1 AC 294 and by some of their lordships in *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296) rather than to apply some overriding principle of the kind suggested by Mr White.'

[18] He then considered the second basis of the claim and examined the circumstances in which the letter of 28 July 1997 came to be written. He said:

> '[66] I accept, as submitted by Mr White, that the following matters were within the knowledge of Mr Hall when he wrote the letter of 28 July and that they must therefore be regarded as within the defendant's knowledge.
>
> • The claimant's medical condition and the likelihood that he would never be able to return to his previous occupation.
>
> • His salary would soon cease to be payable.
>
> • He had made an application under the scheme.
>
> • It was only if that application was successful that he would obtain some partial replacement of his income from work.
>
> • The claimant could only pursue his application through the defendant and was relying on the defendant to ensure that his application progressed.
>
> • It would be perfectly possible for the claimant to remain on the defendant's books as an employee, albeit indefinitely absent from work, for the purpose of receiving benefits under the scheme.
>
> • If the claimant resigned from his employment, his right to benefits would cease and he would depend for benefits on the exercise by UNUM of its discretion in his favour.'

[19] He continued:

> '[67] In my judgment, these matters are insufficient to impose on the defendant, when writing the letter of 28 July 1997, an obligation to alert the claimant to the effect which resignation would have on his pension rights. I set out my reasons below.
>
> • The context in which the letter was written was one in which the claimant had already decided to retire and had, in consequence of that decision, applied for benefit under the scheme. The claimant had made his decision to retire in April, on his own initiative and on the basis of medical advice, and his decision was, on my findings of fact, unprompted by the defendant. In May the application for benefit had been submitted. Apart from fixing the date of retirement, the die had been cast.
>
> • The letter of 28 July was written with a view to assisting the claimant to retire in a manner which would, vis-à-vis his salary or a leaving payment in lieu, be the most tax-efficient from his point of view. What the claimant is seeking is to import into that limited context an obligation on the part of the defendant to have regard to the claimant's overall financial situation.

a • Whilst there might possibly be some ground for regarding the defendant as having assumed some such responsibility if it were dealing with a junior and relatively low paid employee, there could be no such justification in the case of someone in the claimant's situation. I have regard to his experience, status, wealth (which he acknowledged in evidence) and access for advice to Castlegate and Mr Suffell.

b • I appreciate that the duty relied upon by Mr White is of a negative kind, namely, not to act in a way which will imperil the claimant's rights. But what is in fact required of the defendant by way of performance of the duty is, or comes perilously close to, what the courts refused to countenance in *University of Nottingham v Eyett* [1999] ICR 721, *Outram v Academy Plastics* [2000] IRLR 499, [2001] ICR 367 and *Hagen v ICI Chemicals and Polymers Ltd* c [2002] IRLR 31, namely, an affirmative obligation on an employer to give advice as to pension rights.

• Finally, to return to *Scally*'s case, the foundation of the decision was that the doctors' rights could be made efficacious only if the board alerted them to those rights. Hence the term as to conveying information was implied as d a matter of necessity. In order to make the claimant's rights efficacious, it is not necessary to imply a term that the defendant will not suggest any step which might be potentially destructive of those rights. As I have already indicated, the claimant was in a position in which he could reasonably be expected to decide upon his own course of action.

[68] These points, taken together, have convinced me that, when Mr Hall e wrote the letter of 28 July 1997, there was no obligation on him to have regard to the effect which the writing of a formal letter of resignation might have on the claimant's position under the scheme. The same reasoning would apply to Mr Ridley's request, which was similarly relied upon by Mr White, for the letter of 4 June. Accordingly, the second basis of claim f fails.'

[20] As regards the third basis of claim (failure to warn), he said (at [70]) that the circumstances of *Scally*'s case were very special: he described it as a 'bridgehead from which there has been no advance'. Having recited the criteria enunciated by Lord Bridge of Harwich in *Scally*'s case (to which I shall shortly g refer), he said (at [72]):

'As I have already indicated, the claimant was a person of status and long experience within the defendant. He, as much as any other director, could be expected to familiarise himself with the terms of the scheme. It is true that the scheme is not phrased in language the import of which is immediately h plain to the lay reader and that there was (or there is no evidence that there was) an explanatory booklet of the kind available to Mr Eyett. This difficulty is, however, far outweighed by the fact that the claimant had ready access to Mr Suffell, who had the dual roles (between which there was no conflict) of advising both the claimant and the defendant on pension matters. In these j circumstances it is *unnecessary*, which is the test propounded in *Scally*'s case, to place an obligation to advise or warn on the defendant. Mr White's additional factors, with respect, do not advance the case. As regards the claimant's illness, this affected his ability to work, but did not on the evidence prevent him from attending meetings with KPMG about CGT or consulting Mr Suffell from time to time. As regards the claimant's reliance on the defendant to pursue the claim and the importance of the matter to him, I

repeat that he had Mr Suffell to advise him if he wished to avail of such advice. Finally, the defendant's anxiety for the claimant's welfare does seem (if Mr White will forgive my saying so) to be something of a jury point.' a

THE AUTHORITIES

[21] In *Scally*'s case, the plaintiffs were doctors working in the public service and employed by the defendant board. Under their contracts of employment they were required to belong to a statutory superannuation scheme and were entitled to its benefits. It was necessary to accumulate 40 years' service in order to qualify for the maximum pension. Employees had the right to purchase 'added years' of entitlement in order to make up a full 40 years' contributions. This right was, however, exercisable only for a limited period. The House of Lords decided that there was to be implied into the contracts of employment an obligation on the board to take reasonable steps to bring to the attention of the plaintiffs their right to purchase 'added years'. Lord Bridge, with whose speech the other law lords agreed, implied the term as a necessary incident of the employer/employee contractual relationship, rather than as being necessary to give business efficacy to the contract. The category of contractual relationship in which the implication would arise, however, had to be defined with precision. Lord Bridge defined it as— b c d

'the relationship of employer and employee where the following circumstances obtain: (1) the terms of the contract of employment have not been negotiated with the individual employee but result from negotiation with a representative body or are otherwise incorporated by reference; (2) a particular term of the contract makes available to the employee a valuable right contingent upon action being taken by him to avail himself of its benefit; (3) the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is brought to his attention.' (See [1991] 4 All ER 563 at 571–572, [1992] 1 AC 294 at 307.) e

[22] He considered that it was not merely reasonable, but necessary, in the circumstances postulated, to imply an obligation on the employer to take reasonable steps to bring the term of the contract in question to the employee's attention, so that he was in a position to enjoy its benefit. f

[23] In *Spring*'s case, the plaintiff claimed damages in negligence against his former employer for supplying an unfavourable reference to a third party. By a majority of four to one, he was successful in the House of Lords. The majority based their decision on an application of the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, [1964] AC 465. Three of the majority were also prepared to base their decision on breach of an implied term of the contract: see [1994] 3 All ER 129 at 147, 166, 178–179, [1995] 2 AC 296 at 320, 340, 353–354 per Lord Goff of Chieveley, Lord Slynn of Hadley, and Lord Woolf, respectively. The fullest discussion appears in the speech of Lord Woolf. Having referred to the speech of Lord Bridge in *Scally*'s case, Lord Woolf said: g h

'As I understand *Scally*, it recognises that, just as in the earlier authorities the courts were prepared to imply by necessary implication a term imposing a duty on an employer to exercise due care for the physical wellbeing of his employees, so in the appropriate circumstances would the court imply a like duty as to his economic well-being, the duty as to his economic well-being giving rise to an action for damages if it is breached.' (See [1994] 3 All ER 129 at 178, [1995] 2 AC 296 at 353.) j

[24] Lord Woolf went on to specify circumstances which would enable a term to be implied. He said:

> 'The circumstances are: (i) the existence of the contract of employment or services; (ii) the fact that the contract relates to an engagement of a class where it is the normal practice to require a reference from a previous employer before employment is offered; (iii) the fact that the employee cannot be expected to enter into that class of employment except on the basis that his employer will, on the request of another prospective employer made not later than a reasonable time after the termination of a former employment, provide a full and frank reference as to the employee. This being the nature of the engagement, it is necessary to imply a term into the contract that the employer would, during the continuance of the engagement or within a reasonable time thereafter, provide a reference at the request of a prospective employer which was based on facts revealed after making those reasonably careful inquiries which, in the circumstances, a reasonable employer would make.' (See [1994] 3 All ER 129 at 179, [1995] 2 AC 296 at 353–354.)

[25] In *University of Nottingham v Eyett* [1999] ICR 721, the complainant was employed by the university and was a member of its pension scheme. He inquired as to what his pension entitlement would be if he took early retirement on 31 July 1994. The university provided an entirely accurate quotation, but failed to inform him that his pension would be increased if he retired on the earliest date after 31 July. Unaware of the advantage of deferring his retirement, the complainant retired on 31 July 1994. The Pensions Ombudsman held that the university had been in breach of its 'general duty of good faith' in failing to provide the complainant with sufficient information to enable him to make an informed choice of retirement age, although it had supplied him with an explanatory booklet from which he could have discovered the financial advantage of deferring his retirement. Hart J allowed the university's appeal. It was conceded on behalf of the Ombudsman that *Scally*'s case provided no support for Mr Eyett, because he knew of the existence of his early retirement rights. Counsel for the Ombudsman sought to support his decision on the basis that, by failing to give appropriate advice, the university had been in breach of the duty of trust and confidence implicit in the contractual relationship of employer and employee as elaborated in *Malik v Bank of Credit and Commerce International SA (in liq), Mahmud v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1, [1998] AC 20. Hart J observed that this duty has consistently been applied negatively, to prohibit conduct damaging to the relationship, and not positively to enjoin conduct which would avoid damaging consequences. Nevertheless, he was unwilling to exclude the possibility that the duty may, in appropriate circumstances, have a positive as opposed to a merely negative content, although he recognised that so to hold would involve an extension of the existing law: see [1999] ICR 721 at 727–728. He then said:

> 'In the final analysis the question for determination comes down to this: does the implied term include a positive obligation on the employer to warn an employee who is proposing to exercise important rights in connection with his contract of employment that the way in which he is proposing to exercise them may not be financially the most advantageous way in the particular circumstances? Expressed in those terms, it can be seen that the

recognition of such a duty has potentially far reaching consequences for the employment relationship. A degree of caution is therefore required.' a

[26] He pointed out that in the specific area of giving advice to employees in connection with their pension rights, the furthest the courts have gone in recognising such a default obligation appears to have been in *Scally*'s case, a decision which provided no support for the complainant's case. The authorities (including those on the duties of pension fund trustees) neither compelled nor justified the judge in holding that the university was in breach of contract in failing to alert the complainant to the possibility that he was making a financial mistake. The appeal was allowed. b

[27] In *Outram v Academy Plastics* [2000] IRLR 499, [2001] ICR 367, the deceased was employed by the defendant company and was a member of the company pension scheme. He left his employment and ceased to be a member of the scheme. He was later re-employed by the defendant, but did not rejoin the scheme. After a further eight months, he resigned on account of ill-health, and shortly thereafter he died. His widow and personal representative brought an action against the defendant company alleging that it should have advised the deceased to rejoin the scheme when he was re-employed. The claim was brought in negligence, not in contract. The Court of Appeal held that the judge at first instance had rightly struck out the claim as disclosing no cause of action. c d

[28] Tuckey LJ pointed out that in *Scally*'s case the claim had been framed in tort as well as in contract. Lord Bridge had expressly stated ([1991] 4 All ER 563 at 569, [1992] 1 AC 294 at 303) that, if a duty to make employees aware of their pension rights 'was not inherent in the contractual relationship, [he did] not see how it could possibly be derived from the tort of negligence'. Tuckey LJ's conclusion was expressed ([2000] IRLR 499 at 501, [2001] ICR 367 at 373 (para 21)) as follows: e

'The simple answer to this case is that, as the claimant does not say the duty to give advice is contractual arising expressly or impliedly out of the deceased's contract of employment, the claim is bound to fail following *Scally* ([1991] 4 All ER 563, [1992] 1 AC 294). Taking the matter at its highest from the claimant's point of view if there is a duty of care in tort it is only coextensive with the contractual duty and, since no contractual duty is, or I think could be, relied on in this case, there is no duty of care in tort either.' f g

[29] Chadwick LJ ([2000] IRLR 499 at 502, [2001] ICR 367 at 375 (para 32)) seems to have thought that it might have been arguable that the claim could have been put in contract, since the contractual duties owed by an employer, or former employer, in relation to its employees were 'in a state of development, particularly in the field of economic loss suffered by an employee as a result of action or omission by the employer ancillary to the performance of the contract of employment itself'. But since counsel rejected the suggestion that the claim could be put on a contractual basis, the court had no choice other than to dismiss the appeal on the grounds that the claim in the tort of negligence was bound to fail. h j

[30] In *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31, the claimants had been employed by ICI in its central engineering resource section. ICI transferred this section as a going concern to Redpath Engineering Services (RES). The claimants' case was that they were persuaded to agree to the move by representations made to them by ICI and RES. They put their case against ICI in

negligence and breach of contract. The implied terms for which they contended included (a) a duty not, without reasonable and proper cause, to act in such a way as would be likely to destroy or seriously damage the relationship of trust and confidence existing between it and its employees; and (b) a duty at all reasonable times to take all reasonable steps to ensure that the plaintiffs were made aware of the true position in regard to their pension rights and to all other benefits and entitlements under their contract of employment.

[31] In relation to (a) Elias J said (at 39):

> '55. [Counsel for ICI] accepts (subject to an argument that I address below) that it is in principle possible for even negligent conduct to constitute a breach of this implied term, but she submits that it would have to be a rare case, coming close to recklessness, before that term could be engaged. I accept that submission. Lord Steyn emphasised in *Malik* that in order to constitute a breach of this term, the conduct had at least *seriously* to undermine trust and confidence. It seems to me that the negligent conduct would have to demonstrate a real and unacceptable disregard for the interests of the employee before this term could successfully be invoked. It would have to be the kind of conduct that would justify the employee treating it as a repudiatory breach ...
>
> 56. Plainly individual acts of negligence will not in the ordinary way constitute a breach of this duty. They will not undermine the confidence necessary to sustain the employment relationship, and I do not think that anyone would suggest that they should. Indeed, it would be highly detrimental to employees if any act of negligence could be equated with a repudiatory breach of the duty of trust and confidence so as to justify lawful termination of the contract.'

[32] In relation to (b) Elias J referred to the speech of Lord Bridge in *Scally*'s case and said (at 41):

> '67. It is to be noted that this term is very carefully framed and depends upon, in particular, the fact that the employee could not reasonably be expected to be aware of this term at all without it being brought to his attention.
>
> 68. In my view there is no justification for applying *Scally* here so as to impose a general duty to make employees aware of their pension rights (or indeed the other terms and conditions of their employment.) *Scally* cannot be read as a general authority requiring an employer to give information about pension terms. There are in my view three factors which make the *Scally* principle inapplicable to the facts of this case. First, it is not and could not be alleged that the employees have not been informed of their pension rights with ICI, far less can it be said that they could only reasonably be expected to know about them if informed by ICI. Second, the complaint is that the employees have not been fully informed about the precise nature of the benefits accorded by RES's pension scheme; it is difficult to imagine that there could be a contractual duty requiring an employer to give information about the pension scheme of another employer, absent at least some very exceptional circumstances. Third, the pension benefits in this case did not in any event arise under the contract but rather were conferred under a separate trust deed. In my judgment, for those reasons in particular, it cannot

conceivably be said that there is a duty to be derived from the principles in *Scally* which obliges ICI to provide that information.' a

IMPLIED TERM TO TAKE CARE FOR ECONOMIC WELL-BEING OF EMPLOYEE

[33] In my view, the judge was right to reject the 'portmanteau obligation' contended for by Mr White ie an implied term of any contract of employment that the employer will take reasonable care for the economic well-being of his b employee. This would be a standardised term to be implied by law, that is to say a term which, in the absence of any contrary intention, is an incident of all contracts of employment. It is not a term implied to give business efficacy to the particular contract in question which is dependent on an intention imputed to the parties from the express terms of the contract and the surrounding circumstances. As is said in *Anson's Law of Contract* (28th edn, 2002) p 149: c

> 'In these cases concerning a common relationship, for example sale, carriage, landlord and tenant, or employment, the parties may have left a lot unsaid and the process of implication is different. It involves the Court determining, in the light of general considerations of policy, the standard incidents of the particular type of relationship rather than constructing a d hypothetical bargain. Although it has sometimes been said that the criterion for this form of implication is also "necessity" rather than "reasonableness", it does appear that a broader approach is taken. The Courts will consider how the proposed implied term will sit with existing law, will affect the parties to the relationship, and wider issues of fairness. While the parties can e exclude or modify the standard incidents of the relationship by express words, unless they do so they will form part of the obligation as a legal incident of the particular kind of contractual relationship. Such standardized terms, implied by law, have been said to "operate as default rules". In these cases it has been said that the problem of implication is to be solved by asking: [H]as the law already defined the obligation or the extent of it? If so, f let it be followed. If not, look to see what would be reasonable in the general run of such cases ... and then say what the obligation shall be.'

[34] It is submitted by Mr Cavanagh QC that it is a prerequisite of such an implied term that it is *necessary*. There is some support for this submission in the g authorities. But the word 'necessary' is somewhat protean. In *Liverpool City Council v Irwin* [1976] 2 All ER 39, [1977] AC 239 the House of Lords held that there was a term to be implied in a council letting (as a legal incident of the relationship) that the landlord would keep the means of access in reasonable repair. Lord Wilberforce said ([1976] 2 All ER 39 at 44, [1977] AC 239 at 254) that such an obligation should be read into the contract 'as the nature of the contract h itself implicitly requires, no more, no less; a test in other words of necessity'. Means of access is an essential of a tenancy without which life in the premises, as a tenant, is not possible. It is easy enough to see how in that context the implied term was necessary. As Lord Wilberforce put it 'The subject-matter of the lease (high-rise blocks) and the relationship created by the tenancy demands, of its j nature, some contractual obligation on the landlord'.

[35] In *Scally*'s case, the implied term was said to be necessary, because unless the employer informed the employee of the terms of the scheme, the employee would have no means of knowing what they were, and would therefore not be able to avail himself of one of the benefits of his contract of employment. But I confess that it is less clear to me in what sense it is *necessary* to imply into a

contract of employment the implied term that three of their lordships were willing to find in *Spring v Guardian Assurance plc* [1994] 3 All ER 129, [1995] 2 AC 296. More fundamentally, it is difficult to see in what sense it is *necessary* to imply into a contract of employment the term that the employer will take reasonable care for the physical and mental health and safety of his employees. It obviously makes sense to imply such a term into a contract of employment on wider policy grounds. But that is different from saying that the nature of the employer/employee relationship implicitly requires such a term.

[36] It seems to me that, rather than focus on the elusive concept of necessity, it is better to recognise that, to some extent at least, the existence and scope of standardised implied terms raise questions of reasonableness, fairness and the balancing of competing policy considerations: see Peden 'Policy concerns behind implication of terms in law' (2001) 117 LQR 459, pp 467–475. Such considerations are, I believe, reflected in the recent significant developments in the field of the employer/employee relationship. In *Spring*'s case, Lord Slynn of Hadley commented:

> '... it is relevant to consider the changes which have taken place in the employer/employee relationship, with far greater duties imposed on the employer than in the past, whether by statute or by judicial decision, to care for the physical, financial and even psychological welfare of the employee.' (See [1994] 3 All ER 129 at 161, [1995] 2 AC 296 at 335.)

[37] In *Johnson v Unisys Ltd* [2001] UKHL 13 at [35], [2001] 2 All ER 801 at [35], [2003] 1 AC 519, Lord Hoffmann observed:

> 'But over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person's employment is usually one of the most important things in his or her life. It gives not only a livelihood but an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality. Most of the changes have been made by Parliament ... And the common law has adapted itself to the new attitudes, proceeding sometimes by analogy with statutory rights.'

[38] In recent years, the common law has moved to impose certain duties on employers beyond the duty to take reasonable care to protect the physical well-being of his employees. One example of such an extension is the implied term that an employer will not engage in conduct which is likely to undermine the trust and confidence required if the employment relationship is to continue in the manner the employment contract implicitly envisages: see *Malik v Bank of Credit and Commerce International SA (in liq)* [1997] 3 All ER 1 at 5, [1998] AC 20 at 35 per Lord Nicholls of Birkenhead. The evolution of such an implied term was said by Lord Steyn to be a comparatively recent development (see [1997] 3 All ER 1 at 15, [1998] AC 20 at 45).

[39] Other examples of the evolutionary process at work are to be found in *Scally*'s and *Spring*'s cases. It is important to see how the House of Lords approached the question in those two cases. In *Scally*'s case, Lord Bridge could have formulated the implied obligation in wide terms. He could, for example, have said that there was an implied term of any contract of employment that the employer should take reasonable steps to protect the economic well-being of his employees. But it is quite clear that he was unwilling to express the obligation in such wide terms. He could (more narrowly) have said that there was an implied term of any contract of employment which provides for an occupational pension

scheme that the employer will take reasonable steps to protect the employee's rights under the scheme. But Lord Bridge was not willing to express the implied term even in this more limited way. Instead, he restricted the implied term by defining the category of relationship in which the implication would arise with 'sufficient precision' to meet the difficulty that had been identified by Carswell J at first instance that to imply a term in *all* contracts of employment 'must necessarily be too wide'. He did not say why it would be too wide. It seems to me that he must have had in mind policy considerations, and some of the practical difficulties to which I shall shortly refer.

[40] So too in *Spring*'s case. Lord Woolf said that just as in the case of an implied duty to exercise due care for the physical well-being of an employee, so 'in the appropriate circumstances' the court will imply a like duty in relation to the economic well-being of an employee. Far from being willing to imply such a term in all contracts of employment, Lord Woolf was only prepared to do so in 'appropriate' circumstances. He then proceeded to specify the circumstances which would enable a term to be implied in relation to the giving of references. He underlined ([1994] 3 All ER 129 at 178, [1995] 2 AC 296 at 353) the fact that the views that he had expressed were confined to the class of case with which he was dealing ie cases about references.

[41] In both of these cases, the House of Lords defined the contract of which the implied term was an incident in extremely narrow terms. It seems to me that there is some force in the observation that by sub-dividing relationships into smaller and more numerous categories with terms that have a less general application, the distinction between implication of terms in cases concerning a common relationship (eg employment, sale of goods, contracts for work and materials etc) and implication in those concerning a particular contract becomes blurred: see *Anson* p 150.

[42] In my view, there are two principal reasons why the implied term proposed by Mr White should be rejected. First, it is not for this court to take a big leap to introduce a major extension of the law in this area when only comparatively recently the House of Lords declined to do so. It is clear that the approach adopted by Lord Bridge and Lord Woolf is wholly inconsistent with the proposition that there is to be implied into a contract of employment a general duty on the part of the employer that he will take reasonable care of the economic well-being of his employees. Thus, having emphasised that his views were confined to the class of case with which he was dealing, Lord Woolf went on to say that some of his statements could be applied to analogous situations, but he did not intend to express any view as to what the position would be in those analogous situations. So he was being cautious about extending the implied term even to analogous situations.

[43] But secondly and more fundamentally, quite apart from authority, I would not accept the implied term contended for by Mr White. Such an implied term would impose an unfair and unreasonable burden on employers. It is one thing to say that, if an employer assumes the responsibility for giving financial advice to his employee, he is under a duty to take reasonable care in the giving of that advice. That is no more than an application of the *Hedley Byrne* principle. An example of such a case in the context of a contract of employment is *Lennon v Metropolitan Police Comr* [2004] EWCA Civ 130, [2004] 2 All ER 266. It is quite a different matter to impose on an employer the duty to give his employee financial advice in relation to benefits accruing from his employment, or generally to safeguard the employee's economic well-being.

[44] As Mr Cavanagh points out, the financial well-being of the employee may be in conflict with that of the employer. Take the case of an employer who is considering whether or not to make an employee redundant. In deciding whether to make a particular employee redundant or to invite him to take voluntary redundancy, does the employer have a duty to consider the financial consequences of redundancy to that employee? The all-embracing implied term for which Mr White contends would suggest that he does. But that is surely unreasonable. The employer is not required to have regard to the employee's financial circumstances when he takes lawful business decisions which may affect the employee's economic welfare. There is no reason to suppose that he will even be aware of the details of those circumstances. Nor is it the function of the employer to act as his employee's financial adviser: that is simply not part of the bargain that is comprised in the contract of employment. There are no obvious policy reasons to impose on an employer the general duty to protect his employer's economic well-being. The employee can obtain his own advice, whether from his union or otherwise. The policy considerations in relation to questions of health and safety are wholly different. If an employer fails to provide a safe system of work, it will usually not be possible or reasonable to expect the employee to take steps to make good the shortcomings in the system.

[45] Mr White submits that the fact that the implied duty for which he contends is no more than a duty to take *reasonable* steps to protect his well-being provides the necessary control mechanism to meet the difficulties to which I have referred. At first sight, it might be thought that this provides an answer to the charge that the portmanteau obligation is exorbitant, and imposes an unreasonable duty on an employee. It is a beguiling response to the charge that the duty is unreasonable to say that the duty only requires reasonable care to be taken. It is true that the law implies that an employer should take reasonable steps to protect the physical well-being of his employees. Sometimes, this can give rise to difficulty. But in most cases, it is obvious what an employer is required to do and/or refrain from doing in order to discharge this duty. Likewise the implied duty recognised in *Malik*'s case. I find considerable difficulty in seeing what the content of a general duty to take reasonable care for the economic well-being of an employee would be. It is not, therefore, at all surprising that no court has held such a duty to exist. And that is why in my view this is an area where the court should be astute only to imply a precise term in carefully circumscribed circumstances. I would agree with the very cautious approach to this issue adopted in *University of Nottingham v Eyett* [1999] ICR 721 and *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31 and the (obiter) rejection of an implied term by Tuckey LJ in *Outram v Academy Plastics* [2000] IRLR 499, [2001] ICR 367.

[46] I should not complete this discussion of the law without referring to *Reid v Rush & Tompkins Group plc* [1989] 3 All ER 228, [1990] 1 WLR 212, a decision that was not cited to the judge. This court (May, Neill and Ralph Gibson LJJ) held that an employer owed no duty of care in contract or tort to advise his employee to obtain personal accident insurance against special risks arising out of his posting overseas. The court refused to extend the duty of care owed in tort to protect an employee's physical safety and well-being by imposing a duty to protect the employee from economic loss. The court also refused to find that there was an implied term of the contract that the employer would give the employee all necessary advice in relation to insurance: see, in particular [1989] 3 All ER 228 at 240–241, [1990] 1 WLR 212 at 227–228 per Ralph Gibson LJ. This decision was

cited, but not commented upon, in *Scally v Southern Health and Social Services Board (British Medical Association, third party)* [1991] 4 All ER 563, [1992] 1 AC 294. In my judgment, Mr Cavanagh was right not to place much reliance on this decision, since it pre-dates *Scally*'s case, and it is now clear that there are certain restricted circumstances where the court will imply a term whose effect is to impose on the employer a duty which affects the employee's economic interests.

THE FACTS OF THIS CASE

[47] Although I have rejected Mr White's 'portmanteau obligation', the question remains whether the second or third alternative bases of claim should have succeeded before the judge. I shall take these in turn.

THE SECOND BASIS OF CLAIM: THE LETTER OF 28 JULY 1997

[48] Mr White criticises the reasoning of the judge set out at [67] of his judgment in a number of respects. He submits that the judge wrongly treated the claimant's decision in April 1997 to seek early retirement and apply for benefits under the scheme as a decision to terminate his employment. Although he had received medical advice that he should cease work, this did not mean that he had to terminate his employment. The reference to 'retirement' in his letters was layman's language for 'stopping work'. It did not indicate that he wished to terminate his employment rather than remain as an employee on permanent sick leave. The judge was wrong to say that, when the application for benefit was submitted, the die had been cast. He was also wrong to distinguish, at the stage of considering whether any duty was owed, between the claimant as a senior employee with 'experience, status and access to advice' and a 'junior and relatively low paid employee'. The provisions of the Scheme were incorporated into the contracts of employment of all employees, and the duty on the defendant to its employees in relation to the Scheme would apply equally to all its employees. Finally, the judge was wrong to say (last bullet point in [67]) that, since the claimant was in a position to decide upon his own course of action, it was not necessary to imply a term that the defendant would not suggest any step which might be potentially destructive of his rights.

[49] In my view, the judge was right to reject the second basis of claim. The starting point is the finding (at [42]) that, during the telephone conversation of 21 April, Mr Hall did not ask the claimant to write a letter of retirement. The decision that the claimant should retire was made by him, and not by the defendant. The discussions between the claimant and Mr Ridley in May and June were conducted on the footing that the claimant had decided to terminate his contract. The judge heard evidence from both the claimant and Mr Hall. In my view, he was fully justified in finding that the claimant had decided to retire in April of his own initiative, and that the defendant did not contribute to that decision. It is clear that by the use of the word 'retire', the claimant meant, and was understood to mean, 'resignation from employment'. That is why he was discussing with Mr Ridley the period for which he would be paid his salary. It should not be overlooked that during the spring/early summer of 1997 it had not been confirmed that UNUM would accept the claimant's entitlement to benefit under the scheme. It follows that the judge was right to find that the letter of 28 July was written with a view, as he put it, 'to assisting the claimant to retire in a manner which would, vis-à-vis his salary or a leaving payment in lieu, be the most tax-efficient from his point of view'. The other aspects of the judge's reasoning which Mr White criticises were not necessary to support his

conclusion on this part of the case, and I do not therefore propose to deal with those criticisms. It is important to emphasise that, on the judge's findings, in sending the letter of 28 July, Mr Hall did not assume any responsibility in relation to the question whether the claimant should terminate his contract of employment rather than remain as an employee on permanent sick leave. The claimant took the decision on that question without any contribution from the defendant.

THE THIRD BASIS OF CLAIM: FAILURE TO WARN

[50] The third basis of the claim was that the claimant's case satisfied the *Scally* criteria. That is to say all three of the criteria identified by Lord Bridge (see [21], above) were satisfied. The judge held (at [72]) that the first two criteria were more or less satisfied, but that the claimant failed at the third hurdle. Mr White submits that the judge was wrong. As he points out, the kernel of the judge's reasoning was that the claimant could reasonably have been expected to be aware of the terms of the scheme, since (a) the claimant as much as any other director could be expected to familiarise himself with the terms of the scheme, and (b) he had access to Mr Suffell for advice. As regards (a), Mr White submits that the claimant, who had no individual responsibility for administering the scheme, could not be assumed to have familiarised himself with its contents. The scheme was complex and not easy for a layperson to understand. The defendant had not supplied its employees with an explanatory booklet as in *Eyett*'s case. As for (b), the claimant was off work suffering from depression. There was no reason to suppose that he was receiving advice from Mr Suffell. The question is not whether it would have been possible for the employee to find out about the relevant provision of the scheme, but whether he could reasonably have been expected to be aware of it. Mr White also submits that the judge's approach has the difficulty that a duty would be owed to a lower paid junior employee without access to independent advice, but not to a senior employee who enjoys access to such advice, even though both were employed under identical contracts of employment.

[51] The third of the criteria propounded by Lord Bridge (see [1991] 4 All ER 563 at 571–572, [1992] 1 AC 294 at 307) is that 'the employee cannot, in all the circumstances, reasonably be expected to be aware of the term unless it is brought to his attention'. It is only in such a case that there is an implied term of the contract that the employer will bring the term to the attention of the employee. The question, therefore, is whether in all the circumstances the claimant could reasonably have been expected to be aware of the term unless it was brought to his attention by the defendant. I am in no doubt that the judge was entitled to conclude that, on the facts of this case, the claimant could reasonably have been expected to be aware of the relevant provisions of the scheme even though they were not brought to his attention by the defendant.

[52] The judge was right to say that it is relevant that the claimant was a director and senior employee of the company. I see no difficulty in holding that Lord Bridge's third criterion may be satisfied in relation to some, but not all, employees of the same employer, even if they are all subject to the same conditions of employment. The question whether the duty arises will always depend on whether the employee can reasonably be expected to be aware of the existence of the relevant provision unless it is brought to his attention by the employer.

[53] The judge was also right to decide that the fact that the claimant had access to the advice of Mr Suffell was of critical importance. I agree with Mr White that the question is not whether it was possible for the claimant to find out about the terms of the scheme, but whether he could reasonably have been expected to do so. It is implicit in [72] of the judgment that the judge was of the opinion that the claimant could reasonably have been expected to seek the advice of Mr Suffell. Despite his illness, he had consulted Mr Suffell in March 1997, and asked what needed to be done in order to make a claim. On 24 April, Mr Suffell sent the claimant the necessary application forms, and concluded: 'If you have any queries whatsoever, please do not hesitate to contact me.' Mr Suffell had been his pensions adviser since about 1985. He could reasonably have been expected to seek Mr Suffell's advice, especially in the light of the offer made in the letter of 24 April. Despite his illness, the claimant had also been well enough to attend meetings with KPMG in February and March 1997 to discuss means by which CGT could be avoided on the sale of his shares. Finally, he had been well enough to examine his contract of employment and see that the company could pay his salary for longer than six months after he had stopped work. It seems to me in these circumstances, and bearing in mind his experience and seniority in the company, that the judge was justified in concluding that the claimant could reasonably have been expected to be aware of the provisions of the scheme.

CONCLUSION

[54] It follows that for the reasons that I have given, the judge correctly rejected both the second and third bases of claim. I would dismiss this appeal.

THOMAS LJ.

[55] I agree.

SIR ANDREW MORRITT V-C.

[56] I also agree.

Appeal dismissed.

Celia Fox Barrister.

Re Millennium Advanced Technology Ltd

[2004] EWHC 711 (Ch)

CHANCERY DIVISION (COMPANIES COURT)

MICHAEL BRIGGS QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

5, 23, 25 MARCH, 2 APRIL 2004

Company – Compulsory winding up – Just and equitable – Public interest – Local authority creditor petitioning to wind up company in public interest – Whether abuse of process – Insolvency Act 1986, ss 122(1)(g), 124, 124A.

The company was incorporated to provide technology training for underprivileged persons with the aid of regeneration grant moneys. It was intended to operate on a non-profit making basis. The principal provider of grants to the company was a local authority. It received a complaint concerning a number of grant-funded transactions and suspended funding to the company. There was a police investigation into the company's operations. The local authority presented a petition stating that it was a contingent or prospective creditor and seeking the winding up of the company claiming that, in the public interest, it was just and equitable for the company to be wound up under s 122(1)(g)[a] of the Insolvency Act 1986. At the substantive hearing of the petition, the company applied, inter alia, for the petition to be struck out as an abuse of process. The local authority contended that, while it did not appear that anyone other that the Secretary of State acting under the special jurisdiction of s 124A[b] of the 1986 Act had ever sought to obtain the winding up of a company in pursuance of a public interest, s 124[c] of the 1986 Act afforded locus standi to any creditor to seek to persuade the court to wind up a company on grounds serving the public interest as much as on grounds serving the creditor's private interest, and that it could not be an abuse of process for a local authority as a creditor to petition on grounds deriving from the undoubted public interest that companies with a propensity to dishonestly misapply public money should be put out of business as soon as possible.

Held – The consistent thread in the authorities on winding-up petitions which affected all classes of potential petitioners, including the Secretary of State under s 124A of the 1986 Act, was that a petition was only properly presented if it was bona fide in pursuit of some interest of the petitioner arising from his particular status as such. In the case of the Secretary of State, Parliament had identified him as the guardian or promoter of the public interest, by making it a condition of his locus standi that it should appear to him 'that it is expedient in the public interest

a Section 122, so far as material, provides: '(1) A company may be wound up by the court if— … (g) the court is of the opinion that it is just and equitable that the company should be wound up.'

b Section 124A, so far as material, provides: '(1) Where it appears to the Secretary of State … that it is expedient in the public interest that a company should be wound up, he may present a petition for it to be wound up if the court thinks it just and equitable for it to be so.'

c Section 124, so far as material, provides: '(1) … an application to the court for the winding up of a company shall be by petition presented … by any creditor or creditors (including any contingent or prospective creditor or creditors) …'

that a company should be wound up'. His petition was then in essence reliant upon the just and equitable ground, as that was separately stated in s 124A(1), but it would be an improper petition if he had not duly satisfied himself as to the public interest in the manner required. Further, the obvious intention of Parliament was to impose a filter on petitions presented in pursuance of the public interest, namely that they should be presented only by the Secretary of State. In the case of creditors, although the requirement that a creditor should by petitioning be pursuing his private interest attributable to his status as creditor was not to be treated as going to his locus standi, that requirement had necessarily to be satisfied by his petition if it was not to be an abuse of process. Accordingly, it was not open to the local authority as a creditor to seek to persuade the court to wind up the company on grounds serving the public interest. However, it could not be said that a winding up would not to a material extent serve the private interest of the local authority as a contingent or prospective creditor so the assertion in its petition of public interest reasons for the winding up of the company did not deprive the local authority of locus standi or render the proceedings as a whole an abuse of process (see [31]–[42], below); *Re Chesterfield Catering Co Ltd* [1976] 3 All ER 294 and *Re a Company (003028 of 1987)* [1988] BCLC 282 considered.

(2) Having regard to the extent to which the allegations relevant to the local authority's private interest as a contingent creditor of the company were made out on the evidence it was just and equitable that the company should be wound up (see [61], [62], [64], [72], [75]–[79], below); *Re a Company (003028 of 1987)* [1988] BCLC 282 applied.

Notes

For the grounds for winding up by the court, for just and equitable winding up, and for who may petition, see 7(3) *Halsbury's Laws* (4th edn) (1996 reissue) paras 2202, 2208–2212.

For the Insolvency Act 1986, ss 122, 124, 124A, see 4 *Halsbury's Statutes* (4th edn) (2004 reissue) 974, 977, 980.

Cases referred to in judgment

Chesterfield Catering Co Ltd, Re [1976] 3 All ER 294, [1977] Ch 373, [1976] 3 WLR 879.

Company (003028 of 1987), Re a [1988] BCLC 282.

Mann v Goldstein [1968] 2 All ER 769, [1968] 1 WLR 1091.

Rica Gold Washing Co, Re (1879) 11 Ch D 36, [1874–80] All ER Rep Ext 1570, CA.

Petition

The London Borough of Tower Hamlets served a petition on 22 October 2003 seeking the winding up of Millennium Advanced Technology Ltd (MATT) under s 122(1)(g) of the Insolvency Act 1986. The facts are set out in the judgment.

Ashley Underwood QC (instructed by *Edwin Coe*) for Tower Hamlets.

Mr Abu Ahmed and Mr Mithra Dulloo for MATT.

Cur adv vult

2 April 2004. The following judgment was delivered.

MICHAEL BRIGGS QC.

[1] I have before me a creditor's petition by the Mayor and Burgesses of the London Borough of Tower Hamlets (Tower Hamlets) for the winding up of Millennium Advanced Technology Ltd (MATT). Notices of intention to support the petition were given by the Mayor and Commonalty and Citizens of the City of London, and by Greenwich Council, both also claiming to be creditors, but neither appeared or was represented at the hearing.

[2] The petition is unusual in a number of respects. First, Tower Hamlets seeks to have MATT wound up on the just and equitable ground under s 122(1)(g) of the Insolvency Act 1986 rather than on the ground that the company is unable to pay its debts, pursuant to s 122(1)(f). Secondly, it is apparent both from the terms of the petition and from the manner in which the case was originally presented, both orally and in his skeleton argument, by Mr Underwood QC on behalf of Tower Hamlets, that the petitioner's principal reason for petitioning appears to have been a perception on its part that it was in the public interest that MATT should be wound up, rather than in the private interest of the petitioner as a creditor.

[3] Although MATT had the benefit of solicitors on the record for most of the period between the presentation of the petition in October 2003 and its hearing, its funding for legal purposes having now run out, it sought to be represented at the hearing by one of its directors, a Mr Abu Ahmed. Since he had unexpectedly been taken ill and admitted to hospital on 22 March, the day before this matter was listed for hearing, and in order to give the petitioner time to consider and if thought fit make submissions on the legal implications arising from the unusual nature of the petition, I directed that it should be adjourned for a day's hearing on 25 March. Happily, Mr Ahmed had by then recovered to an extent sufficient for him to attend court. He appeared none the less to be in some continuing discomfort and, at his request, in addition to permitting him to represent MATT, I also took the exceptional course of allowing the office manager of the company, a Mr Mithra Dulloo, to assist Mr Ahmed with the task of making oral submissions. They had already jointly prepared some concise and useful written submissions, supported by a file of documents, which, with Mr Underwood's consent, I admitted as additional evidence. Mr Ahmed and Mr Dulloo both spoke concisely and with good sense in amplification of their written submissions.

[4] It was apparent from MATT's written submissions, and confirmed by Mr Ahmed at the beginning of the hearing, that the company's stance towards the matter may be summarised as follows. First, it was submitted that the petition should be struck out or dismissed, essentially on the grounds that Tower Hamlets' alleged debt was disputed. Alternatively, Mr Ahmed applied for an adjournment of the petition, not in order to put in further evidence, but to provide time during which an application might be made for an administration order, in preference to an immediate winding up. Finally, Mr Ahmed submitted that if neither of those courses were followed, neither MATT nor he personally (having already committed substantial personal resources of his own to the defence of the petition) had either the financial resources or the legal ability to mount any continued defence of the petition on its merits. Although at times their oral submissions understandably verged into the arena of pure evidence, neither Mr Ahmed nor Mr Dulloo sought to give evidence as witnesses

themselves, by way of addition to the evidence already lodged on MATT's behalf in January of this year.

[5] Having heard argument, I rejected MATT's application to have the petition struck out or dismissed, and I also rejected its application for an adjournment. In view of the time, I indicated that I would give my reasons for those decisions after the conclusion of the proceedings, and then heard the substance of the petition. This judgment is therefore not only a judgment on the petition itself, but also upon the two applications of MATT which immediately preceded its hearing.

HISTORY OF THE COMPANY

[6] MATT was incorporated on 23 February 1999 for the purpose of providing technology training for underprivileged persons with the aid of regeneration grant moneys. It either was originally or at least became the intention of its management that it should operate on a non-profit making basis. In its first audited accounts for the period ended 30 June 2000 its principal activity was described as having since incorporation been the provision of information technology training to socially excluded groups on a non-profit making basis. Its original promoters were Mr Ahmed and a Dr Nurun Nabi. Mr Ahmed became its chief executive and Mr Nabi its secretary.

[7] Tower Hamlets was the principal but not the only provider of grants for the purpose of funding MATT's activities. Other funders included the supporting creditors to whom I have already referred, and Hackney Borough Council. Its total grant income since incorporation has been approximately £1·2m, of which sum £700,000-odd has been provided by Tower Hamlets. By early 2003 it was operating from premises in Whitechapel Road, Bethnal Green Training Centre, Fordham Street and Greatorex Street. Unaudited financial statements prepared for the company by Hill Wooldridge & Co for the year ended 30 June 2002 suggest that its income was by then £775,548 having been £430,683 for the previous year.

[8] It is apparent from copy correspondence and other material submitted on MATT's behalf that by the end of 2002 the company had become well regarded in certain quarters for the quality of its activities, and had become a successful competitor for local authority and related funding. On 13 January 2003, however, the chief executive of Tower Hamlets, Christine Gilbert, wrote to Mr Ahmed giving notice that a complaint had been received 'regarding a number of financial transactions associated with grant funded expenditure to MATT', inviting the company to co-operate in a report by accountants engaged for that purpose by Tower Hamlets, namely Robson Rhodes, and stating that as a precautionary measure, all funding to MATT by Tower Hamlets would be suspended.

[9] Robson Rhodes had by then already submitted a preliminary report to Tower Hamlets in December 2002. A further report was submitted in January 2003, and a composite report in May 2003. This third report constituted Tower Hamlets' evidence in support of the petition, and I shall refer to it as 'the Robson Rhodes report'.

[10] It appears that the public sector fraud team of the Metropolitan Police (the fraud squad) must have commenced an investigation into the same or related matters at much the same time, because at the beginning of March 2003 they searched both MATT's and Mr Ahmed's premises and took away substantial quantities of MATT's records. Mr Ahmed was himself interviewed by the fraud

squad in July 2003, and that investigation is, I was informed, still ongoing but no charges have so far been brought.

[11] The combined effect of the suspension of funding and the presentation and advertisement of the petition caused MATT to have to cease its training activities by the end of 2003. In his written submissions, Mr Ahmed stated that he regards MATT as being owed approximately £476,000-odd (of which he says that £218,000-odd is due from the petitioner) by way of suspended funding arrears due by reference to expenditure already incurred. Against that, he states that the company owes some £426,000-odd to creditors. It has £10,000-odd in accounts frozen as a result of these proceedings. It owns computer equipment and office equipment and furniture, and Mr Ahmed regards it as being contingently entitled to income of another £475,000-odd if its activities could be resumed and current contracts completed satisfactorily.

[12] The terms upon which Tower Hamlets made grant funding available to MATT at least from August 2001 appear from Appendix B to a letter of offer to Mr Ahmed countersigned by him on 20 August 2001, in which MATT is described as the project sponsor and the training purposes for which the grant was made as 'the project'. Appendix B is in the form of standard conditions of grant, and the following conditions are material.

[13] By condition 3.3, MATT was obliged to maintain written records of every item of expenditure in relation to the project, to include dates of the incurring of the expenditure, prices paid, payees, description of goods and/or services received and copy receipts and invoices in respect of such goods or services.

[14] Condition 10 required orders for work, goods or services to be the subject of competitive tendering or quotation, of varying degrees of sophistication dependent upon the amounts involved.

[15] Condition 12 provided for grants to be payable following submission by MATT to Tower Hamlets (described as 'the accountable body') of relevant information about its expenditure, on a quarterly basis. By condition 12.3 Tower Hamlets reserved the right to reduce, suspend or withdraw any payment of grant if MATT was in breach of any of the conditions.

[16] Finally, condition 13 provided that if (inter alia)—

> 'The project sponsor is in breach of any of the conditions attaching to the grant then the project sponsor shall make repayment of any part of the grant as required in the notice within 14 days of the said notice.'

[17] Mr Underwood was disposed to volunteer that there was scope for argument whether such a draconian condition (under which the most trifling breach could in theory lead to the recovery of the whole of a substantial grant) might not be subject to some implied limitations. In the event it has not been necessary to examine that issue further.

HISTORY OF THESE PROCEEDINGS

[18] As I have said, the petition was presented in mid-October 2003, and served together with the Robson Rhodes report as the evidence in support on 22 October. The evidence served did not include the appendices to the report which, after request, were served on 11 November.

[19] Paragraph 5 of the petition described the grounds upon which the winding up of MATT was sought as follows:

'The company has been paid in excess of £700,000 of regeneration grant monies by your petitioners, both from their own funds and from grant funds for which it is the accountable body. The petitioners are accordingly contingent or prospective creditors of the company in the event of grant monies being misapplied. The company has been misusing grant monies for the purpose of enriching individuals associated with it.

(A) No adequate tendering process has been adopted for securing services and equipment, and false documents have been created to give the false impression that there has been tenders;

(B) Significant sums of money have been paid to companies associated with directors of the company, to which no consideration was given or for which the price was inflated. False invoices have been created to disguise the true situation;

(C) Very few students have been trained or employed, and the information as to their qualifications and employment is contradictory;

(D) An investigation by RSM Robson Rhodes into the company commissioned by the petitioners has concluded "MATT was used as a vehicle for deception and the diversion of public funds to sources unknown, but not for the benefit of the local community";

(E) Although the petitioners were the source of substantial funds, the company has received grant monies from other bodies, and may continue to do so.'

[20] By this time Tower Hamlets had applied in the Queen's Bench Division for disclosure from the fraud squad of documents in its possession relating to its investigation of MATT. On 7 August 2003 Master Rose made an order for such disclosure, but on terms that 'in the first instance Mr Zaidi [of Tower Hamlets' solicitors] not be permitted to disclose such documents or the contents thereof to any other person save for counsel instructed by the claimants but the claimants have permission to apply on evidence by witness statement or affidavit for the purposes for an order for disclosure to other persons'. That order was varied, again by Master Rose, on 15 August 2003 so as to permit wider disclosure within Tower Hamlets and its advisers. On 2 February 2004, that regime was again varied by Master Foster so as to enable the material obtained from the fraud squad to be used in these proceedings. I was informed by Mr Underwood who was personally involved in the process of inspection of the fraud squad's relevant documents, that inspection was an ongoing process which extended into 2004, so that further documents, and in particular statements of particular prosecution witnesses were obtained after the first round of Tower Hamlets' evidence in these proceedings.

[21] Case management directions were given in these proceedings by Mrs Registrar Derrett on 19 November 2003, which required Tower Hamlets to provide further information by then requested, for MATT to file witness statements including any experts' reports by 9 January 2004, and for evidence from Tower Hamlets in reply by 30 January. On 29 January 2004 Mr Registrar Simmonds extended time for Tower Hamlets' evidence in reply until 5 March.

[22] MATT's evidence in answer to the petition consisted of one witness statement and one expert's report, dated respectively 8 and 9 January 2004. The witness statement was made by a Mr Timothy Horner, a partner in the firm of Hill Wooldridge & Co, MATT's auditors. It simply exhibited MATT's audited

accounts for the periods to June 2000 and June 2001, and its unaudited financial statements for the year ended 30 June 2002.

[23] The expert's report consisted of a 130-page report by one Monica Bond, a chartered accountant, solicitor, certified fraud examiner and member of the Academy of Experts. It consisted of a lengthy and very detailed critique of the Robson Rhodes report based partly upon examinations of the underlying documents and partly upon information supplied by officers and employees of MATT.

[24] Given that the Robson Rhodes report broadly verified, with varying degrees of certainty, the serious allegations made against MATT in para 5 of the petition, it is noteworthy that MATT did not include in its evidence in answer a statement or statements from any of its officers or employees (who might be expected to have direct knowledge of the matters in issue) denying what was alleged. Nor has any explanation for the absence of such material been proffered on MATT's behalf.

[25] Tower Hamlets served substantial evidence in reply, on 27 February 2004. It took the form of a 53-page response by a Mr William Cleghorn, a partner in Robson Rhodes, replying in detail to Monica Bond's report and, perhaps more importantly for present purposes, a statement from Mr Zaidi of Tower Hamlets' solicitors exhibiting, with a concise introduction, a large number of witness statements obtained by the fraud squad during their related investigation of MATT's affairs.

[26] Early in March, MATT and Mr Ahmed decided that they could no longer fund the ever increasing cost of defending the petition, and at a board meeting on the 11 March, so I was informed by Mr Ahmed, the directors decided to investigate the possibility of obtaining an administration order. MATT has been without legal representation since its most recently retained solicitors came off the record on 12 March.

MATT'S STRIKE-OUT APPLICATION

[27] MATT's submission that the petition should be struck out appeared for the first time not in any application notice but in the concluding paragraph of Mr Ahmed's written submission, which reached the court shortly before the commencement of the hearing on 23 March. On a purposive interpretation it may be said to have been based upon two limbs, the first and foremost being the assertion of a dispute to Tower Hamlets' alleged status as a creditor, and the second being an assertion of procedural abuse. I shall deal with each of those grounds in turn, but first I must mention what, in advance of receiving MATT's written submissions, appeared to me a possible further difficulty in the way of Tower Hamlets. This was that, as I have described, it appeared when the matter was originally opened to me that Tower Hamlets was seeking to use its alleged status as a creditor to obtain a winding up of the company upon what were essentially public interest grounds rather than in pursuit of its private interest as a creditor. Mr Underwood readily acknowledged that there was so far as he knew no reported case in which anyone other than the Secretary of State (in that case acting under the special jurisdiction in s 124A of the 1986 Act), or previously the Board of Trade, had ever sought to obtain the winding up of a company in pursuance of a public interest. I shall deal with that issue first.

[28] Mr Underwood sought to deal with this potential difficulty by two main arguments, one broad, one narrow. His broad argument was, quite simply, that as a matter of construction s 124 of the 1986 Act unambiguously afforded locus

standi to any creditor (as defined, so as to include any contingent or prospective creditor) so that, once through the court door as he described it, it was open to such a petitioner to seek to persuade the court to wind up the company upon any grounds which might make it appear that it was just and equitable to do so, and therefore as much upon grounds serving the public interest as upon grounds serving that petitioner's private interest.

[29] He acknowledged that for over a century there had been a judge-made rule that contributories had to satisfy the court, as a condition for having locus standi, that they were petitioning in pursuit of a private interest arising out of their status as such, and that this was the rationale for the rule that a fully paid-up shareholder needed to be able to show that upon winding up there would be a surplus for payment to shareholders, save only in cases where his inability to do so was caused by a default by the company in providing him with information to which he was entitled. That this was both the rule and its rationale was, he accepted, established by a line of cases commencing with *Re Rica Gold Washing Co* (1879) 11 Ch D 36, [1874–80] All ER Rep Ext 1570 and exemplified by *Re Chesterfield Catering Co Ltd* [1976] 3 All ER 294, [1977] Ch 373. None the less he submitted that this was a quaint rule applicable to contributories, from which creditors were immune, and he relied upon the decision of Scott J in *Re a Company (003028 of 1987)* [1988] BCLC 282. That case showed, he submitted, that a creditor establishes his locus standi purely by proof of his status as such, and he was supported in that submission by the following passage (at 294):

> 'A contingent creditor has, in my judgment, locus standi to present a petition. Whether the petition will succeed, whether the petition is an abuse of process, will depend on the underlying facts and not upon a lack of status to present the petition.'

[30] Accepting again that this did not preclude the possibility that a creditor with locus standi might none the less have his petition struck out as an abuse of process, Mr Underwood submitted that it could not possibly be an abuse of process for a local authority with locus standi as a creditor to petition on grounds deriving from the undoubted public interest that companies with a propensity dishonestly to misapply public money should be put out of business as soon as possible. Local authorities were the guardians of the public interest in their locality, he said, and could not rationally be regarded as mere busybodies. He pointed to an earlier passage in the same judgment of Scott J in which he said (at 294): 'Ordinarily, the interest of a creditor is in obtaining repayment of his debt.' From this it followed, he submitted, that Scott J was there recognising that a creditor might pursue an interest separate and distinct from the obtaining of repayment of his debt.

[31] Attractively though this broad argument was presented, I have not been persuaded by it. In my judgment there is a consistent thread in the authorities on winding-up petitions which affects all classes of potential petitioners, including for that matter the Secretary of State under s 124A, and which may be summarised by the proposition that a petition is only properly presented if it is bona fide in pursuit of some interest of the petitioner arising from his particular status as such.

[32] In relation to contributories this is in my view best expressed by Oliver J in the *Chesterfield Catering* case [1976] 3 All ER 294 at 299, [1977] Ch 373 at 380, where he said:

a '... it seems to me to be contrary to the principle of all the cases to suggest that, even allowing that there may be exceptions to the general rule, a petitioner can demonstrate his locus standi by pointing to some private advantage which he may derive from the winding-up and which is unconnected with his membership of the company.'

b All the examples which were given by Oliver J as potentially justifying a petition by a contributory were so connected, including by way of exception to the requirement to show a surplus, the interest of a fully paid shareholder who petitions on the ground that the number of members has been reduced below the requisite minimum thereby exposing him (as the law then stood) to unlimited liability for the company's debts.

c **[33]** In the case of the Secretary of State it is in my judgment obvious that Parliament has identified him as the guardian or promoter of the public interest, by making it a condition of his locus standi that it should appear to him 'that it is expedient in the public interest that a company should be wound up'. His petition is then in essence reliant upon the just and equitable ground, as that is separately stated in s 124A(1), but it would be an improper petition if he had not d duly satisfied himself as to the public interest in the manner required.

[34] In the case of creditors, Mr Underwood is right that the requirement that a creditor should by petitioning be pursuing his private interest attributable to his status as creditor is not, apparently, treated as going to his locus standi. That much is apparent from the passage in the judgment of Scott J quoted in [29], e above. But in my judgment the same requirement must necessarily be satisfied by his petition if it is not to be an abuse of process.

[35] I reach that conclusion by a number of routes. The first derives from a consideration of the paragraph which precedes the one relied upon by Mr Underwood, and which follows on from the sentence quoted in [30], above. f Scott J continued as follows ([1988] BCLC 282 at 294):

'If his debt is repayable and is not repaid, the creditor can apply to wind up on the ground that the company cannot pay its debts: para (f) of s 122(1). If the petitioner were a contingent creditor, the debt would not be immediately repayable, and in order to obtain a winding up order the g contingent creditor would have to show something in the affairs of the company to justify the apprehension that when the time for repayment of the debt arrived the company would be unable to repay and that in those circumstances the company ought to be at once wound up. Current inability on the part of a company to pay its debts would not necessarily entitle a contingent creditor to succeed in a winding-up petition. The contingent h creditor would, I think, be expected to show, not only and not necessarily a current inability by the company to pay its debts, but rather an inability to pay its debts at the time when the contingent debt became payable. A case of that character would, in my opinion, fall more clearly within para (g) than (f) of s 122(1).'

j **[36]** That passage shows a clear focus upon debt repayment as the essential basis for a creditor's petition, whether based on insolvency or the just and equitable ground. It does not seem to me from the use of the word 'ordinarily' by way of introduction to that passage, that Scott J can be thought to have intended to include as a possible alternative justification a desire on the part of the creditor, essentially collateral to his status as such, to achieve some public interest

in clearing the streets of companies misappropriating public moneys for private gain.

[37] Secondly, that conclusion derives from what seems to me to be the obvious intention of Parliament to impose a filter on petitions presented in pursuance of public interest, namely that they should be presented only by the Secretary of State. Parliament could have included local authorities within the class of qualifying petitioners as guardians of the local public interest, but it did not.

[38] Thirdly, abuse may lie in the pursuit of one procedure where another is clearly more appropriate. Just as it is an abuse for a person with a disputed debt to pursue it in the Companies Court rather than by an ordinary claim, so in my judgment would it be an abuse for any person to pursue his or its perception of the public interest by a winding-up petition, rather than by bringing the matters complained of to the attention of the Secretary of State.

[39] Finally, I doubt whether there is any important distinction between an exclusionary rule based on locus standi and one based on abuse of process. That there probably is not is illustrated in the judgment of Ungoed-Thomas J in *Mann v Goldstein* [1968] 2 All ER 769 at 775, [1968] 1 WLR 1091 at 1099 where, after stating that a creditor whose debt is disputed has no locus standi to petition to wind up, he said:

> 'Indeed, the prevention of the abuse of the process of the court is the very essence of the whole of this court's jurisdiction to restrain the presentation of a winding-up petition.'

For those reasons, I reject Mr Underwood's broad submission.

[40] His narrow submission was that in any event there could be discerned within the petition, without the need for any amendment, a sufficient private interest of Tower Hamlets as a creditor in having MATT wound up. Tower Hamlets was, he submitted, sufficiently shown to be a contingent or prospective creditor because it was a claimant for recovery of grant moneys, either because of breach of the conditions which I have described (the general conditions), or because moneys were paid as the result of dishonest misrepresentations constituted by the presentation of forged invoices. On the company's own admission, he submitted, it was currently insolvent, and the only likely or possible recourse for repayment of Tower Hamlets' grant moneys would be by the pursuit by a liquidator of those responsible for the misappropriation of its funds. Since those responsible for the misappropriations included those presently in control of its management, nothing short of a liquidation could be expected to bring about that result. Accordingly, the presentation of the petition and the winding up of the company were in Tower Hamlets' interests as a creditor in the obtaining of repayment of those moneys, or such part of them as, after due investigation, Tower Hamlets considered it appropriate to claim. That last qualification arose from the acknowledgment by Tower Hamlets that some at least of the grant moneys had been properly used for the purpose for which they had been made available to MATT, and it would therefore be appropriate to limit any claims to repayment to the amounts misappropriated.

[41] Mr Underwood pointed out that Tower Hamlets had yet to demand repayment by notice pursuant to general condition 13, so that its debt could be said to be contingent or prospective rather than immediate. That being so, he submitted that Tower Hamlets' case fell squarely within the contingent creditor analysis provided by Scott J in the passage quoted above, so that the proper basis

for the petition was upon the just and equitable ground rather than that of insolvency.

[42] In my judgment that narrow submission is correct. While it may not have been Tower Hamlets' principal motive for petitioning and while it may depend to some extent upon the company's admission through Mr Ahmed of its present financial plight, it cannot in my judgment be said that a winding up would not to a material extent serve the private interest of Tower Hamlets as a contingent or prospective creditor, so that the assertion in the petition of public interest reasons for the winding up of MATT do not thereby deprive Tower Hamlets of locus standi, or render the proceedings as a whole an abuse of process.

DISPUTED DEBT

[43] It is clearly the case that MATT disputes Tower Hamlets' alleged debt. By way of submission MATT's case is that the true position is that Tower Hamlets owes it £218,000-odd by way of arrears of promised grant, based upon submission of expenditure invoices, following the suspension of payments early in 2003.

[44] It is not however sufficient that the debt is disputed. It must be bona fide disputed on substantial grounds: see for example *Mann v Goldstein*. At first sight that additional requirement might be thought easily to be satisfied in this case by the exchange of very substantial experts' reports running to hundreds of pages in the aggregate. None the less, Mr Underwood submits that it is for the company to demonstrate both bona fides and substantial grounds for its dispute of the debt, and that, on analysis, there is a minimum of £4,000 due or contingently due to Tower Hamlets as to which there is no evidence at all to the contrary. His analysis is as follows.

[45] Paragraph 4.32 of the Robson Rhodes report identified two invoices from Onyx Diginets Ltd (Onyx) dated 15 October 2001 as appearing to be false. Those two invoices, copies of which appear in the Tower Hamlets' reply evidence were for an aggregate of £4,400-odd and related to ASDL Business Package Installations. Monica Bond's report, at para 6.3.9 expressed no firm conclusion as to the falsity or genuineness of these invoices. In reply Tower Hamlets produced a statement (obtained by the fraud squad) from a Mr Amir Farhan dated 25 September 2003. Mr Farhan said he was a director of Onyx, that it had only ever rendered one invoice to MATT dated 24 December 2001, for some 'networking', and had never supplied ASDL Business Packages to MATT or to any other company. Finally, but also only by way of reply evidence, Mr Zaidi's witness statement dated 27 February 2004 showed, at para 27, that Tower Hamlets had paid grant money to MATT equivalent to the face value of, and in reliance upon, those two purported Onyx invoices. That evidence had all been with MATT by the end of February 2004 and there was no evidential answer to it at all.

[46] That demonstrated, said Mr Underwood, two things. The first was that Tower Hamlets had an unanswerable case for the return of the £4,400 as money paid as the result of a dishonest misrepresentation. Secondly it showed that there had been a manifest breach of the general conditions by MATT both by creating and keeping false records, and by making a false claim for payment. Those breaches were sufficient, upon demand, to give rise to a repayment liability, and also, since the breaches occurred before the suspension of payments by Tower Hamlets in January 2003, to justify that suspension under the general conditions

as sufficiently based upon a breach of those conditions and thereby to destroy MATT's cross-claim for arrears of grant moneys.

[47] In my judgment that submission is well-founded. MATT was sufficiently appraised of Tower Hamlets' case on those invoices as long ago as October 2003. It could have produced evidence to challenge that claim, even by simple denial by an appropriate officer or employee of the company with the relevant knowledge. Furthermore, the matter was reaffirmed in Tower Hamlets' reply evidence after Monica Bond's inconclusive response, and that evidence was served more than three weeks before the hearing of the petition.

[48] It may well be that the pendency of a criminal investigation into the affairs of MATT may explain why there has been a reluctance on the part of the company's officers and employees to commit themselves to giving evidence in these proceedings in relation to these allegations of false invoicing. If that were the reason, it would not be a matter for criticism, but the fact remains that this clear and unequivocal evidence has not been challenged, and it is sufficient to show that there exists a debt or contingent debt which is not the subject of a dispute on substantial grounds, and a sufficient breach of the general conditions to give Tower Hamlets a defence to MATT's suggested cross-claim for arrears of grant moneys. Accordingly, the first ground for the strike-out of the petition advanced by MATT fails.

PROCEDURAL ABUSE

[49] The essence of MATT's criticism of the conduct of the petitioner under this heading is that it deliberately withheld material available to it when serving evidence in support of its petition, keeping it up its sleeve for a later reply, when in reality the material was not reply evidence at all. This it is said imposed an unfair burden on MATT and constituted the springing of a trap whereby MATT had expended its available litigation resources in answering the first round of evidence, leaving it effectively defenceless in the face of the reply evidence.

[50] Tower Hamlets made three points by way of response. First, it pointed out that by no means all of what ultimately became the main part of the reply evidence (that is the statements obtained by the fraud squad) was available even for inspection by Tower Hamlets prior to service of its evidence in support of the petition, or even prior to the receipt of Monica Bond's report in answer. Secondly, the fraud squad documentary materials were not in any event permitted to be used in these proceedings until the reply stage. Thirdly, it is submitted that the evidence was in any event genuinely reply evidence, because the Robson Rhodes report had sufficiently verified the matters of complaint, and the reply evidence merely did so in more detail, following Monica Bond's criticisms of the Robson Rhodes report in her own report.

[51] In my judgment, Tower Hamlets' answers do not place their approach to the deployment of evidence in this case entirely beyond criticism. First, it is not at all clear to what extent Tower Hamlets only received the all-important statements obtained by the fraud squad only after the first round of evidence, although it is fair to say that they may have received little or no advance notice that this complaint would be made the subject of an abuse application at the hearing. Secondly, it appears likely to me that the time at which Tower Hamlets obtained a variation to the confidentiality regime surrounding this material sufficient to enable it to be used in these proceedings may have been to a large extent a time of their own choosing. Again, this is not a matter which was, or sensibly could have been, pursued in any depth at the hearing of the petition and

I do not ignore the possibility that the obtaining of the necessary relaxation of that regime may have been a difficult matter calling for delicate negotiation, before the necessary order was obtained. Finally, there are important respects in which the reply evidence goes further than the first round of evidence. A relevant example is the allegation that the Onyx invoices were successfully used to obtain payment from Tower Hamlets, which only appeared for the first time by way of reply.

[52] It seems to me however that Tower Hamlets' explanations in relation to these matters are sufficient to deprive their approach to the deployment of evidence of the gravity necessary for it to constitute such an abuse of process as to justify the dismissal of the petition. In the end, it seems to me that the real question is how far MATT has been prejudiced by that conduct. I am in the end not persuaded by the submission that the absence of any evidence in answer to these grave allegations is the consequence of MATT really having been trapped by the way in which Tower Hamlets handled its evidence. In my judgment it was open to MATT to challenge Tower Hamlets' case with evidence from those directly involved in the matters under review, from the moment when they obtained the petition and the Robson Rhodes report in support of it. The absence of the essential evidence, for example to demonstrate that Tower Hamlets' debt is disputed on substantial grounds, is in my judgment more a consequence of MATT's choice as to the extent and manner in which it sought to defend its case, than a consequence of the way in which Tower Hamlets only deployed its most persuasive material by way of reply.

[53] It follows therefore that MATT's second ground for the striking out or dismissal of the petition also fails.

ADJOURNMENT

[54] Mr Ahmed seeks a four-week adjournment of the petition in order to enable the directors or MATT (it matters not which) to seek to have MATT made the subject of an administration order. According to a helpful chronology provided by Mr Ahmed, it appears that the directors began to consider this option at a meeting on 11 March 2004. I was told that Mr Ahmed has spoken to two insolvency practitioners, both of whom have expressed a readiness to consider the matter, but neither of whom has committed himself to taking any active steps in that regard, without first being placed in funds. Mr Ahmed's proposal is that he and his fellow directors should have recourse to the £10,000-odd currently frozen in company accounts for the purpose of funding the consideration and preparation of an administration petition. It is suggested that administration would be likely to achieve either the survival of MATT as a going concern or a more advantageous realisation of its assets than would be effected on a winding up: see s 8(3)(a) and (d) of the 1986 Act. It was I think implicit in Mr Ahmed's written and oral submissions on behalf of the company that it is in his view at present unable to pay its debts as they fall due, so that the requirement in s 8(1)(a) of the Act would also be satisfied.

[55] Tower Hamlets resisted this application on two grounds. First, it was submitted that there was no realistic prospect that the court would make an administration order in the present circumstances. Secondly and in any event, it was submitted that this application comes too late, the administration route having been available ever since the presentation of the petition last October, and the company having had the benefit of professional advice until 10 March this year.

[56] In my judgment, the first of those objections is well founded, and therefore the second does not need to be separately addressed, although as will appear it seems to me that the passage of time since the end of 2003 is a significant reason why there is now no reasonable prospect that the court would make an administration order.

[57] MATT's case for an administration order may be summarised as follows. (a) During its short period of existence, MATT developed a substantial reputation as a valuable provider of a much-needed service to the local public, in the face of stiff competition. (b) Although its teaching staff have been stood down since the end of 2003, and some have now obtained other full-time employment, there are still loyal members of staff who could be persuaded to return and resume its training activities at short notice, and it retains the equipment needed for that purpose. (c) MATT still has at least one ongoing discussion with a potential funder for training activities. (d) Placing the conduct of such renewed activities in the hands of an administrator, and therefore out of the control of the present management, (save to the extent that an administrator chose to make use of their time and expertise), would restore the confidence in MATT that has been shaken by recent adverse publicity in relation to the matters now under investigation. (e) There is a shortage of experienced providers of the training service offered by MATT, and therefore a real public need that its activities be resumed.

[58] Against that, Tower Hamlets makes the following points. (a) While MATT may have developed some reputation as a training provider prior to the present investigations, that has been entirely dissipated by reason of those investigations and the attendant publicity, regardless of whether Tower Hamlets' suspicions as to the propriety of the conduct of MATT's affairs are or are not well founded. (b) There is not now and has not been since the beginning of this year, any going concern which could be rescued or sold on advantageous terms, for the purpose of fulfilling either of the purposes mentioned in s 8(3)(a) and (d) of the Act. (c) All except one of MATT's funders support the petition, and all of them have without exception suspended grant funding. There is therefore no readily identifiable source of funding with which MATT could resume its activities, or any purchaser of its business which could restart them. Since its activities are in any event 'not for profit', it is difficult to see why any third party should wish to pay money for the right to resume them. (d) The evidence of ongoing funding negotiations is exiguous. (e) Far from an administration being the best way of realising the value of MATT's assets, its real assets are likely to consist of claims against its officers and persons connected with them for the recovery of moneys misappropriated, a process more appropriately conducted by a liquidator than by an administrator.

[59] In my judgment and largely for the reasons given by Tower Hamlets, it is fanciful to suppose that an administration order would now be made in relation to MATT. Its business has been dormant now for three months, and it plainly has insufficient funds with which to recommence its activities. It seems to me wholly unreal to suppose that any of its existing funders would resume funding while there exist the present grave uncertainties, to put it at its lowest, as to the propriety of the conduct of its affairs by its management merely because an insolvency practitioner is placed in overall charge. Similarly, it seems to me illusory to suppose that any third party is going to pay anything more than the break-up value of its present assets for the right to continue with or recommence its activities. There being, in my view, no possibility of a rescue, there is equally

no reason to think that it is realistically possible, let alone likely, that an administration would lead to a more advantageous realisation of MATT's assets than a liquidation.

[60] Accordingly, I decline to adjourn the hearing of the petition.

DECISION ON THE PETITION

[61] The fact that Tower Hamlets is, as I have concluded, an actual or contingent creditor for at least £4,400-odd, and that, on its own admission, the company is at present unable to pay its debts as they fall due, does not of itself automatically resolve the question whether it should now be wound up. At a technical level, that is because Tower Hamlets' petition is not based upon s 122(1)(f); ie the inability of the company to pay its debts, but upon the just and equitable ground. When this matter came on for hearing on 23 March, I invited Mr Underwood to consider whether in the light of the difficulties which then appeared to me to face his client in pursuing what was in substance a public interest petition, Tower Hamlets would wish to consider amending the petition so as positively to plead that MATT was unable to pay its debts. After consideration, that alternative route was declined, principally because of the delay likely to have been engendered by the necessity to give the company time to consider and respond to any such amendment, and to any evidence in support thereof.

[62] More substantially, and leaving aside the technicality of pleading, it is not in my judgment automatically just and equitable that a company should be wound up on the basis of a contingent liability to pay £4,400. The question calls for precisely that sort of analysis envisaged by Scott J in the passage quoted in [35], above. Applying that analysis to this case, the essential questions are, first; to what extent has Tower Hamlets made out its pleaded case under para 5 of the petition, to the extent that those allegations are relevant to its private interest as a contingent creditor of MATT; and secondly, having regard to such of those allegations as are made out on the evidence, is it just and equitable to make a compulsory order.

[63] Adopting therefore the structure of para 5 of the petition, I now make those findings which I have found it necessary to decide, in approaching the final question whether it is just and equitable to make an order. The position of Mr Ahmed at this stage in the proceedings was that, consistent with his earlier written submissions, neither MATT nor he had the resources with which to deal with the full merits of the petition. Subject to two particular points upon which he invited Mr Dulloo to address me, and to which I return below, the petition was at this point largely undefended. I have none the less had regard to the evidence already lodged by the company, and to the submissions made on its behalf, both in writing and orally.

[64] It is common ground, and in any event sufficiently proved, that MATT received in excess of £700,000 by way of grants from Tower Hamlets, being a mixture of Tower Hamlets' own funds and grant funds for which it is the accountable body. It is also, as I have already held, sufficiently proved that Tower Hamlets is a contingent or prospective creditor (if not indeed an actual creditor) in respect of £4,400-odd, either on the basis of a contractual right to recover that money pursuant to the general conditions, or on the basis that it was paid as the result of a dishonest misrepresentation by MATT to the effect that it had incurred the expenditure purportedly recorded in the Onyx invoices dated 15 October 2001.

[65] Tower Hamlets' case is that its contingent or prospective right of recovery is by no means limited to the £4,400-odd the subject matter of those two invoices, but extends in principle to the whole of the £700,000 paid by way of grant, less such sums as Tower Hamlets may choose not to demand, upon a recognition after full investigation that they have been properly spent for the purposes envisaged by the relevant schemes, and required by the general conditions. In particular, it is Tower Hamlets' case that the breach of conditions constituted by the Onyx invoices was only the tip of a very substantial iceberg, and that there is unchallenged or unchallengeable evidence both of further falsification of invoices with a view to using them (albeit possibly unsuccessfully) for the obtaining of further grant instalments, and of the forgery or falsification of purported tender documentation designed to conceal serious breaches of the tendering obligations imposed on MATT by the general conditions. Those matters it is said fall squarely within para 5(A) and (B) of the petition, were sufficiently verified by the first round of Tower Hamlets' evidence and, to the extent necessary, proved to the civil standard by the reply evidence.

[66] So far as concerned false invoicing, Mr Underwood contented himself with a single further example, consisting of four related invoices purportedly rendered to MATT by IT Architecture Ltd, two of them on 25 February 2000 and two of them on 3 May 2001. The 2000 invoices were for an aggregate sum of £41,125·00 being invoices numbered 15652 and 15653 respectively and in each case bearing a paid stamp for the full amount, and being supported by a paid cheque from MATT, on which the payee was stated to be not IT Architecture Ltd but Integrated Business Computer Systems Ltd (IBCS). Mr Zaidi's witness statement dated 27 February 2004 sufficiently proved that these invoices were presented to Tower Hamlets as part of a grant claim, albeit not in the event successfully. A statement made to the fraud squad by one Kwame Adu-Brako proves that IBCS, the payee under the cheque for £41,125·00, was a company of which Mr Ahmed had originally been a director but which by the relevant time had been taken over by Mr Ahmed's wife, without any significant change in the manner of conduct of its affairs.

[67] A statement to the fraud squad by one Derek French, the managing director of IT Architecture Ltd proves that the two invoices dated 25 February 2000 were indeed issued by IT Architecture, but that it did so at Mr Ahmed's request purely as a front or screen for the real underlying transaction, which consisted of the supply of equipment by IBCS to MATT and that IT Architecture was in fact uninvolved either in the supply of the equipment or the payment of the purchase price.

[68] This evidence was not answered or challenged by any evidence or even submissions on the part of MATT. Although the evidence does not begin to show that the equipment was sold by IBCS to MATT at an undervalue, the use of IT Architecture Ltd as a screen to conceal significant transactions between MATT and a connected company, and thereby to conceal the possibility (which I regard as a probability) that IBCS was making a profit for persons connected with MATT out of the supply of equipment to MATT, a grant-aided non-profit making company, is a telling example by way of proof of the primary allegation that MATT was using grant moneys for the purpose of enriching individuals associated with it, and doing so in a manner which involved grave breaches of the general conditions, which plainly required that documentation recording MATT's transactions should be true, rather than false and misleading.

[69] The IT Architecture matter does not rest there however. The second pair of invoices, dated 3 May 2001 surprisingly bear precisely the same numbers, namely 15652 and 15653, as the 2000 invoices. The evidence from Robson Rhodes stated that this ought not to be possible in relation to invoices in consecutive years apparently generated by a computerised invoicing process.

[70] Even more surprisingly, the address of IT Architecture Ltd on the 2001 invoices, although the same as its address on the 2000 invoices, was misspelt in that the relevant county (Surrey) was spelt as 'Surry'. This apparently insignificant typographical error might have been regarded as a mere curiosity, were it not for the fact that, first, a package of blank headed paper found in MATT's offices but purportedly deriving from various suppliers to MATT included one from IT Architecture with the same misspelling, and, secondly, that an inspection of MATT's computer records revealed copies of the 2001 invoices on MATT's own hard disk, similarly misspelt. That these two invoices were forgeries was confirmed by Mr French in the witness statement to which I have referred.

[71] MATT's expert Monica Bond was unable to offer any concluded view about Robson Rhodes' concern about the IT Architecture invoices. No other evidence was proffered by MATT in relation to them, but Mr Dulloo offered by way of submission the suggestion that the 2001 invoices might have come into existence as a result of the misuse of one of MATT's computers by one of its students.

[72] In my judgment the evidence in relation to the IT Architecture invoices, albeit different in relation to the two consecutive sets, is amply sufficient to establish Tower Hamlets' case in relation to them on the balance of probabilities, and therefore to make good, albeit within a relatively narrow compass and essentially by way of example, the allegation in para 5(B) of the petition, and the general allegation of misuse of grant moneys of which para 5(B) is a particular.

[73] I turn to the allegation in relation to tendering in para 5(A) of the petition. Again, Mr Underwood was content to confine himself to an example of the allegation of inadequate tendering and the creation of false documents. It will be recalled that general condition 10.2 required MATT to carry out various forms of tender process before placing orders for work, goods or services. The example relied upon by Mr Underwood related to a document purporting to be a letter from Cosmic Media Services Ltd dated 17 July 2001, and responding to an invitation to quote for the supply of support staff for MATT, specifically for the services of a Mr Mahidur Rashid and a Mr Sarwar Chowdhuri, quoting a monthly rate for Mr Rashid and hourly rate for Mr Chowdhuri, and enclosing a CV in relation to both gentlemen. The letter identifies Cosmic's company registration number (4293447) and curiously appears to respond to an invitation to quote by letter from MATT dated 2 July 2002, that is almost a year later than the date of the reply. Plainly, the two dates appearing on the face of the document cannot both be correct.

[74] A letter dated 7 June 2002 from Cosmic to Mr Ahmed demonstrated that by that date there was already in existence a contract between MATT and Cosmic for the provision of Mr Rashid's services, so that it is improbable to say the least that the document purporting to be dated 17 July 2001 was in reality written on 17 July 2002 as a genuine response to an invitation to quote for those services on 2 July 2002. There is however an even greater difficulty in concluding that the document was created in July 2001, because as at that date, as is proved from a

Companies House search, Cosmic had not been incorporated nor, therefore, given a registration number. It was only incorporated on 25 September 2001. a

[75] The prima facie case thus disclosed that the letter purporting to have been written on 17 July 2001 was an amateur forgery created after the event to manufacture an appearance that Cosmic's services have been properly quoted before being accepted by MATT has not been answered by any, let alone any credible, evidence from MATT. Again, Mr Dulloo in his oral submissions b attempted an explanation, to the effect that somehow an earlier letter genuinely issued by the promoters of Cosmic before its incorporation had been later copied onto headed paper created after its incorporation, failed despite its ingenuity to carry any weight with me. I consider therefore that Tower Hamlets has proved its case to the necessary civil standard in relation to this example of the allegation in para 5(A) of the petition. As with the allegations of false invoicing, it is c impossible for me within the bounds of appropriate proportionality to form any view as to the extent to which these allegations in para 5 of the petition occurred within the conduct of MATT's affairs. Tower Hamlets is content to rest its case upon proof of those specific examples, and I must consider whether upon that basis it is just and equitable to make an order. d

[76] Tower Hamlets did not seek to develop by way of proof para 5(C) of the petition, relating to the number of students who had been trained or employed, and as to the quality of MATT's information as to their qualifications and employment. The allegation in para 5(D) that Robson Rhodes had concluded that MATT was used as a vehicle for deception and the diversion of public funds to sources unknown, rather than for the benefit of the local community, is, e strictly, merely an assertion that Robson Rhodes held that opinion, rather than an allegation that it was true. In my judgment it adds nothing to the case, and in particular nothing to a case based as it must be upon the pursuit by Tower Hamlets of its private interest as a creditor. Finally, the allegation in para 5(E) that MATT has received grant moneys from other bodies is plainly true and f undisputed, and it is MATT rather than Tower Hamlets that asserts, rather unrealistically in my judgment, that MATT may continue to receive such grants, if not wound up. In any event, that allegation is again of no consequence in relation to Tower Hamlets' interests as a creditor, however relevant it may be to the public interest.

[77] In my judgment those findings of fact give rise to the following g consequences relevant to the question whether it is just and equitable to make a winding-up order. (1) There have been repeated breaches of the general conditions pursuant to which Tower Hamlets has made grant moneys available to MATT, as a consequence of which Tower Hamlets has a very substantial claim, lying somewhere between £4,400 and £700,000, for recovery of its grant h moneys. (2) MATT is presently unable to repay those moneys, and is most unlikely to be able to generate funds itself with which to repay those moneys once, at the conclusion of all relevant investigations, Tower Hamlets decides how much to seek to recover. (3) The examples of false invoicing and the creation of false tender documentation which I have found to have been proved j are amply sufficient to justify a concern on the part of Tower Hamlets as a creditor that those presently charged with the management of MATT's affairs cannot be trusted to conduct them with due regard to the interests of its creditors, and in particular Tower Hamlets, if left in unsupervised charge of the company.

[78] The only prospect whereby moneys might be recovered for MATT to enable it to repay any significant amount of the grant moneys so far advanced by

Tower Hamlets lies in the rigorous pursuit by a liquidator of such remedies as, after due investigation, appear to be available for the recovery of moneys misappropriated by its officers or persons connected with them. That conclusion involves no finding that such remedies are necessarily available, or of the commercial value of such claims, but merely a negative conclusion that nothing other than the pursuit of such remedies is likely to give rise to any realistic prospect of recovery.

[79] In those circumstances it seems to me eminently just and equitable that MATT should be wound up, and I so order.

Petition granted.

Martyn Gurr Barrister.

Silven Properties Ltd and another v Royal Bank of Scotland plc and others

[2003] EWCA Civ 1409

COURT OF APPEAL, CIVIL DIVISION

ALDOUS, TUCKEY LJJ AND LIGHTMAN J

29, 30 JULY, 21 OCTOBER 2003

Mortgage – Receiver – Receiver's duties to mortgagor – Whether receiver owing duty to mortgagor to take steps to increase value of mortgaged property before exercising power of sale.

The appellant mortgagors secured their indebtedness to a bank by mortgaging various properties to it. After demanding repayment, the bank appointed the respondents, pursuant to the mortgages, as receivers of the mortgaged properties. As was common form, the mortgages provided that the receivers were to be agents of the mortgagors. When they began their receivership, the receivers investigated the possibility of adding value to some of the mortgaged properties by obtaining planning permission, and they subsequently instructed consultants to make planning applications. However, the receivers eventually decided not to proceed with those applications or to await the completion of negotiations for the grant of a lease in respect of a vacant mortgaged property. Instead, they decided to proceed immediately with sales of the mortgaged properties as they were. The properties were duly sold. In subsequent proceedings against the receivers for allegedly selling the properties at an undervalue, the mortgagors alleged, inter alia, that, in order to obtain the best price obtainable, the receivers had been under a duty before selling to pursue the planning applications and proceed with the grant of the lease, and to defer a sale until those goals had been achieved. That contention was rejected by the judge who dismissed all of the mortgagors' claims. The mortgagors appealed.

Held – Having regard to the fact that the primary duty of a receiver was to bring about a situation where the secured debt was repaid, the receiver had to be entitled as a matter of principle to sell the property in the condition in which it was in the same way as a mortgagee could, and in particular without awaiting or effecting any increase in value or improvement in the property. That conclusion accorded with repeated statements in the authorities that the duties in respect of the exercise of the power of sale by mortgagees and receivers were the same, and with a series of first instance decisions which had held that receivers were not obliged before sale to spend money on repairs, make the property more attractive before marketing it or work an estate by refurbishing it. In the instant case, the receivers, by accepting office as receivers of the mortgagors' properties, assumed a fiduciary duty of care to the bank, the mortgagors and all (if any) others interested in the equity of redemption. Having regard to the special character of a receiver's agency, the receivers' appointment as agents of the mortgagors did not affect the scope or content of the fiduciary duty. The scope or content of the duty had to depend on, and reflect, the special nature of the relationship between the bank, the mortgagors and the receivers arising under the terms of the mortgages and the appointments of the receivers, and in particular the role of the

receivers in securing repayment of the secured debt and the primacy of their obligations in that regard to the bank. Those circumstances precluded the assumption by, or imposition on, the receivers of the obligation to take the pre-marketing steps for which the mortgagors contended. Further, no such obligation could arise in their case (any more than in the case of the bank) from the steps which they took to investigate and (for a period) to proceed with applications for planning permission. The receivers were at all times free (as was the bank) to halt those steps and exercise their right to proceed with an immediate sale of the mortgaged properties as they were. Accordingly, the appeal would be dismissed (see [28]–[30], below).

Notes

For the duties of receivers to mortgagors, see 32 *Halsbury's Laws* (4th edn reissue) para 679.

Cases referred to in judgment

Charnley Davies Ltd (No 2), Re [1990] BCLC 760.

China and South Sea Bank Ltd v Tan [1989] 3 All ER 839, [1990] 1 AC 536, [1990] 2 WLR 56, PC.

Cuckmere Brick Co Ltd v Mutual Finance Ltd, Mutual Finance Ltd v Cuckmere Brick Co Ltd [1971] 2 All ER 633, [1971] Ch 949, [1971] 2 WLR 1207, CA.

Downsview Nominees Ltd v First City Corp Ltd [1993] 3 All ER 626, [1993] AC 295 [1993] 2 WLR 86, PC.

Garland v Ralph Pay & Ransom [1984] 2 EGLR 147.

Gomba Holdings UK Ltd v Homan [1986] 3 All ER 94, [1986] 1 WLR 1301.

Gomba Holdings UK Ltd v Minories Finance Ltd [1989] 1 All ER 261, [1988] 1 WLR 1231, CA.

Gaskell v Gosling [1896] 1 QB 669, CA; *rsvd* [1897] AC 575, [1895–9] All ER Rep 300, HL.

Henderson v Merrett Syndicates [1994] 3 All ER 506, [1995] 2 AC 145, [1994] 3 WLR 761, HL.

Johnson (B) & Co (Builders) Ltd, Re [1955] 2 All ER 775, [1955] Ch 634, [1955] 3 WLR 269, CA.

Kelly v Cooper [1994] 1 BCLC 395, [1993] AC 205, [1992] 3 WLR 936, PC.

Kendle v Melsom (1998) 139 CLR 46, Aust HC.

Knight v Lawrence [1993] BCLC 215.

McHugh (decd) v Union Bank of Canada [1913] AC 299, PC.

Medforth v Blake [1999] 3 All ER 97, [2000] Ch 86, [1999] 3 WLR 922, CA.

Meftah v Lloyds TSB Bank plc [2001] 2 All ER (Comm) 741.

Nash v Eads (1880) 25 Sol Jo 95, CA.

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Piacentini, Re, Dayman (receiver of Piacentini) v IRC [2003] EWHC 113 (Admin), [2003] STC 924, [2003] QB 1497, [2003] 3 WLR 354.

Raja (administratrix of the estate of Raja (decd)) v Austin Gray (a firm) [2002] EWCA Civ 1965, [2003] Lloyd's Rep PN 126.

Ratford v Northavon DC [1986] 3 All ER 193, [1987] QB 357, [1986] 3 WLR 770, CA.

Rhodes v Allied Dunbar Pension Services Ltd, Re Offshore Ventilation Ltd [1989] 1 All ER 1161, [1989] 1 WLR 800, CA.

Routestone Ltd v Minories Finance Ltd, Routestone Ltd v Bird [1997] 1 EGLR 123.

Standard Chartered Bank Ltd v Walker [1982] 3 All ER 938, [1982] 1 WLR 1410, CA.

Tse Kwong Lam v Wong Chit Sen [1983] 3 All ER 54, [1983] 1 WLR 1349, PC.
Yorkshire Bank plc v Hall, Hall v Yorkshire Bank plc [1999] 1 All ER 879, [1999] 1 WLR 1713, CA.

Cases also cited or referred to in skeleton arguments
Astor Chemicals Ltd v Synthetic Technology Ltd [1990] BCLC 1.
Cohen v TSB Bank plc [2002] 2 BCLC 32.
Jefferys v Dickson (1866) LR 1 Ch App 183.
National Bank of Australasia v United Hand-in-Hand and Band of Hope Co (1879) 4 App Cas 391, PC.
Parker-Tweedale v Dunbar Bank plc (No 1) [1990] 2 All ER 577, [1991] Ch 12, [1990] 3 WLR 767, CA.

Appeal
The claimants, Silven Properties Ltd and Chart Enterprises Inc, appealed with permission of Chadwick LJ from part of the decision of Patten J on 3 October 2002 ([2002] EWHC 1976 (Ch), [2003] BPIR 171) dismissing their claims against the second and third defendants, Nigel Vooght and Timothy Harris, the receivers of various properties mortgaged by the claimants to the first defendant, the Royal Bank of Scotland plc (the bank), for breach of duty in the exercise of their power of sale over the mortgaged properties by selling them at an undervalue. Patten J had also dismissed similar claims brought by the claimants against the bank as mortgagee, and there was no appeal from that part of his decision. The facts are set out in the judgment of the court.

Michael Driscoll QC and *Michael Michell* (instructed by *Kenneth Elliott & Rowe*, Romford) for the claimants.
Christopher Nugee QC and *Daniel Bayfield* (instructed by *Linklaters*) for the receivers.

Cur adv vult

21 October 2003. The following judgment of the court was delivered.

LIGHTMAN J.

[1] This is the judgment of the court prepared by Lightman J.

INTRODUCTION

[2] This is an appeal brought with the permission of Chadwick LJ against part of the judgment of Patten J ([2002] EWHC 1976 (Ch), [2003] BPIR 171). By his judgment, Patten J dismissed all the claims of Silven Properties Ltd (Silven) and Chart Enterprises Inc (Chart), the claimants in this action (the claimants) against the first defendant, the Royal Bank of Scotland plc (the bank), and the second and third defendants, Nigel Vooght and Timothy Harris (the receivers).

[3] The claimants mortgaged properties to the bank to secure indebtedness. The bank, pursuant to the mortgages, appointed the receivers as receivers of the mortgaged properties and between them the bank and the receivers sold all the properties. The mortgages (as is common form) provided that the receivers should be the agents of the claimants.

[4] In this action the claimants as mortgagors claimed damages against the bank as mortgagee and the receivers as receivers (the defendants) alleging that in breach of duty they sold the mortgaged properties at an undervalue. Patten J

dismissed all the claimants' claims against all the defendants and refused permission to appeal. Chadwick LJ gave the claimants permission to appeal limited to the claims against the receivers in respect of six of the properties. In the case of each of these sales it was conceded by the claimants or established by evidence at the trial that the sales were at the best price reasonably obtainable at the dates of such sales for the properties in the condition in which they were. The relevant complaint made by the claimants at the trial in respect of these sales was that the receivers were under a duty not to sell the properties as they were. Instead they were under a duty before selling, in order to obtain the best price obtainable, to pursue planning applications for the development of the properties and (in the case of two of the properties, which were vacant or partially vacant, but in respect of which there were negotiations for grant of leases) to proceed with the grant of leases, and to defer a sale until these goals were achieved. Patten J dismissed these claims against the receivers without determining whether the receivers' failure to take this course of action caused any damage or loss. He did so on the ground that as a matter of law the receivers had no duty to delay the sale for the purposes suggested by the claimants and were entitled, whether or not it was reasonable for them to do so, to sell the properties without delay as they were. The only issue on this appeal is whether the judge was correct. It is common ground that, if the judge was wrong, the case must be remitted to the judge (or some other judge) to decide whether any breaches by the receivers of the duties established on this appeal by the claimants in fact occasioned any damage or loss.

[5] The issue of law raised on this appeal is of some considerable practical importance. Earlier authorities have expressed the view that the duties of receivers appointed by mortgagees are the same as the duties of the mortgagees themselves in respect of the sale of mortgaged property and that mortgagees do not have the duties for which the claimants contend. But (as Chadwick LJ stated when granting permission to appeal) consideration is called for whether the express appointment in the mortgage of receivers as agents of the mortgagor leads to the assumption by receivers who accept such appointment of responsibilities and duties which differ from those owed by the mortgagees, and it is important that any doubt in this regard should be resolved in the interests of mortgagees, mortgagors and receivers.

[6] The full history of events in this case is set out in the careful and detailed judgment of Patten J. Only a very brief summary is called for of the facts relevant to this appeal. But a detailed examination is called for of the relevant authorities and principles which throw light on the legal implications in this context of the appointment by a mortgagee of receivers as agents of the mortgagor.

FACTS

[7] The claimants are property companies set up for the benefit of the Ezekiel family. They had large borrowings from the bank secured by mortgages over some 34 properties which they owned. In May 1996 in accordance with the terms of the mortgages the bank demanded repayment. According to the bank the indebtedness at that date of Silven was £4,309,946 and of Chart was £620,891. In May and June 1996 the bank appointed receivers over all the properties mortgaged to it. Save for one property (which is not relevant on this appeal) the receivers appointed were the receivers. The receivers set about selling the 33 properties in respect of which they had been appointed receivers and in the course of some 18 months all 34 mortgaged properties were sold. The gross

realisation in respect of properties owned by Silven was £4,881,500 and in respect of properties owned by Chart was £366,500. The receivers entered into the various contracts for sale of the 33 properties as agents for the claimants. In the case of some of these properties, however, instead of the receivers completing the sales, in order to make title overriding adverse registered interests, the bank conveyed or transferred the properties as mortgagee. No point was taken before the judge or this court that in the cases where the bank completed the sales those sales ceased to be sales by the receivers and became sales by the bank in respect of which no liability could attach to the receivers. Accordingly, it does not fall to us to express any view on that question.

[8] The claimants complained in the action that many of the properties were sold at an undervalue. The appeal relates only to six of the properties. The particular complaint which is the subject of this appeal is that the undervalue is attributable to the decision of the receivers to sell without first obtaining planning permission for development and without first letting a vacant property.

[9] When they began their receivership, the receivers adopted the strategy of investigating the possibility of adding value to some of the mortgaged properties by obtaining planning permission. This strategy was clearly set out in their first, second and third reports to the bank dated respectively 13 August, 17 September and 5 November 1996. In accordance with that strategy the receivers obtained reports from planning consultants advising them as to the prospects of obtaining planning permission for various of the properties. On 8 November 1996 the receivers obtained estimates for applying for planning permission. On 30 December 1996 the receivers instructed planning consultants to make planning applications and at the same time asked the property consultants to give them advice as to the expected uplift in price which would be achieved by obtaining planning permission. By the end of February 1997, however, the receivers had decided not to proceed with any planning application or to await the completion of negotiations for the grant of a lease of the vacant property and instead to proceed immediately with sales of the mortgaged properties as they were. The reasons for their decision are disputed. By so doing the receivers decided to forgo any potential increase in price obtainable on a sale if delayed until after the result of the planning applications and the grant of the leases in favour of the advantage to the bank of saving the costs of those exercises and obtaining an immediate realisation and partial repayment of its secured indebtedness. The issue before this court is whether, for whatever the reason they decided on this course, the receivers were free to do so.

JUDGMENT BELOW

[10] The judge set out clearly in his judgment his reasons for dismissing the claim against the receivers. The first relevant extract reads as follows ([2003] BPIR 171):

> '[112] Underpinning the claims against the Coopers receivers is the proposition that they owed a duty to the mortgagors to act in their best interests in determining when to sell the mortgaged property and that, as part of their duty to obtain the best or a proper price, they were obliged to take steps to improve the value of the properties by, for example, applying for planning permission, completing the grant of a lease or, in the case of Watney Street, of carrying into effect a land swap with the local authority. If this is correct, there is a fundamental difference between the legal duties owed by a mortgagee and those of any receiver he chooses to appoint. It is

common ground that a mortgagee who exercises his power of sale owes a duty to take reasonable precautions to obtain the true market value or a proper price for the property at the time when he comes to sell: see [*Cuckmere Brick Co Ltd v Mutual Finance Ltd, Mutual Finance Ltd v Cuckmere Brick Co Ltd* [1971] 2 All ER 633, [1971] Ch 949].'

After citing passages from the judgment of Salmon LJ supporting these propositions, the judge went on to say:

'[113] ... Whilst accepting these propositions, Mr Driscoll contends that they have no application to a receiver who is appointed by a mortgagee and then sells. He relies in particular on a decision of Millett J in [*Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 at 775], who held that an administrator owed a duty to the company over which he was appointed to take reasonable care to obtain the best price that the circumstances, as he reasonably perceived them to be, permitted, including a duty to take reasonable care in choosing the time at which to sell the property. In reaching this decision, the judge contrasted the position of the administrator with that of the mortgagee: "It was common ground that an administrator owes a duty to a company over which he is appointed to take reasonable steps to obtain a proper price for its assets. That is an obligation which the law imposes on anyone with a power, whether contractual or statutory, to sell property which does not belong to him. A mortgagee is bound to have regard to the interests of the mortgagor, but he is entitled to give priority to his own interests, and may insist on an immediate sale whether or not that is calculated to realise the best price; he must 'take reasonable care to obtain the true value of the property at the moment he chooses to sell it': see [the *Cuckmere* case]. An administrator, by contrast, like a liquidator, has no interest of his own to which he may give priority, and must take reasonable care in choosing the time at which to sell the property. His duty is 'to take reasonable care to obtain the best price that the circumstances permit': see [*Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938, [1982] 1 WLR 1410]." ...

[115] I take the view that I am bound on the authorities as they stand to regard the receiver as under the same (but no greater) obligations to the mortgagor as the mortgagee. This does not mean that he is not entitled to exercise some judgment of his own in relation to the timing of any sale. They are his powers to exercise. But inevitably he is likely to give primacy to the interests and wishes of the mortgagee and if he does so, he is under no liability to the mortgagor unless he acts in bad faith or fails to take reasonable steps to obtain a proper price at the relevant time. That is, I think, made clear by the decision of the Privy Council in [*Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626 at 635, [1993] AC 295 at 312], where Lord Templeman, delivering the opinion of the Board, said this: "The next question is the nature and extent of the duties owed by a mortgagee and a receiver and manager respectively to subsequent encumbrancers and the mortgagor. Several centuries ago equity evolved principles for the enforcement of mortgages and the protection of borrowers. The most basic principles were, first, that a mortgage is security for the repayment of a debt and, secondly, that a security for repayment of a debt is only a mortgage. From these principles flowed two rules, first, that powers conferred on a mortgagee must be exercised in good faith for the purpose of obtaining repayment and secondly that, subject to the first rule, powers conferred on a

mortgagee may be exercised although the consequences may be disadvantageous to the borrower. These principles and rules apply also to a receiver and manager appointed by the mortgagee." Similarly in [*Medforth v Blake* [1999] 3 All ER 97 at 103, [2000] Ch 86 at 93] Sir Richard Scott V-C, when considering the position of a receiver and manager appointed by a mortgagee to run a business, said this ... "The proposition that, in managing and carrying on the mortgaged business, the receiver owes the mortgagor no duty other than that of good faith offends, in my opinion, commercial sense. The receiver is not obliged to carry on the business. He can decide not to do so. He can decide to close it down. In taking these decisions he is entitled, and perhaps bound, to have regard to the interests of the mortgagee in obtaining repayment of the secured debt. Provided he acts in good faith, he is entitled to sacrifice the interests of the mortgagor in pursuit of that end ..."

[117] ... The mortgagee or receiver, when exercising the power of sale, must therefore act in good faith with a view to securing repayment of the debt by the conversion of the security into money. The timing of the sale will be a matter for them, unaffected by the wishes of the mortgagor. But the preparation for and the method of sale to be adopted will be matters in respect of which there is no conflict between the interests of the mortgagor and the mortgagee, and where the mortgagee or receiver will be potentially liable to the mortgagor if he fails to act with reasonable care so as to obtain a proper price. In this context it is clear that the property must be fairly and properly exposed to the market, absent perhaps cases of real urgency. Similarly, as part of this duty of care, the receiver may be required to take positive steps to maintain the value of the property. [*Knight v Lawrence* [1993] BCLC 215] is an example of this. But I am unconvinced that the mortgagee or a receiver appointed by him is required to incur expense in the improvement of the security in order to sell it at a higher price or to embark on making applications for planning permission, granting leases or the like, which, however well-founded, are likely to delay a sale beyond the normal period of marketing.'

CLAIMANTS' CASE ON APPEAL

[11] The claimants on this appeal advance three general propositions of law in support of their contention that the judge was wrong and that the receivers were duty bound to proceed with the steps necessary to increase the market price of the properties charged before proceeding with a sale: (i) a receiver from the date of his appointment owes a duty of care to mortgagors in all he does in the course of his receivership if he is appointed agent of the mortgagor and has exclusive control of property of the mortgagor; (ii) alternatively a receiver (in the like manner to a mortgagee) who has exercised his power to investigate and to pursue an application for planning permission becomes bound not to abandon that course unless to do so would accord with his duty of care, ie unless a reasonable and prudent person would do so; (iii) the clearly established duty of care of mortgagees and receivers to take reasonable care on sale to obtain the best price reasonably obtainable includes a duty to take the pre-marketing steps required to achieve the best price reasonably obtainable and this includes pursuing applications for development and granting leases of vacant premises.

THE LAW

[12] The claimants' submissions require an examination and comparison of the duties of mortgagees and receivers. We shall therefore first consider the relevant duties of mortgagees and then turn to the duties of receivers.

MORTGAGEES

[13] A mortgagee has no duty at any time to exercise his powers as mortgagee to sell, to take possession or to appoint a receiver and preserve the security or its value or to realise his security. He is entitled to remain totally passive. If the mortgagee takes possession, he becomes the manager of the charged property: see *Kendle v Melsom* (1998) 193 CLR 46 at 64. He thereby assumes a duty to take reasonable care of the property secured: see *Downsview Nominees Ltd v First City Corp Ltd* [1993] 3 All ER 626 at 637, [1993] AC 295 at 315 per Lord Templeman; and this requires him to be active in protecting and exploiting the security, maximising the return, but without taking undue risks: see *Palk v Mortgage Services Funding plc* [1993] 2 All ER 481 at 486, [1993] Ch 330 at 338 per Nicholls V-C.

[14] A mortgagee 'is not a trustee of the power of sale for the mortgagor'. This time-honoured expression can be traced back at least as far as Jessel MR in *Nash v Eads* (1880) 25 Sol Jo 95. In default of provision to the contrary in the mortgage, the power is conferred upon the mortgagee by way of bargain by the mortgagor for his own benefit and he has an unfettered discretion to sell when he likes to achieve repayment of the debt which he is owed: see *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] 2 All ER 633 at 646–647, [1971] Ch 949 at 969. A mortgagee is at all times free to consult his own interests alone whether and when to exercise his power of sale. The most recent authoritative restatement of this principle is to be found in *Raja (administratrix of the estate of Raja (decd)) v Austin Gray (a firm)* [2002] EWCA Civ 1965 at [55], [2003] Lloyd's Rep PN 126 at [55] per Peter Gibson LJ. The mortgagee's decision is not constrained by reason of the fact that the exercise or non-exercise of the power will occasion loss or damage to the mortgagor: see *China and South Sea Bank Ltd v Tan* [1989] 3 All ER 839, [1990] 1 AC 536. It does not matter that the time may be unpropitious and that by waiting a higher price could be obtained: he is not bound to postpone in the hope of obtaining a better price: see *Tse Kwong Lam v Wong Chit Sen* [1983] 3 All ER 54 at 59, [1983] 1 WLR 1349 at 1355.

[15] The claimants contend that a mortgagee is not entitled to ignore the fact that a short delay might result in a higher price. For this purpose they rely on certain obiter dicta of Lord Denning MR in *Standard Chartered Bank Ltd v Walker* [1982] 3 All ER 938 at 942, [1982] 1 WLR 1410 at 1415–1416. The mortgagee in that case, having obtained insufficient on the sale at auction of the property charged to recover the sum secured, applied for summary judgment against the mortgagor for that sum. The mortgagor resisted the application alleging that the mortgagee had sold at an undervalue on a variety of grounds one of which was that the sale took place at the wrong time of year. The Court of Appeal gave the mortgagor leave to defend on the ground that there was an arguable case that the sale had been negligently handled. It was common ground in that case that a mortgagee can choose his own time for sale: see [1982] 3 All ER 938 at 942, [1982] 1 WLR 1410 at 1418 per Fox LJ. Lord Denning MR accepted that there were dicta to this effect, but added that he did not think that this meant that the mortgagee could sell at the worst possible moment and that it was at least arguable that in choosing the time he must exercise a reasonable degree of care. The view expressed by Lord Denning MR cannot stand with the later authorities to which

we have referred and which state quite categorically that the mortgagee is under no such duty of care to the mortgagor in respect of the timing of a sale and can act in his own interests in deciding whether and when he should exercise his power of sale.

[16] The mortgagee is entitled to sell the mortgaged property as it is. He is under no obligation to improve it or increase its value. There is no obligation to take any such pre-marketing steps to increase the value of the property as is suggested by the claimants. The claimants submitted that this principle could not stand with the decision of the Privy Council in *McHugh v Union Bank of Canada* [1913] AC 299. Lord Moulton in that case held (at 312) that, if a mortgagee does proceed with a sale of property which is unsaleable as it stands, a duty of care may be imposed on him when taking the necessary steps to render the mortgaged property saleable. The mortgage in that case was of horses, which the mortgagee needed to drive to market if he was to sell them. The mortgagee was held to owe to the mortgagor a duty to take proper care of them whilst driving them to market. The duty imposed on the mortgagee was to take care to preserve, not increase, the value of the security. The decision accordingly affords no support for the claimants' case.

[17] The mortgagee is free (in his own interest as well as that of the mortgagor) to investigate whether and how he can 'unlock' the potential for an increase in value of the property mortgaged (e g by an application for planning permission or the grant of a lease) and indeed (going further) he can proceed with such an application or grant. But he is likewise free at any time to halt his efforts and proceed instead immediately with a sale. By commencing on this path the mortgagee does not in any way preclude himself from calling a halt at will: he does not assume any such obligation of care to the mortgagor in respect of its continuance as the claimants contend. If however the mortgagee is to seek to charge to the mortgagor the costs of the exercise which he has undertaken of obtaining planning permission or a lessee, subject to any applicable terms of the mortgage, the mortgagee may only be entitled to do so if he acted reasonably in incurring those costs and fairly balanced the costs of the exercise against the potential benefits taking fully into account the possibility that he might at any moment 'pull the plug' on these efforts and the consequences for the mortgagor if he did so.

[18] If the mortgagor requires protection in any of these respects, whether by imposing further duties on the mortgagee or limitations on his rights and powers, he must insist upon them when the bargain is made and upon the inclusion of protective provisions in the mortgage. In the absence of such protective provisions, the mortgagee is entitled to rest on the terms of the mortgage and (save where statute otherwise requires) the court must give effect to them. The one method available to the mortgagor to prevent the mortgagee exercising the rights conferred upon him by the mortgagee is to redeem the mortgage. If he redeems, there can be no need or justification for recourse by the mortgagee to the power of sale to achieve repayment of the debt due to him secured by the mortgage.

[19] When and if the mortgagee does exercise the power of sale, he comes under a duty in equity (and not tort) to the mortgagor (and all others interested in the equity of redemption) to take reasonable precautions to obtain 'the fair' or 'the true market' value of or the 'proper price' for the mortgaged property at the date of the sale, and not (as the claimants submitted) the date of the decision to sell. If the period of time between the dates of the decision to sell and of the sale is short, there may be no difference in value between the two dates and indeed in many (if not

most cases) this may be readily assumed. But where there is a period of delay, the difference in date could prove significant. The mortgagee is not entitled to act in a way which unfairly prejudices the mortgagor by selling hastily at a knock-down price sufficient to pay off his debt: see *Palk's* case [1993] 2 All ER 481 at 486–487, [1993] Ch 330 at 337–338. He must take proper care whether by fairly and properly exposing the property to the market or otherwise to obtain the best price reasonably obtainable at the date of sale. The remedy for breach of this equitable duty is not common law damages, but an order that the mortgagee account to the mortgagor and all others interested in the equity of redemption, not just for what he actually received, but for what he should have received: see the *Standard Chartered Bank* case [1982] 3 All ER 938 at 942, [1982] 1 WLR 1410 at 1416.

[20] In our judgment there can accordingly be no duty on the part of a mortgagee, as suggested by the claimants, to postpone exercising the power of sale until after the further pursuit (let alone the outcome) of an application for planning permission or the grant of a lease of the mortgaged property, though the outcome of the application and the effect of the grant of the lease may be to increase the market value of the mortgaged property and price obtained on sale. A mortgagee is entitled to sell the property in the condition in which it stands without investing money or time in increasing its likely sale value. He is entitled to discontinue efforts already undertaken to increase their likely sale value in favour of such a sale. A mortgagee is under a duty to take reasonable care to obtain a sale price which reflects the added value available on the grant of planning permission and the grant of a lease of a vacant property and (as a means of achieving this end) to ensure that the potential is brought to the notice of prospective purchasers and accordingly taken into account in their offers: see the *Cuckmere* case. But that is the limit of his duty.

RECEIVERS

[21] We turn to the question of the duties regarding mortgaged properties of receivers and in particular of receivers who under the term of the mortgage under which they are appointed are designated as agents of the mortgagor.

[22] There is binding authority for the proposition that (again in default of agreement to the contrary) in the exercise of the power of sale receivers owe the same equitable duty to the mortgagor and others interested in the equity of redemption as is owed by the mortgagee: they are both obliged to take care to obtain the best price reasonably obtainable: see eg the *Cuckmere* case; the *Downsview* case; *Yorkshire Bank plc v Hall, Hall v Yorkshire Bank plc* [1999] 1 All ER 879 at 893, [1999] 1 WLR 1713 at 1728; *Medforth v Blake* [1999] 3 All ER 97 at 108, [2000] Ch 86 at 98–99; and *Raja's* case [2003] Lloyd's Rep PN 126 at [55]. The critical issue however is whether the receiver (unlike the mortgagee) is under a duty of care in regard to the date of sale and to ensure that steps are taken (in particular in respect of planning and the grant of leases) to realise the full potential of the secured property before sale by obtaining permission or granting the leases.

[23] In a number of respects it is clear that a receiver is in a very different position from a mortgagee. Whilst a mortgagee has no duty at any time to exercise his powers to enforce his security, a receiver has no right to remain passive if that course would be damaging to the interests of the mortgagor or mortgagee. In the absence of a provision to the contrary in the mortgage or his appointment, the receiver must be active in the protection and preservation of the charged property over which he is appointed: see Lightman and Moss *The Law of Receivers and Administrators of Companies* (3rd edn, 2000) pp 153–154 (para 7-030). Thus if the

mortgaged property is let, the receiver is duty bound to inspect the lease and, if the lease contains an upwards only rent review, to trigger that rent review in due time: see *Knight v Lawrence* [1993] BCLC 215. His management duties will ordinarily impose on him no general duty to exercise the power of sale: see *Routestone Ltd v Minories Finance Ltd, Routestone Ltd v Bird* [1997] 1 EGLR 123 at 126. But a duty may arise if eg the goods are perishable and a failure to do so would cause loss to the mortgagee and mortgagor.

[24] The critical issue raised is whether (as contended by the claimants) the wider management duties imposed on a receiver (but not on a mortgagee) may require a receiver (and in particular a receiver appointed the agent of the mortgagor) to postpone a sale until after steps have been taken (in this case proceeding with an application for planning permission and with the grant of a lease) calculated to increase the price obtainable in a sum greater than the cost of taking those steps plus the sum representing accrued interest over the period whilst those steps are being taken.

[25] The existence and scope of the duties of an agent, fiduciary and otherwise, depend on the terms on which they are acting: see *Kelly v Cooper* [1994] 1 BCLC 395 at 400, [1993] AC 205 at 214. In the case of an agent appointed to manage his principal's property on his behalf alone, general agency principles will apply. The agent will be obliged to pursue single-mindedly the interests of his principal and he will owe the duties to his principal for which the claimants contend. This is reflected in the passage in the judgment of Millett J in the case of *Re Charnley Davies Ltd (No 2)* [1990] BCLC 760 cited by Patten J ([2003] BPIR 171 at [113]). The administrator as agent for the company owes a duty of care to the company in the choice of the time to sell and (by parity of reasoning) in the decision whether to take the appropriate available advantageous pre-marketing steps which are calculated to achieve the best price. The issue raised is whether receivers who are appointed by a mortgagee to act as agents of the mortgagor are in a like legal position and owe a like duty to the mortgagor.

[26] The character and incidents of such receivers' agency has been the subject of judicial and extra-judicial consideration. Peter Millett QC (as he then was) in 'The Conveyancing Powers of Receivers After Liquidation' (1977) 41 Conv (NS) 83 at 88 wrote: '... the so-called "agency" of the [receivers] is not a true agency, but merely a formula for making the company, rather than the [mortgagee], liable for his acts ...' But this agency of the receivers is a real one, even though it has some peculiar incidents: see *Rhodes v Allied Dunbar Pension Services Ltd, Re Offshore Ventilation Ltd* [1989] 1 All ER 1161 at 1167, [1989] 1 WLR 800 at 807. Its reality is reflected in the continuity after the appointment of receivers of the rateable occupation of the mortgagor through the agency of the receivers (see *Ratford v Northavon DC* [1986] 3 All ER 193, [1987] QB 357) and in the absence of personal liability of the receivers for tax in respect of receipts which come to the hands of the receivers as agents: see *Re Piacentini, Dayman (receiver of Piacentini) v IRC* [2003] EWHC 113 (Admin), [2003] STC 924, [2003] QB 1497.

[27] The peculiar incidents of the agency are significant. In particular: (1) the agency is one where the principal, the mortgagor, has no say in the appointment or identity of the receiver and is not entitled to give any instructions to the receiver or to dismiss the receiver. In the words of Rigby LJ in *Gaskell v Gosling* [1896] 1 QB 669 at 692: 'For valuable consideration he has committed the management of his property to an attorney whose appointment he cannot interfere with'; (2) there is no contractual relationship or duty owed in tort by the receiver to the mortgagor: the relationship and duties owed by the receiver are equitable only: see *Medforth's*

case and *Raja*'s case; (3) the equitable duty is owed to the mortgagee as well as the mortgagor. The relationship created by the mortgage is tripartite involving the mortgagor, the mortgagee and the receiver; (4) the duty owed by the receiver (like the duty owed by a mortgagee) to the mortgagor is not owed to him individually but to him as one of the persons interested in the equity of redemption. The class character of the right is reflected in the class character of the relief to be granted in case of a breach of this duty. That relief is an order that the receiver account to the persons interested in the equity of redemption for what he would have held as receiver but for his default; (5) not merely does the receiver owe a duty of care to the mortgagee as well as the mortgagor, but his primary duty in exercising his powers of management is to try and bring about a situation in which the secured debt is repaid: see *Medforth*'s case; and (6) the receiver is not managing the mortgagor's property for the benefit of the mortgagor, but the security, the property of the mortgagee, for the benefit of the mortgagee: see *Re B Johnson & Co (Builders) Ltd* [1955] 2 All ER 775 at 790, [1955] Ch 634 at 661 per Jenkins LJ (cited with approval by Lord Templeman in the *Downsview* case [1993] 3 All ER 626 at 635, [1993] AC 295 at 313) and [1955] 2 All ER 775 at 780, [1955] Ch 634 at 646 per Lord Evershed MR (cited with approval by Scott V-C in *Medforth*'s case [1999] 3 All ER 97 at 105, [2000] Ch 86 at 95–96). His powers of management are really ancillary to that duty: see *Gomba Holdings UK Ltd v Homan* [1986] 3 All ER 94 at 97, [1986] 1 WLR 1301 at 1305 per Hoffmann J.

[28] In the context of a relationship such at the present, which is no ordinary agency and is primarily a device to protect the mortgagee, general agency principles are of limited assistance in identifying the duties owed by the receiver to the mortgagor: see *Gomba Holdings UK Ltd v Homan* [1986] 3 All ER 94 at 97, [1986] 1 WLR 1301 at 1305 per Hoffmann J; *Gomba Holdings UK Ltd v Minories Finance Ltd* [1989] 1 All ER 261 at 263, [1988] 1 WLR 1231 at 1233 per Fox LJ. The core duty of the receiver to account to the mortgagor subsists, but (for example) the mortgagor has no unrestricted right of access to receivership documents. The mortgage confers upon the mortgagee a direct and indirect means of securing a sale in order to achieve repayment of his secured debt. The mortgagee can sell as mortgagee and the mortgagee can appoint a receiver who likewise can sell in the name of the mortgagor. Having regard to the fact that the receiver's primary duty is to bring about a situation where the secured debt is repaid, as a matter of principle the receiver must be entitled (like the mortgagee) to sell the property in the condition in which it is in the same way as the mortgagee can and in particular without awaiting or effecting any increase in value or improvement in the property. This accords with the repeated statements in the authorities that the duties in respect of the exercise of the power of sale by mortgagees and receivers are the same and with the holding in a series of decisions at first instance that receivers are not obliged before sale to spend money on repairs (see *Meftah v Lloyds TSB Bank plc* [2001] 2 All ER (Comm) 741 at [9], [100] per Lawrence Collins J), to make the property more attractive before marketing it (*Garland v Ralph Pay & Ransom* [1984] 2 EGLR 147 at 151 per Nicholls J) or to 'work' an estate by refurbishing it (*Routestone Ltd v Minories Finance Ltd* [1997] 1 EGLR 123 at 130 per Jacob J).

[29] In summary, by accepting office as receivers of the claimants' properties the receivers assumed a fiduciary duty of care to the bank, the claimants and all (if any) others interested in the equity of redemption. This accords with the statement of principle to this effect of Lord Browne-Wilkinson in *Henderson v Merrett Syndicates* [1994] 3 All ER 506 at 543, [1995] 2 AC 145 at 205 relied on by the claimants. The appointment of the receivers as agents of the claimants having regard to the special

character of the agency does not affect the scope or the content of the fiduciary duty. The scope or content of the duty must depend on and reflect the special nature of the relationship between the bank, the claimants and the receivers arising under the terms of the mortgages and the appointments of the receivers, and in particular the role of the receivers in securing repayment of the secured debt and the primacy of their obligations in this regard to the bank. These circumstances preclude the assumption by, or imposition on, the receivers of the obligation to take the pre-marketing steps for which the claimants contend in this action. Further no such obligation could arise in their case (any more than in the case of the bank) from the steps which they took to investigate and (for a period) to proceed with applications for planning permission. The receivers were at all times free (as was the bank) to halt those steps and exercise their right to proceed with an immediate sale of the mortgaged properties as they were.

CONCLUSION

[30] For these reasons this appeal should be dismissed.

Appeal dismissed. Permission to appeal refused.

Melanie Martyn Barrister.

23 February 2004. The Appeal Committee of the House of Lords dismissed a petition by the first claimant for permission to appeal.

Todd and another v Secretary of State for the Environment, Food and Rural Affairs

[2004] EWHC 1450 (Admin)

QUEEN'S BENCH DIVISION (ADMINISTRATIVE COURT)

EVANS-LOMBE J

19–21, 24 MAY, 22 JUNE 2004

Highway – Definitive map – Modification order – Modification order made on discovery by authority of evidence showing that a right of way not shown in the map subsisted or was reasonably alleged to subsist – Secretary of State confirming modification order on basis of evidence from which existence of right of way could reasonably be alleged to subsist – Whether Secretary of State applying correct standard of proof – Wildlife and Countryside Act 1981, s 53(3)(c)(i), Sch 15.

The relevant surveying authority made an order modifying its definitive map of public rights of way under s 53[a] of the Wildlife and Countryside Act 1981, which provided for such modification, inter alia, under sub-s (3)(c)(i), on the discovery by the authority of evidence which showed that a right of way which was not shown in the definitive map and statement subsisted or was reasonably alleged to subsist. The modification made was the inclusion of a byway open to all traffic (a BOAT). Orders made, inter alia, under s 53(3)(c) took effect subject to the provisions of Sch 15 to the 1981 Act. Under para 2[b] of Sch 15, an order was not to take effect until confirmed either by the authority or the Secretary of State under para 6[c], or by the Secretary of State under para 7[d]. Paragraph 6 related to unopposed orders, which the authority could confirm without modification, or submit to the Secretary of State for confirmation if they required any modification. Paragraph 7 required the authority to submit opposed orders to the Secretary of State , who could then either hold a local inquiry or afford objectors an opportunity of being heard. The claimants would not have objected to the inclusion of the way in question as a footpath or bridleway, but they did oppose to its inclusion as a BOAT, as that meant it would be open to motorised vehicles. Accordingly, the authority submitted the order to the Secretary of State; she appointed an inspector and public inquiries were held. The inspector found that the way could 'be reasonably alleged to subsist as a vehicular highway' and confirmed the order. The claimants sought to have the order quashed. They submitted, inter alia, that the inspector had applied too low a standard of proof, namely that the authority could establish facts from which the existence of a BOAT could reasonably be alleged to subsist, as opposed to the normal civil burden of proof that such a way subsisted on the balance of probabilities. The claimants referred to the history of the legislation and to decided cases relating to appeals at the preliminary stage against a refusal by a relevant authority to make a modification order which held that in considering whether or not to make an

a Section 53 is set out at [9], below
b Paragraph 2 is set out at [15], below
c Paragraph 6 is set out at [15], below
d Paragraph 7 is set out at [15], below

order the authority had to able to demonstrate that a way subsisted or was reasonably alleged to subsist. a

Held – Having regard to the legislative history of s 53(3)(c)(i) of the 1981 Act, the burden of proof to be applied by the Secretary of State when confirming orders modifying the definitive map and statement was the civil burden of proof. Although Sch 15 to the 1981 Act gave no express guidance as to the burden of b proof applicable on the confirmation of a s 53(3)(c)(i) order, it was reasonable to assume that the legislature intended to replicate the pattern of the predecessor Acts so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof, namely the balance of probabilities. It would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden c of proof than that which would be applicable were the existence of those same rights to be determined in the course of ordinary litigation in the civil courts. Moreover, there was a clear implication from the principle that a lower standard of proof applied at the preliminary stage and that that was acceptable because where the evidence of the subsistence of a right of way was conflicting, those d issues would be determined following a public inquiry, that such determination would take place applying a higher standard of proof than one of a merely justifiable allegation. The provisions in Sch 15, which conferred on the authority a discretion to confirm unopposed modification orders or, if the authority considered that changes to the order should be made required it to submit the revised order to the Secretary of State, who was given a further discretion e whether or not to confirm it or to confirm it after a further alteration, implied a revisiting by the authority or the Secretary of State of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage. Accordingly, the order would be quashed (see [51], [73], below).

R v Secretary of State for the Environment, ex p Bagshaw (1994) 68 P & CR 402 and *R v Secretary of State for Wales, ex p Emery* [1998] 4 All ER 367 considered. f

R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin) not followed.

Notes g

For the modification of maps and statements, and for opposed modification orders, see 21 *Halsbury's Laws* (4th edn) (2004 reissue) paras 597, 609.

For the Wildlife and Countryside Act 1981, s 53, Sch 15, see 20 *Halsbury's Statutes* (4th edn) (2003 reissue) 552, 574.

h

Cases referred to in judgment

Eyre v New Forest Highway Board (1892) 56 JP 517, Assizes and CA.

Fairmount Investments Ltd v Secretary of State for the Environment [1976] 2 All ER 865, [1976] 1 WLR 1255, HL.

R v Secretary of State for the Environment, ex p Bagshaw (1994) 68 P & CR 402. j

R v Secretary of State for the Environment, ex p Hood [1975] 3 All ER 243, [1975] QB 891, [1975] 3 WLR 172, CA.

R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs [2003] EWHC 171 (Admin).

R v Secretary of State for Wales, ex p Emery [1998] 4 All ER 367, CA.

Shears Court (West Mersea) Management Co Ltd v Essex CC (1986) 85 LGR 479.
Suffolk CC v Mason [1979] 2 All ER 369, [1979] AC 705, [1979] 2 WLR 571, HL.

Application

The claimants, Philip Napier Todd and Douglas Bradley, applied under para 12 of Sch 15 to the Wildlife and Countryside Act 1981 for the quashing of an order made by Hampshire County Council on 26 May 2000, and confirmed by the Secretary of State on 15 September 2003, modifying the Council's definitive map of public rights of way pursuant to s 53 of the 1981 Act. The facts are set out in the judgment.

George Laurence QC and *Ross Crail* (instructed by *William Sturges & Co*) for the claimants.

Timothy Morshead (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

22 June 2004. The following judgment was delivered.

EVANS-LOMBE J.

[1] This is an application for the quashing of the order made by the Hampshire County Council (the council) on 26 May 2000 and confirmed on 15 September 2003 by the defendant's inspector (the inspector), modifying the council's definitive map of public rights of way pursuant to s 53 of the Wildlife and Countryside Act 1981. The modification in question was to include on the council's definitive map as a byway open to all traffic (BOAT) a way over land which in the past had formed part of the Bramshill Estate in the parishes of Bramshill and Eversley. The way is described in the order as running from the junction of the roads C164 and C24 over a distance of 1,690 m to the road U241. The claimants are two persons having an interest in the extent of the rights over the way. The defendant is the Secretary of State for the Environment, Food and Rural Affairs. The actual issue between the claimants and the defendant is not as to the way's status as a highway but as to the extent of the public's rights over it. Whereas the claimants would not object to the way's inclusion on the definitive map as a footpath or bridleway, they object to its being included as a BOAT and thus subjected to motorised vehicular traffic.

[2] The way in question is called Sandy Lane. Counsel for the claimants have helpfully included in their written submissions as an appendix a history of Sandy Lane from the middle of the nineteenth century in the form of a chronology with, as a further appendix, a description of the persons referred to in that chronology. I do not understand that any of the events and descriptions set out in those two documents are in issue between the parties. I therefore append them to this judgment as a clear and succinct summary of the background events to this application concluding with the issue of these proceedings on the 12 November 2003.

[3] It will be seen that the inspector gave an interim decision by a decision letter dated 18 July 2002 (the interim letter) to which references are made in the chronology as OD 2002. The inspector gave his final decision confirming the council's order by a letter (the final letter) dated 15 September 2003 to which references are made in the chronology as OD 2003. The interim letter indicated the inspector's intention to modify the council's order of 26 May 2000

so as to confirm an entry on the definitive map of Sandy Lane as a way but with user limited to a footpath or bridleway. As a result that modification necessitated re-advertisement of the order and following further objections, a further inquiry. As a result the inspector received further written submissions from the parties which caused him to change his mind so that the final order confirmed Sandy Lane as a BOAT in accordance with the council's initial order.

[4] The claimants seek to have the council's order of confirmation of the 15 September 2003 (the confirming order) quashed under four heads as follows:

> '1. That in confirming the council's order the Inspector applied too low a standard of proof for the existence of a BOAT on Sandy Lane namely that the council could establish facts from which the existence of such a way could "reasonably be alleged to subsist" as opposed to the normal civil burden of proof that such a way subsisted on the balance of probabilities.
>
> 2. That the Inspector's change of mind was caused by a re-evaluation of documents and plans associated with procedures for the purpose of the [Finance (1909–10) Act 1910] which he found to have constituted a dedication of Sandy Lane by its then owner Sir Anthony Cope which dedication was subsequently accepted by user by the public.
>
> 3. That the Inspector's conclusion was reached by procedural unfairness in that the objectors were not given a [sic] opportunity to comment upon new material which they submit passages in the final letter show were the product of independent research by the Inspector which plainly affected his decision.
>
> 4. That the Inspector's changed conclusion was unsupported by any findings of fact or any findings capable of supporting that conclusion were unsupported by evidence.'

[5] I turn to deal with the first and main issue.

THE BURDEN OF PROOF REQUIRED UNDER SCH 15 TO THE 1981 ACT FOR CONFIRMING AN ORDER

[6] At para 38 of the final letter, having analysed the effect of the material before him resulting from the Finance Act 1910 procedures, the inspector concluded that 'this leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway'. He then went on to consider evidence tending against 'this allegation' and concluded at para 54:

> 'Having deduced that the Order route may be reasonably alleged to subsist as a vehicular highway and noting that it is now "used by the public mainly for the purposes for which footpaths and bridleways are so used", I conclude that the Order should be confirmed.'

[7] Although there are other passages in the final letter, notably at para 46, where the inspector appears to have been applying the normal civil standard of proof it is not in issue that the standard he ultimately applied in confirming the order was that he was satisfied that a BOAT could 'be reasonably alleged to subsist'. It is the claimants' case that in doing so the inspector made an error of law.

[8] Part IV of the National Parks and Access to the Countryside Act 1949, under the short title 'Ascertainment of footpaths, bridleways and certain other highways' contained provision for the preparation of maps and statements to

record all footpaths, bridleways and roads carrying vehicular traffic but which were being used primarily as footpaths and bridleways (referred to as 'RUPPs'). The 1949 Act's means of doing so was through the preparation of 'definitive maps' and supporting statements, covering the whole country, on which such public rights of way were recorded, and once so recorded, were deemed unchallengeably to exist until lawfully terminated. The 1949 Act placed a duty on each county council as 'the surveying authority' to prepare, and by periodic reviews, to keep up-to-date such definitive maps and statements. It will be necessary later in this judgment to examine in some detail the provisions of Pt IV. Sections of the 1949 Act were repealed and replaced by the Countryside Act 1968. Again it will be necessary to examine the relevant parts of this Act. That process was continued by the 1981 Act. The issues arising from the first ground upon which the claimants seek to quash the council's order result from the application to the facts of this case of the provisions of s 53 of and Sch 15 to the 1981 Act.

[9] Part III of the 1981 Act, which by s 66 applies to footpaths, bridleways or BOATs, under the heading 'Ascertainment of public rights of way' provides by s 53 as follows:

> '**53.** *Duty to keep definitive map and statement under continuous review.*—(1) In this Part "definitive map and statement", in relation to any area, means, subject to section 57(3)—(a) the latest revised map and statement prepared in definitive form for that area under section 33 of the 1949 Act; or (b) where no such map and statement have been so prepared, the original definitive map and statement prepared for that area under section 32 of that Act; or (c) where no such map and statement have been so prepared, the map and statement prepared for that area under section 55(3).
>
> (2) As regards every definitive map and statement, the surveying authority shall—(a) as soon as reasonably practicable after the commencement date, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence, before that date, of any of the events specified in subsection (3); and (b) as from that date, keep the map and statement under continuous review and as soon as reasonably practicable after the occurrence, on or after that date, of any of those events, by order make such modifications to the map and statement as appear to them to be requisite in consequence of the occurrence of that event.
>
> (3) The events referred to in subsection (2) are as follows—(a) the coming into operation of any enactment or instrument, or any other event, whereby—(i) a highway shown or required to be shown in the map and statement has been authorised to be stopped up, diverted, widened or extended; (ii) a highway shown or required to be shown in the map and statement as a highway of a particular description has ceased to be a highway of that description; or (iii) a new right of way has been created over land in the area to which the map relates, being a right of way such that the land over which the right subsists is a public path; (b) the expiration, in relation to any way in the area to which the map relates, of any period such that the enjoyment by the public of the way during that period raises a presumption that the way has been dedicated as a public path; (c) the discovery by the authority of evidence which (when

considered with all other relevant evidence available to them) shows—(i) that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates, being a right of way to which this Part applies; (ii) that a highway shown in the map and statement as a highway of a particular description ought to be there shown as a highway of a different description; or (iii) that there is no public right of way over land shown in the map and statement as a highway of any description, or any other particulars contained in the map and statement require modification.

(4) The modifications which may be made by an order under subsection (2) shall include the addition to the statement of particulars as to—(a) the position and width of any public path or byway open to all traffic which is or is to be shown on the map; and (b) any limitations or conditions affecting the public right of way thereover.

(5) Any person may apply to the authority for an order under subsection (2) which makes such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (b) or (c) of subsection (3); and the provisions of Schedule 14 shall have effect as to the making and determination of applications under this subsection.

(6) Orders under subsection (2) which make only such modifications as appear to the authority to be requisite in consequence of the occurrence of one or more events falling within paragraph (a) of subsection (3) shall take effect on their being made; and the provisions of Schedule 15 shall have effect as to the making, validity and date of coming into operation of other orders under subsection (2).'

[10] Section 53 replaces s 33 of the 1949 Act. Section 53(3) is the subsection with which this part of my judgment is primarily concerned and which replaced s 33(2) of the 1949 Act but also contained a power to remove a right of way shown on the definitive map which was not contained in the 1949 Act and first appeared in the 1968 Act.

[11] It will be seen that s 53 places a duty on the 'surveying authority' (the authority) here the council, to modify the definitive map by an order under sub-s (2) in consequence of the occurrence of any of the events specified in sub-s (3). The present case concerns an event specified in sub-s (3)(c)(i) namely the discovery by the authority—

'of evidence which (when considered with all other relevant evidence available to them) shows—(i) that a right of way which is not shown on the map and statement subsists or is reasonably alleged to subsist ...'

It will be observed that there are two tests to be met by the authority before making an order. The authority must be satisfied either, that the right of way 'subsists' or, alternatively, 'is reasonably alleged to subsist'. It is accepted that the former test would require the authority to be satisfied of the subsistence of the right of way to the normal civil burden of proof ie on the balance of probabilities, whereas the latter test imposes on the authority a lesser burden, namely one which obliges them only to be satisfied of the existence of facts which raise a prima facie case for the subsistence of the way.

[12] It is pursuant to sub-s (3)(c)(i) that the council made the order of 26 May 2000.

[13] The 'events' specified in sub-s (3)(a) primarily concern alterations to the definitive map consequent on prior 'legal events' such as orders diverting or stopping up existing rights or creating new ones. That subsection has no application to the facts of this case. Subsection (5) permits members of the public to apply to an authority to make an order under sub-s (2) on being satisfied of events falling within sub-s (3)(b) or (c). The 'making and determination' of such applications are governed by Sch 14 to the 1981 Act. Paragraph 2(1) of Sch 14 requires any applicant to 'serve a notice stating that the application has been made on every owner and occupier of any land to which the application relates' and the applicant is required by para 2(3) to certify to the authority that he has done so. Paragraph 3 of the schedule is headed 'Determination by authority' and provides:

> '3.—(1) As soon as reasonably practicable after receiving a certificate under paragraph 2(3), the authority shall—(a) investigate the matters stated in the application; and (b) after consulting with every local authority whose area includes the land to which the application relates, decide whether to make or not to make the order to which the application relates ...
>
> (3) As soon as practicable after determining the application, the authority shall give notice of their decision by serving a copy of it on the applicant and any person on whom notice of the application was required to be served under paragraph 2(1).'

[14] Paragraph 4 gives the applicant a right of appeal against a refusal by the authority to make an order under s 53(2).

[15] Section 53(6) provides that orders consequent on events specified in sub-s (3)(a) shall take immediate effect but those consequent on events specified in paras (b) and (c) of sub-s (3) shall take effect subject to the provisions of Sch 15. So far as material to this judgment that schedule provides as follows:

> '2. *Coming into operation.* An order shall not take effect until confirmed either by the authority or the Secretary of State under paragraph 6 or by the Secretary of State under paragraph 7.
>
> 3. *Publicity for orders.*—(1) On making an order, the authority shall give notice in the prescribed form ...
>
> (2) Subject to sub-paragraph (4) [immaterial], the notice to be given under sub-paragraph (1) shall be given—(a) by publication in at least one local newspaper ... (b) by serving a like notice on—(i) every owner and occupier of any of that land ... (iv) such other persons as may be prescribed in relation to the area in which that land is situated or as the authority may consider appropriate ...
>
> 6. *Unopposed orders.*—(1) If no representations or objections are duly made, or if any so made are withdrawn, the authority may—(a) confirm the order without modification; or (b) if they require any modification to be made, submit the order to the Secretary of State for confirmation by him.
>
> (2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State may confirm the order with or without modifications.

7. *Opposed orders.*—(1) If any representation or objection duly made is not withdrawn the authority shall submit the order to the Secretary of State for confirmation by him.

(2) Where an order is submitted to the Secretary of State under sub-paragraph (1), the Secretary of State shall either—(a) cause a local inquiry to be held; or (b) afford any person by whom a representation or objection has been duly made and not withdrawn an opportunity of being heard by a person appointed by the Secretary of State for the purpose.

(3) On considering any representations or objections duly made and the report of the person appointed to hold the inquiry or hear representations or objections, the Secretary of State may confirm the order with or without modifications.'

[16] Paragraph 8 imposes certain restrictions on the Secretary of State's power to confirm orders with modifications and the remaining paragraphs in the schedule provide for local inquiries (para 9), the appointment of inspectors (para 10), the notice to be given of final decisions (para 11), and the power to make regulations 'as to the procedure on the making, submission and confirmation of orders as appears to him to be expedient' (para 13(1)). Paragraph 12 of the schedule provides for any person to challenge an order which has taken effect as not being within the powers conferred by ss 53 and 54, or for non-compliance with Sch 15, by application to the High Court. It is pursuant to para 12 that these proceedings have been brought.

[17] It will be seen, therefore, that modifications to the definitive map by an authority consequent on any of the events specified in s 53(3)(b) or (c), to become effective, must proceed through two stages, the order stage and the confirmation stage. The order stage is governed by s 53(5) and Sch 14 and the confirmation stage is governed by s 53(6) and Sch 15. It is accepted that when the authority after consultation decides 'whether to make or not to make the order' within para 3(1)(b) of Sch 14 it is empowered to make the order even if it is not, on the material before it, able to conclude that the relevant right of way subsists, provided it is satisfied, on the material before it, that it can be 'reasonably alleged to subsist'. The question on this part of the case is whether when such an order comes to be confirmed under s 53(6) and Sch 15 the Secretary of State, in the exercise of the discretion conferred on him by para 7(3) of Sch 15, can confirm that order even if satisfied, only, that the allegation of the subsistence of the way is reasonable, or, alternatively whether he must be satisfied on the balance of probabilities that the way subsists.

[18] I have been shown three internally circulated documents intended to guide the ministry's inspectorate. The first dated 21 October 1997 appears at para 10 to advise inspectors that, at the confirmation stage, they need only be satisfied up to the lesser burden of proof. That guidance appears to be withdrawn by a circular of February 2001 but restored by one of April 2003.

[19] It is submitted by the defendant that the Secretary of State's current view as to the standard of proof required for the confirmation of modification orders under Sch 15 is supported by the recent decision of Collins J in *R (on the application of Leicestershire CC) v Secretary of State for the Environment, Food and Rural Affairs* [2003] EWHC 171 (Admin). The case concerned a public footpath running between two cottages before debouching onto a main road. To get to the main road it had to pass through either the garden of Manor Cottage or the contiguous garden of Glebe Cottage. The existing footpath, as being used at

the time of the application, passed through that of Glebe Cottage but in order to do so it had to do a sharp left turn when reaching the garden fences in order to pass through an existing gate at the top end of Glebe Cottage garden thereafter straightening up to run in a straight line to the road along the boundary between the two gardens, but on the Glebe Cottage side. If the footpath had passed through Manor Cottage garden it would have run in a straight line to the road. The application under the 1981 Act was brought by the owner of Glebe Cottage under s 53(3)(c)(i) for an order modifying the definitive map to make the path run through Manor Cottage garden and under sub-para (iii) of para (c) to remove the existing entry on the map showing the path as running through Glebe Cottage garden. The matter came before Collins J on a renewed application for permission, it having been refused on paper. It is not entirely clear from the report but it seems that the relevant surveying authority, the Leicestershire County Council, had made an order on the application of the owner of Glebe Cottage and the question was whether that order should be confirmed. The authority had referred the order to the Secretary of State who had appointed an inspector to hold an inquiry. It seems that the inspector, regarding himself as at liberty to apply either the test of subsistence on the balance of probabilities or the test of reasonable allegation of subsistence, found that the owner of Glebe Cottage had satisfied the latter test for the purpose of establishing that the footpath should run through his neighbour's garden (s 53(3)(c)(i)) but had failed to establish, to what he regarded as a higher burden of proof, a case justifying the removal from the map of the right of way running through his own garden (s 53(3)(c)(iii)). The inspector regarded the latter finding as taking precedence and accordingly declined to confirm the order under s 53(3)(c)(i) and also that under para (c)(iii). It is to be observed that the dual test only applies to cases brought under para (c)(i). There is no ambiguity, as to the test applicable to cases under para (c)(iii) (or para c(ii)), which is the normal civil burden of proof.

[20] I quote from the judgment of Collins J starting at [20]:

> '[20] The inspector then directed himself as to the correct approach that he should adopt. He relied on a decision which had been put before him, *R v the Secretary of State for the Environment, ex p Bagshaw* (1994) 68 P & CR 402, a decision of Owen J. In that case Owen J was considering, among other things, the correct approach to s 53(3)(c)(i), and what he said about it (at 407) was this: "It is necessary to give some meaning to all the words used. Accordingly, there must be a difference between showing 'that a right of way which is not shown in the map and statement subsists' and showing that a right of way which is not shown in the map and statement 'is reasonably alleged to subsist'. Accordingly the questions for the council and subsequently for the Secretary of State were: does the evidence produced by the claimant together with all the other evidence available show that either—(a) a right of way subsists? (I shall call this test 'A'), or (b) it is reasonable to allege that a right of way subsists? (I shall call this test 'B'). To answer either question must involve some evaluation of the evidence and a judgment upon that evidence. For the first of those possibilities to be answered in the affirmative, it will be necessary to show that on a balance of probabilities the right does exist. For the second possibility to be shown it will be necessary to show that a reasonable

person, having considered all the relevant evidence available, could reasonably allege a right of way to subsist." a

[21] The inspector then sets out test A and test B in the terms of the section. When considering test A, he says to establish whether a right of way exists on the balance of probabilities would require clear evidence in favour of the applicant and no credible evidence to the contrary. Mr Richards has submitted that that is an incorrect approach to a finding b on the balance of probabilities. There may be credible evidence to the contrary, but that would not necessarily prevent a finding that on the balance of probabilities the existence of the right of way was made out. I suppose it must be obvious that, if there is credible evidence to the contrary, it would need clearer evidence to establish on the balance of probabilities that the right of way existed. But, as it seems to me, it is c perhaps unsafe and unnecessary for inspectors, as it was for this inspector, to analyse or to use other words to indicate what is the test on the balance of probabilities. All it requires is that the inspector or the council is persuaded that it is more probable than not on the evidence—and on all the evidence—that the right of way exists. If so, it will be established in d conformity with the Act.

[22] The inspector then sets out test B, which he explains thus: "If there is a conflict of credible evidence, and no incontrovertible evidence that a way cannot reasonably be alleged to subsist, then the answer must be that it is reasonable to allege that one does exist." That has not been criticised as a proper approach. Indeed, as Owen J made clear, the question is e whether a reasonable person could reasonably allege a right of way, having considered all the relevant evidence, and the council and the Secretary of State in turn must be judges of that. It is perfectly obvious that the evidence necessary to establish test B will be less than that necessary to establish test A. f

[23] Mr Morshead has submitted—and, as I understand it, Mr Richards does not dissent from this, although he does not positively put it forward—that the reason for the lesser test in s 53(3)(c)(i) is a recognition by Parliament that, if it can be shown that it is reasonable to allege that a right of way subsists, then it ought to be put down in the public interest on g the map, and then it will be for the relevant landowner or whoever to bring forward a case to show that that was wrong and that the map therefore shows a right of way which it should not show. The burden upon the individual to establish that is that set out in s 53(3)(c)(iii).

[24] The circular which is published by the department under the Act makes it clear that the evidence to establish that a public right of way h should be removed from an authoritative record will need to be cogent, and indeed that is consistent with what is set out in s 56 as to the effect of a right of way shown on the definitive map.

[25] The inspector then considers the tests under s 53(3)(c)(i). On test A in para 47 he says this: "The evidence in support of the Manor Cottage j route, however, looks at the situation only from the point of view of people walking southwards from the open countryside into Main Street. When considered the other way round, I believe the Glebe Cottage route would have been the more inviting choice. To that should also be added what I consider can reasonably be assumed to have been in the mind of the

author of the 1951 Parish Survey Plan and Statement, namely that he knew where the Main Street end of the footpath was, and showed it on his plan accordingly; it therefore did not need also to be recorded verbally. Taken together, these factors lead me to the conclusion that although there is indeed evidence in favour of the applicant, that evidence is not clear-cut because there is likewise credible evidence to the contrary. The order therefore fails test A." Whether or not the language used was wholly satisfactory, it seems to me to be absolutely clear from what the inspector has there said that he took the view that the weight of the evidence was such that he was not persuaded that the right of way over Manor Cottage existed. Indeed, he would not have referred to the Parish Survey Plan and Statement of 1951 and the point about Glebe Cottage being more inviting from Main Street unless he had formed the view that that was the more probable route. But he then went on to consider test B. He made the point that there was evidence in support of Manor Cottage, in particular a substantial body of user evidence, and in those circumstances he was persuaded that test B was satisfied because the footpath was reasonably alleged to subsist over Manor Cottage.

[26] Mr Richards submits that, in the light of those findings, he was in effect obliged to find in favour of the county council because the test under (i) had been fulfilled and therefore the only proper course to adopt would be to allow the application because it was shown that the map ought to have the footpath through the curtilage of Manor Cottage. However, the inspector went on, properly in my view, to consider (iii) and made the point there that cogent evidence was needed to remove a footpath and that there was not sufficient evidence to persuade him that it ought to be removed. Mr Richards submits that that is a perverse finding and that he could not properly have found in favour of the applicant on (i) and against the applicant on (iii).

[27] As I have indicated, it is perhaps unusual for s 53 to come into play where there is no dispute that a right of way exists but there is a dispute as to precisely the route of that right of way. In those circumstances it is not possible to look at (i) and (iii) in isolation because there has to be a balance drawn between the existence of the definitive map and the route shown on it which would thus have to be removed, and the evidence to support the placing on the map of, in effect, a new right of way.

[28] As I have already indicated, s 53(3)(c)(i) is usually in play when there is a question as to whether a right of way exists at all, ie when there is no question of any alternative route, merely a battle as to whether the right exists. Likewise, s 53(3)(c)(iii) is normally in issue when there is a battle as to whether the right of way shown on a map should be there at all and it is apparently unusual for the battle to be about alternative routes. If it is, however, it seems to me quite clear that the alternative test B under s 53(3)(c)(i) is the less important. Indeed, it may well be that it is of no importance because what the inspector is having to do is to decide which is the correct route. If he is in doubt and if he is not persuaded that there is sufficient evidence to show that the correct route is other than that shown on the map, then what is shown on the map must stay because it is in the interests of everyone that the map is to be treated as definitive and if the map has been so treated for some time, then it is obvious that it is

desirable that it should stay in place. Hence the circular indicating that cogent evidence is needed to remove a right of way shown on the map. It would be difficult to imagine that a finding that is less than that the alternative exists on the balance of probabilities would be sufficiently cogent evidence to change what is on the map. It would be strange indeed if merely to find that it was reasonable to allege that the alternative existed was in a given case sufficient to remove what is shown on the map. I am not saying it is impossible—it is dangerous to rule out any possibility—but I would be surprised, I am bound to say, if in any given case that amounted to sufficiently cogent evidence to remove the route shown on the map.

[29] As I say, where you have a situation such as you have here, it seems to me that the issue really is that in reality s 53(3)(c)(iii) will be likely to be the starting point, and it is only if there is sufficient evidence to show that that was wrong—which would normally no doubt be satisfied by a finding that on the balance of probabilities the alternative was right—that a change should take place. The presumption is against change, rather than the other way around.

[30] It seems that the inspector's approach, albeit perhaps expressed in a way which was somewhat over-complicated, was correct and that there is no reason in the circumstances of this case why what was shown on the map should be changed.'

[21] It seems to me that this decision is not direct authority for the proposition that the lesser standard of proof is available to the Secretary of State in confirming modification orders under s 53(3)(c)(i). The case turned on the application to remove under para (c)(iii) under which the judge concluded that the inspector was correct to apply a higher standard of proof to justify a removal than the reasonable allegation standard although there is no direct reference to the civil standard of proof, 'on the balance of probabilities'. However Collins J did not disapprove of the inspector's initial conclusion that it would have been sufficient for him, on the material before him, to confirm the existence of the footpath over Manor Cottage if satisfied that the reasonable allegation test had been met but for the failure to satisfy the higher test he applied to the application to remove it from Glebe Cottage. Thus, it seems to me, that Collins J's judgment is consistent with the lower test being available on applications for confirmation in respect of cases under para (c)(i) but it was not necessary for him to decide the point, which was not argued before him, and he did not do so.

THE 1949 ACT

[22] Before the enactment of the 1949 Act there were no official records of public rights of way. If a dispute arose about the subsistence of a right of way over land such dispute was determined by litigation in the ordinary courts usually between the landowner and the person or persons asserting the right of way. In *R v Secretary of State for the Environment, ex p Hood* [1975] 3 All ER 243 at 245, [1975] QB 891 at 896 Lord Denning MR described the object of the 1949 Act in these words:

'The object of the Act is this: it is to have all our ancient highways mapped out, put on record and made conclusive, so that people can know what their rights are. Our old highways came into existence before 1835.

a They were created in the days when people went on foot or on horseback or in carts. They went to the fields to work, or to the village, or to the church. They grew up time out of mind. The law of England was: once a highway, always a highway. But nowadays, with the bicycle, the motor car and the bus, many of them have fallen into disuse. They have become overgrown and no longer passable. But yet it is important that they should b be preserved and known, so that those who love the countryside can enjoy it, and take their walks and rides there. That was the object of the National Parks and Access to the Countryside Act 1949 and the Countryside Act 1968.'

[23] The relevant provisions were contained in Pt IV (ss 27–38) of the 1949 c Act under the heading 'Ascertainment of footpaths, bridleways and certain other highways'. Section 27 provided:

'*Surveys of public paths etc., and preparation of draft maps and statements.*—(1) Subject to the provisions of this part of this Act, the council of every county in England or Wales shall, as soon as may be after d the date of the commencement of this Act, carry out a survey of all lands in their area over which a right of way to which this Part of this Act applies is alleged to subsist, and shall, not later than the expiration of three years after that date or of such extended period as the Minister may in any particular case allow, prepare a draft map of their area, showing thereon a e footpath or bridleway, as may appear to the council to be appropriate, wherever in their opinion such a right of way subsisted, or is reasonably alleged to have subsisted, at the relevant date.

(2) A map prepared in accordance with the last foregoing subsection shall also show thereon any way which in the opinion of the authority carrying out the survey (herein after referred to as "the surveying f authority"), was at the relevant date, or was at that date reasonably alleged to be, a road used as a public path.'

[24] Subsection (3) defined 'the relevant date'. Subsections (4) and (5) set out the recording duties of the surveying authority. Subsection (6) described the various forms of right of way to which the 1949 Act applied. Subsection (7) g dealt with highways associated with waterways and rights of navigation. Section 29 required notice of preparation of the draft map and statement to be advertised and provided for objections as to anything contained in (or omitted from) them and determination by the authority of such objections with a right of appeal to the minister.

h [25] Section 29(3) provided:

'If any representation or objection is duly made to the surveying authority as to anything contained in or omitted from the draft map and statement, the authority, after considering the representation or objection and affording to the person by whom it was made an opportunity of being j heard by a person appointed by the authority for the purpose, shall determine what (if any) modification of the particulars contained in the draft map and statement appears to the authority to be requisite in consequence thereof, and shall serve notice of their determination on the person by whom the representation or objection was made.'

[26] Subsection (4) provided for advertisement by the authority of any proposed modifications to the draft map and gave persons affected an opportunity to object and make representations whereupon sub-s (4)(b) required the authority to 'decide whether to maintain or revoke the determination and serve notice of their decision on the person by whom the representation or objection' was made and 'on the original objector'. Subsection (5) conferred a right on 'any person aggrieved' by such determination to appeal to the minister, who, on hearing the appellants and the authority and also the original objector was to dispose of the appeal in various manners including further modification of the draft map.

[27] The next stage was the preparation of a provisional map and statement under s 30, being the draft map and statement modified to reflect the outcome of the objection procedures (if any) which had taken place pursuant to s 29.

[28] Section 31 provided as follows:

> *'Determination by quarter sessions of disputes as to provisional maps and statements.*—(1) At any time within twenty-eight days after the publication of a notice under subsection (1) of the last foregoing section, the owner, lessee or occupier of any land shown on the map to which the notice relates, being land on which the map shows a public path, or a road used as a public path, may apply to quarter sessions for a declaration—(a) that at the relevant date mentioned in the provisional statement there was no public right of way over the land; (b) that the rights conferred on the public at that date by the public right of way over the land were such rights as may be specified in the application, and not such rights as are indicated in the provisional map and statement; (c) that the position or width of that part of the land on which the public right of way subsisted at the said date was as specified in the application, and not as indicated in the provisional map and statement; or (d) that the public right of way over the land at the said date was not unconditional but was subject to limitations or conditions specified in the application, or, if the said right is indicated in the provisional statement as being subject to limitations or conditions, that the said right was subject to other limitations or conditions specified in the application either in addition to or in substitution for those indicated in the provisional statement ...
>
> (3) If on the hearing of an application under subsection (1) of this section, being an application for a declaration under paragraph (a), (b) or (c) of that subsection, it is not proved to the satisfaction of the court or committee—(a) in the case of an application under the said paragraph (a), that there was at the relevant date a public right of way over the land, (b) in the case of an application under the said paragraph (b), that the rights conferred on the public by the public right of way over the land at the said date were rights other than those specified in the application, or (c) in the case of an application under the said paragraph (c), that the position or width of the part of the land therein mentioned was other than that specified in the application, the court or committee shall make the declaration sought by the applicant.
>
> (4) Where the court or committee make a declaration in the case of an application under the said paragraph (a) and it is proved to their satisfaction—(a) that there was at the relevant date a right of way to which this Part of this Act applies over land other than that to which the

application relates, and (b) that the said right is the right of way which the surveying authority had in view when they showed on the map the disputed public path or road used as a public path, the court or committee may, if satisfied that every owner, lessee and occupier of any of the land mentioned in paragraph (a) of this subsection has had an opportunity of appearing before them, make a further declaration that a public right of way as specified in the declaration subsisted over that land at that date.

(5) Where, in the case of an application under paragraph (b) or paragraph (c) of subsection (1) of this section, the court or committee do not make the declaration sought by the applicant, but the true nature of the rights conferred on the public by the public right of way in question or, as the case may be, the true position or width of the part of the land over which the public right of way subsisted at the relevant date (being different both from that specified in the application and from that indicated in the provisional map and statement) is proved to the satisfaction of the court or committee, the court or committee may make a declaration accordingly: Provided that the court or committee shall not make a declaration under this subsection unless they are satisfied that every owner, lessee and occupier of any land which would be affected by the declaration has had an opportunity of appearing before them.

(6) A declaration under paragraph (d) of subsection (1) of this section shall not be made unless the matters to be stated in the declaration have been proved to the satisfaction of the court or committee hearing the application ...

(8) Subject to the last foregoing subsection and to the next following section, a declaration made under this section shall be conclusive evidence of the matters stated in the declaration.'

[29] It will be seen from s 31 that it gave to the owner, lessee or occupier of the land, over which the right of way was being claimed, a right, within 28 days of publication of notice of the provisional map, to apply to quarter sessions for declarations dealing with matters in sub-s (1)(a), (b), (c) and (d)—issues as to the existence and/or extent of rights of way.

[30] The third and final stage was the preparation under s 32 of the definitive map and statement being the provisional map and statement adjusted as necessary to reflect any declarations made under s 31.

[31] Paragraph 9 of Sch 1 to the 1949 Act allowed a six-week period from the publication of notice of its preparation for the validity of the definitive map and statement to be challenged in the High Court on the ground that they were not within the powers of the Act or that any requirements of the legislation had not been complied with at any stage of the above process. Subject thereto the map and statement were not to be questioned in any legal proceedings whatsoever (para 10). In addition s 32(4) provided that a definitive map and statement were to be conclusive as to the particulars contained therein to the extent specified in that subsection. Section 56 of the 1981 Act contains similar but more extensive provisions making the definitive map and statement conclusive evidence of the public rights of way recorded in it, covering the provisions of s 32(4) of the 1949 Act, and extending them.

[32] Section 33 of the 1949 Act required each surveying authority to review and revise its definitive map and statement at periodic intervals, having regard to any events of the kind specified in sub-s (2) which had occurred since the

relevant date (or the latest review date). These events included in sub-para (e) the discovery by the authority of new evidence such that if the authority were then preparing a draft map under s 27, it would be required to show as a highway of a particular description a way not shown at the time of the review (ie evidence that a right of way not shown on the map subsisted or was reasonably alleged to subsist). The revised map and statement were to be prepared in three stages corresponding to the stages of preparation of the original definitive map and statement, ie in draft, provisional and definitive forms, and the provisions of ss 28–32 inclusive were to apply mutatis mutandis: see s 34.

[33] Four relevant comments should be made as to the provisions of the 1949 Act. They are, first, that there was no provision in the 1949 Act for the removal of a right of way from the definitive map and statement which could be shown not in fact to subsist. This omission was provided for, but to a very circumscribed extent, in the 1968 Act.

[34] Secondly s 31(3) places the burden of proof in the proceedings at quarter sessions introduced by that section in respect of declarations under paras (a), (b) and (c) (but not (d)) of sub-s (1), as to the existence, user and extent of the rights of way the subject of challenge, on the surveying authority.

[35] Thirdly there does not seem to me to be any reason to suppose that in arriving at any conclusion in such quarter session proceedings the court would have done other than apply the normal civil standard of proof.

[36] Fourthly, whereas in s 27 the familiar tests of 'subsisted, or is reasonably alleged to have subsisted' appear in sub-ss (1) and (2) of s 27, where they define the standard of proof which the surveying authority must apply in deciding what rights of way to insert on the *draft maps and statements*, there is equally no reason to suppose that the surveying authority or the minister should have applied other than the normal civil burden of proof in determining the matters referred to them by s 29 when objections to the draft map were being resolved. At the s 27 stage the surveying authority was preparing a draft map and statement for publication in order to invite comment and, in an appropriate case, objection from persons interested in the subsistence or otherwise and the extent of rights of way over land. It seems to me to be entirely appropriate that, at the stage up to publication of the draft map and statement, the preparer of those documents should have been concerned to ensure that all reasonable claims to the existence of rights of way should be reflected in them. Thus it was appropriate that s 27 should provide for the inclusion on the draft map and statement of rights of way only reasonably alleged to subsist. At the ss 29 and 31 quarter session stages, by contrast, the rights of parties arising from the existence or otherwise of public rights of way, which would previously have been determined in hostile litigation between individuals in the civil courts, were being determined finally after an extensive procedure of objection inquiry and appeal laid down by the 1949 Act.

[37] It is Mr Morshead's submission for the defendant that the reasonable allegation burden of proof was that which should properly have been applied to the provisions of Pt IV of the 1949 Act, and in particular, to the determinations to be made by the surveying authority and the minister under s 29 up to, but not including, decisions to be made on applications to quarter sessions under s 31. He submits that this reflects a policy of Parliament in enacting Pt IV of the 1949 Act, not only to preserve existing public rights of way by a new system for their ascertainment and recording, but also, in certain

circumstances, to create new rights of way where none existed before. That Parliamentary intention is indicated by the absence of any statutory right in a landowner or other person opposing the existence of a right of way, to remove such a right once it has appeared on the definitive map. In those circumstances, he submits, a new right of way could be created where a landowner took no action once the procedure for entry on the map and statement was commenced by a surveying authority. In particular that occurs where the landowner does not apply to quarter sessions within the 28-day period prescribed by s 31. This is consistent, he submits, with the inclusion of the word 'creation' in the long title to the 1949 Act and with the speech of Lord Diplock in *Suffolk CC v Mason* [1979] 2 All ER 369, [1979] AC 705 in particular the passage where, in dealing with a question which has no bearing on the present problem, he embarked upon a survey of Pt IV of the 1949 Act (see [1979] 2 All ER 369 at 373, [1979] AC 705 at 712). Lord Diplock is recorded as saying:

> 'The sections which follow s 27 deal with the further steps which have to be taken before the definitive map is completed and published. They provide an elaborate procedure for enabling representations or objections to be made to the surveying authority (with a right of appeal to the Minister), as to anything contained in or omitted from the draft map. Such representations and objections can be made not only by persons interested in the land, but also by members of the public, so that a person who alleges that a right of way as shown on the draft map ought to be upgraded from "footpath" to "bridleway", or from "bridleway" to a "road used as a public path" has an opportunity at this stage of adducing evidence to make good his claim. The next step in the procedure is the preparation by the surveying authority of a provisional map incorporating any modifications to the draft which, as a result of representations, have been accepted by the surveying authority or upheld by the Minister on appeal. The procedure for verifying the accuracy of what is eventually to be shown on the definitive map does not stop here; though the remaining step is not likely to bring to light the existence of more extensive rights of way than are shown on the provisional map. Its presence may, however, supply an explanation of why a reasonable allegation that a right of way of a particular kind exists is treated as sufficient justification for entering it on the draft map. The owner, lessee, or occupier of the soil over which any right of way shown on the provisional map passes has the right under s 31 to apply to quarter sessions (now the Crown Court) for declarations, inter alia, that a right of way shown on the provisional map either does not exist or is there shown as being more extensive than it really is; and, if he does so, the onus of proving the existence of the disputed right lies on the county council. But failing any proceedings in the Crown Court under this section, an entry of a right of way that originally appeared on the draft map on no firmer basis than that the surveying authority was of opinion that an allegation that it existed was a reasonable one, is carried through to the definitive map unaltered.'

[38] I am unable to accept these submissions of Mr Morshead. To start with I do not accept that the process described by Lord Diplock was intended by him to indicate that, where there had actually been no public right of way before the institution of proceedings by the surveying authority, a failure by the

landowner to challenge the mistaken allegation that such a right of way existed created a right of way where none had existed before, with the effect that it could not thereafter be challenged on the basis 'once a highway, always a highway' (see [1979] 2 All ER 369 at 375, [1979] AC 705 at 714 per Lord Diplock). What would result would be a temporarily unchallengeable right of passage by the public over the land in question which would not be capable of challenge pending review by the authority or the exercise of the powers of deletion from the map conferred by the 1968 and 1981 Acts (see [41] below for the limited power of deletion introduced by the 1968 Act and s 53(3)(c)(iii) of the 1981 Act).

[39] I do not accept that the creation of new rights of way was part of the statutory policy of Pt IV of the 1949 Act save to the limited extent dealt with in ss 39–41 which have no application to the issues before me. Such a policy runs contrary to the short title to the section of Pt IV dealing with public rights of way namely 'Ascertainment of footpaths, bridleways and certain other highways'. It is also contrary to what Lord Diplock says in *Mason*'s case where he says (at [1979] 2 All ER 369 at 372, [1979] AC 705 at 710):

> 'The purposes for which the Act was passed are set out in the long title. Those that are relevant to the instant appeal are: "... to make further provision for the recording, creation, maintenance and improvement of public paths and for securing access to open country, and to amend the law relating to rights of way ..." The provisions which give effect to these purposes are contained in Parts IV and V of the Act; those relating to the recording of public paths by showing them on a definitive map being found in Part IV, ss 27 to 41.'

[40] As I have already pointed out the 1949 Act provides a statutory framework for the unchallengeable ascertainment and recording of existing public rights of way replacing, in so far as rights of way were contested, litigation in the civil courts to which the ordinary civil burden of proof would plainly have applied. It includes a right under s 31 for landowners, lessees or occupiers of affected land to seek relief by way of declarations at quarter sessions where any rights would be determined on the normal civil standard of proof. It is not without significance that Lord Diplock in *Mason*'s case, in the passage quoted above, found that the s 31 procedure might—

> 'supply an explanation of why a reasonable allegation that a right of way of a particular kind exists is treated as sufficient justification for entering it on the draft map.' (See [1979] 2 All ER 369 at 373, [1979] AC 705 at 712.)

THE 1968 ACT

[41] Section 31 of and Sch 3 to the 1968 Act introduced, for the first time, a circumscribed power to revise the definitive map at the instance of a person prejudiced by the entry of a right of way upon it where no right of way existed. The relevant part of Pt I of Sch 3 to the 1968 Act provides:

> '*Section 33 (Revision of maps and statements)*
>
> In carrying out a review under section 33(1) the authority shall have regard to the discovery by the authority, in the period mentioned in that subsection, of any new evidence, or of evidence not previously considered by the authority concerned, showing that there was no public right of way

over land shown on the map as a public path, or as a road used as a public path, or that any other particulars in the map or statement were not within the powers of Part IV of the Act of 1949, and their powers of preparing a revised map and statement under subsection (4) or as the case may be proviso (d) to subsection (5), of the said section 33 may be exercised accordingly: Provided that the authority shall not take account of the evidence if satisfied that the person prejudiced by the public right of way, or his predecessor in title, could have produced the evidence before the relevant date mentioned in the said section 33(1) and had no reasonable excuse for failing to do so …'

[42] Otherwise Pt II of Sch 3 simplified the procedure applicable to reviews begun under s 33 of the 1949 Act after the commencement of the 1968 Act. Instead of three stages there were to be only two. The revised map and statement were to be prepared in draft form and objections to the revision were to be invited by advertisement. Following a local inquiry the minister was to 'take a decision on' any duly made objections and representations (see para 4(4) of Sch 3) and give the authority such directions to modify the draft map as appeared to him necessary to give effect to his decision. Recourse to quarter sessions cease to be part of this procedure. A similar process was prescribed by Pt III of Sch 3 pursuant to which the minister was to direct modifications resulting from objections in relation to the re-classification of routes used as footpaths and bridleways but which carried vehicular traffic (RUPPs), into BOATs as required by the 1968 Act. I can see no reason why this decision-making process, as to the subsistence of rights of way or their extent, should be arrived at by the application of a burden of proof different from the normal civil burden of proof as I have found applied to similar decisions under s 29 of the 1949 Act.

THE 1981 ACT

[43] Part IV of the 1949 Act and Sch 3 to the 1968 Act were repealed by the 1981 Act and replaced with the provisions of ss 53–58 of and Schs 14 and 15 to that Act. The system of periodic reviews of the definitive map and statement was abolished and a rolling review system was introduced in its place. I have described s 53 and Schs 14 and 15. Section 54 requires the surveying authority as soon as reasonably practicable after the commencement date, to review RUPPs remaining on their definitive maps and make modification orders re-classifying them. The provisions of Sch 15 apply to orders made under both s 53 (except s 53(3)(a)) and s 54. Section 56(1) of the 1981 Act provides that a definitive map and statement shall be conclusive evidence as to the particulars contained therein to the extent specified in that subsection.

[44] The 1981 Act, therefore, abolished the review system and substituted the procedure under s 53 and Schs 14 and 15. And so, for instance, the provisions of s 31(1)(a) of the 1949 Act permitted any owner, lessee or occupier of any land shown on the map, in proceedings at quarter sessions, to apply for a declaration 'that at the relevant date mentioned in the provisional statement there was no public right of way over the land', such a person and others may now under s 53(3)(c)(iii) apply under sub-s (5) for an order under sub-s (2) modifying the map so as to show 'that there is no public right of way over land shown in the map and statement …'. It will be seen that the power to remove a right of way from the definitive map provided for in that sub-para (iii) is much

less restrictive than that inserted by the 1968 Act. However the *Leicestershire CC* case shows that inspectors are requiring 'cogent' evidence to justify the exercise of the power to remove.

THE INSPECTOR'S CONCLUSIONS

[45] The principal conclusions of the inspector contained in the interim letter and the final letter are helpfully summarised in the claimants' written submissions. This summary is not, as I understand it, challenged and I will incorporate it in this judgment. The conclusions of the interim letter are summarised as follows:

- Although Sir William Cope (the then landowner) made a new road along the route of Sandy Lane between 1866 and 1885, and asked the local highway authority to adopt it as a 'public highroad', it was not made up to the satisfaction of the surveyor of highways or adopted. Sir William's intention to dedicate the route as an all-purpose highway was conditional upon its being adopted and that condition not having been fulfilled, it remained at his death in 1892 a private estate road.

- Sir William's description of the road as 'a public convenience' in his 1885 letter to the highway authority requesting adoption suggested current use of the road by the public, but there was no other evidence to support that, and while the 1888 letter from the surveyor of highways referred to 'wheel traffic' having been over it, there was no direct evidence of that being *public* wheeled traffic and it was more likely to be estate traffic.

- Sandy Lane was not included in any taxable hereditament in the valuation carried out by the Inland Revenue for the purposes of the Finance (1909–10) Act 1910; the land on either side was comprised in hereditament no 34 (owner Sir Anthony Cope, Sir William's son and heir), but Sandy Lane (separate OS parcel no 52) was omitted from that hereditament; however, this did not support the county council's contention that Sandy Lane had been dedicated as a public carriageway by 1910.

- In 1922 the Forestry Commission took a 198-year lease of the land adjoining Sandy Lane on both sides. Sandy Lane was not included in the demise but the lease included a grant of a right of way over it for all purposes. The inspector concluded it was 'very unlikely that a mistake was made in 1921/2 about the private status of Sandy Lane'. He also took the view that Sandy Lane was not mentioned as a highway of any kind in the acquisition report prepared for the Forestry Commission in 1921.

- Further confirmation that Sandy Lane was not public was to be found in its omission from the 1929 highway handover records of publicly maintainable highways and the 1949 declaration of the then owner Lord Brocket, as chairman of Bramshill parish meeting, as to what rights of way existed in the parish.

- Lord Brocket showed that he had no intention to dedicate Sandy Lane by that declaration and by telling the Forestry Commission that it was a private road.

- Such pre-1949 user evidence as there was did not give rise to an inference of dedication of Sandy Lane as a public highway.

- But (and this was common ground between the county council and the objectors) there was enough evidence of user by walkers and horseriders after

1970 to support a deemed dedication as a bridleway under s 31 of the Highways Act 1980.

[46] The conclusions of the final letter can be summarised as follows.

• The inspector adhered to his view that the new road was not dedicated by Sir William and remained a private estate road at the date of his death in 1892.

• He reiterated his view that the public were enjoying the 'convenience' of the road by 1885, but said that no documentary evidence had been presented to show that this public user was by vehicle, although vehicles were used along Sandy Lane.

• Contrary to his initial opinion, the Finance Act evidence did support the case for public carriageway status. The exclusion of Sandy Lane from valuation, variously:

• was consistent with Sandy Lane being considered a public carriageway;

• showed that on the balance of probabilities, Sandy Lane was considered to be a public carriageway in 1910;

• led to the reasonable allegation that 'in completing the procedures required by the Finance Act', Sir Anthony dedicated Sandy Lane as a public carriageway.

• There was some, 'not strong' evidence of public vehicular user (by four persons) from 1918–1936, and 'stronger' user evidence after that. This user from 1918 was 'evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway'.

• Sandy Lane being treated as a private road by subsequent owners of the estate could not undo that: 'once a highway, always a highway'.

THE AUTHORITIES

[47] Save for the *Leicestershire CC* case, counsel have been unable to find any authority which deals with the burden of proof applicable by the Secretary of State in confirming orders modifying the definitive map and statement. In *R v the Secretary of State for the Environment, ex p Bagshaw* (1994) 68 P & CR 402 Owen J was considering two cases where county councils had refused to make orders under s 53(3)(c)(i) of the 1981 Act at the preliminary ie Sch 14 stage. In that case, therefore, the judge was properly applying the dual test contained in that subsection and quashed both decisions, which had been made on the basis that insufficient evidence had been shown by the applicant to establish, prima facie, the existence of the two public rights of way in question. Owen J is recorded as saying (at 408):

> 'The wording of [section 53(3)(c)(i)] indicates, as I consider, that the evidence necessary to establish that a right of way is reasonably alleged to subsist over land must be less than that which is necessary to establish that a right does subsist. Indeed, bearing in mind the structure of the Act, this seems to be clear. That structure is, in this respect, that an application under section 53(3)(c)(i), if upheld, will be followed by an order, consequent upon which, after an objection, there may be some form of inquiry with either confirmation or a refusal to confirm.'

[48] Later Owen J continues (at 409):

> 'Whether an allegation is reasonable or not will, no doubt, depend on a number of circumstances and I am certainly not seeking to declare as law any decisions of fact. However, if the evidence from witnesses as to user

is conflicting but, reasonably accepting one side and reasonably rejecting the other, the right would be shown to exist, then it would seem to me to be reasonable to allege such a right. I say this because it may be reasonable to reject the evidence on the one side when it is only on paper, and the reasonableness of that rejection may be confirmed or destroyed by seeing the witnesses at the inquiry.'

[49] Owen J's judgment in *Ex p Bagshaw* was considered by the Court of Appeal in *R v Secretary of State for Wales, ex p Emery* [1998] 4 All ER 367. That again was a case where a local authority had declined to make an order under s 53(3)(c)(i) at the Sch 14 preliminary stage on the basis that the applicant had failed to establish a reasonable allegation of subsistence of the right of way in question in a case where there was conflicting evidence of user of the way by the public between the landowner and the applicant. The Court of Appeal approved the approach of Owen J in *Ex p Bagshaw* and in particular the second passage which I have quoted from his judgment above. The leading judgment was given by Roch LJ. He is recorded as saying this under the heading 'The test that the Secretary of State should apply at the Sch 14 stage' (see 377):

'Section 53(3)(c)(i) relates to discovery by the authority of evidence of two separate things. First, evidence that a right of way which is not shown on the maps subsists and, second, evidence that a right of way which is not shown on the map is reasonably alleged to subsist. Difficulty is caused by these two limbs of this subsection. There can only be discovery by the authority of evidence that a right of way which is not shown on the map subsists if there is clear evidence of 20 years' user uncontroverted by any credible evidence to the contrary and no credible evidence that there was on the part of the landowner no intention during the period to dedicate the way to the public. Where there is no credible evidence of 20 years' user or where there is incontrovertible evidence that the landowner had no intention during the period to dedicate the way to the public, for example by the landowner complying with s 31(6) of the 1980 Act ... then the decision should be not merely that the allegation that a right of way subsists is not reasonable, but that no right of way as claimed subsists. The problem arises where there is conflicting evidence on one or other or both issues. In approaching such cases, the authority and the Secretary of State must bear in mind that an order under s 53(2) made following a Sch 14 procedure still leaves both the applicant objectors with the ability to object to the order under Sch 15 when conflicting evidence can be heard and those issues determined following a public inquiry.'

[50] It seems to me that both these passages from the judgments of Owen J and Roch LJ are similar in effect to the passage from Lord Diplock's speech in *Mason*'s case. Both clearly accept the principle that a lower standard of proof applies at the preliminary stage and that that is acceptable because where the evidence of the subsistence of a right of way is conflicting 'those issues' will be 'determined following a public inquiry'. There would seem to me to be a clear implication that the judges in those cases anticipated that such 'determination' would take place applying a higher standard of proof than one of a merely justifiable allegation.

CONCLUSION UNDER HEAD 1

[51] In my judgment this issue is to be determined in favour of the applicants. It follows that to the extent that the decision of Collins J in the *Leicestershire CC* case is authority for a contrary conclusion I must respectfully decline to follow it. I have arrived at this conclusion for the following reasons.

(i) I have already concluded that the purpose of Pt IV of the 1949 Act was to assist in the preservation of existing public rights of way by their ascertainment and by recording them and by providing such record to be conclusive evidence of their subsistence. It seems to me that the pattern of the 1949 Act has been carried through by the legislature into the 1968 Act and on into the 1981 Act although the detailed provisions have developed over the years. That pattern is one of requiring the local authority to prepare a preliminary record in cases where there is evidence of the existence of a public right of way. That preliminary record is then published with the object of inviting comments and objections from persons interested either in the subsistence of the right of way or to deny its subsistence. There is then a procedure for resolving issues thrown up by objections to the preliminary record. Finally there is the preparation of the final record reflecting those decisions which is given the status of conclusive evidence. In the case of the 1949 Act there can be no doubt that the procedure under s 31 at quarter sessions would be subject to the civil burden of proof. I have formed the view that the determinations by the surveying authority and the minister under s 29 would be subject to the same burden. That is because those determinations were quasi-judicial and, in the absence of a further challenge under s 31 would be determinative of the existence or extent of the rights of way in question. The same is true under the abbreviated review system introduced by Pt II of Sch 3 to the 1968 Act (see para 4(4)). Schedule 15 of the 1981 Act gives no express guidance as to the burden of proof applicable on confirmation of a para (c)(i) order. In the absence of an express provision it seems to me to be reasonable to assume that the legislature intended to replicate the pattern of the 1949 Act in the 1981 Act so as to subject the issue of proof of the existence and extent of public rights of way to the ordinary civil burden of proof namely the balance of probabilities. The contrary contention that it is sufficient to establish a right having serious consequences for landowners and other users by a mere finding that it was reasonable to allege that such a right subsists seems to me to be counter-intuitive.

(ii) It would be surprising if rights in property of such importance were capable of being determined in the course of a statutory procedure applying a lower burden of proof than that which would be applicable were the existence of those same rights to fall to be determined in the course of ordinary litigation in the civil courts. This is illustrated by the decision of Mr Prosser QC sitting as deputy judge of the Chancery Division in *Shears Court (West Mersea) Management Co Ltd v Essex CC* (1986) 85 LGR 479. In that case the deputy judge was dealing with a claim by residents to use a way over the plaintiff's land as access to a beach. The county council after representation by the residents instituted proceedings under the 1981 Act having concluded that there was a public right of way. Meanwhile the plaintiff landowner issued a writ seeking a declaration that no public footpath existed over its land. The county council sought to have the writ struck out. The deputy judge having considered such authority as there was concluded (at 486):

> 'There is nothing in these cases which supports the contention that once the procedure of the Act of 1981 is under way but not yet completed there is no right to bring a question concerning the alleged right of way before the court. That such an action may be stayed is one thing, but to say that it should be struck out is entirely without foundation.'

He therefore declined to strike it out but ordered the proceedings under it to be stayed pending resolution of the local authority's inquiries and determinations under the 1981 Act. No question of differing burdens of proof appears to have been raised.

(iii) Paragraph 6 of Sch 15 to the 1981 Act confers on the authority a discretion to confirm unopposed modification orders or, if the authority considers that changes should be made to the order requires the authority to submit the revised order to the Secretary of State who is given a further discretion whether or not to confirm it or to confirm it after a further alteration. The provisions of para 6 seem to me to imply a revisiting by the authority or the Secretary of State of the material upon which the original order was made with a view to subjecting it to a more stringent test at the confirmation stage.

(iv) There would seem to be little point in having a full public local inquiry with oral evidence and submissions if the inspector is not required finally to resolve material conflicts of fact and adjudicate on disputed issues of law. A distinction between the approach of the authority and the Secretary of State on a Sch 14 appeal to the making of an order, and the Sch 15 inquiry stage for the purposes of confirmation of that order seems to be implicit in the decisions of the courts in *Ex p Bagshaw* and *Ex p Emery* and in the speech of Lord Diplock in *Mason's* case.

(v) It is anomalous if it is sufficient for the purposes of adding a way to the definitive map under s 53(3)(c)(i) that a test of reasonable allegation is sufficient when the civil burden of proof is required to obtain an order varying the permitted user of a way under para (c)(ii) and in removing a way under para (c)(iii).

(vi) In his judgment in the *Leicestershire CC* case [2003] EWHC 171 (Admin) at [23] Collins J said:

> '... the reason for the lesser test in s 53(3)(c)(i) is a recognition by Parliament that, if it can be shown that it is reasonable to allege that a right of way subsists, then it ought to be put down in the public interest on the map, and then it will be for the relevant landowner or whoever to bring forward a case to show that that was wrong and that the map therefore shows a right of way which it should not show. The burden upon the individual to establish that is that set out in s 53(3)(c)(iii).'

With great respect I do not agree for the following reasons.

(a) The s 53(3)(c)(iii) procedure would not inevitably be available to an applicant to remove a way from the record because of the necessity prescribed in para (c) for there to have been a subsequent 'discovery' of evidence to trigger the power and the duty to make an order under sub-s (2). If the applicant simply wanted to argue his case on the basis of the evidence already known at the Sch 15 inquiry which had resulted in the way being put on the map by the application of the lower test, he might have no forum in which to do so. An application to the High Court under para 12 of Sch 15 to have the order set aside would fail because, on the basis of reasonable allegation only, it would

have been quite properly made. An application for a declaration that the right of way did not exist would be struck out because of the conclusive evidence provisions of s 56.

(b) An applicant under s 53(3)(c)(iii), as has been found by Collins J in the *Leicestershire CC* case, must produce 'cogent' evidence to justify an order. This seems to mean that he must satisfy, at least, the civil burden of proof. If he is alerted in time, raises objections, and takes part in an inquiry under Sch 15 it is theoretically possible that, at the inquiry, he could raise a case that there was no right of way satisfying the civil burden of proof and still lose if it could also be said that the preliminary order by the authority had met and continued to meet the criterion of reasonable allegation.

(c) The proposed solution to the problem produces a duplication of proceedings and costs which would not occur if at the hearing of any inquiry by an inspector or otherwise those supporting and opposing the existence or extent of a public right of way were treated as at any other inquiry to determine rights, namely that in order to win a party must establish his case to the civil burden of proof.

(d) If all that is necessary for a proponent to do to obtain confirmation of an order modifying the map so as to include a new right of way is to satisfy a test of reasonable allegation that places upon his opponent the burden of proof of establishing that no right of way exists to at least the standard of the balance of probabilities and, as I have said, even then he may not succeed. It is also contrary to the pattern of ss 29 and 31 of the 1949 Act.

[52] It is Mr Morshead's submission that a higher burden of proof, on the balance of probabilities, is not required at the confirmation stage because if, at that stage, the landowner or other objector satisfies the Secretary of State or his inspector by evidence on the balance of probabilities that no right of way exists it is unlikely that the order will be confirmed because it will no longer be reasonable to allege that it subsists. As I have pointed out this places the burden of proof on the objector at the inquiry stage which seems to be unjust. Alternatively if what is being said is that the stronger the case which the objector can present the more unlikely it will be that the Secretary of State will confirm the order on the basis of reasonable allegation, then the result is that it is being accepted that to confirm the order the Secretary of State must be satisfied of a case for the subsistence of the right of way in question on the balance of probabilities.

THE REMAINING HEADS

[53] I turn to consider the claimants' ground 2.

[54] Until the enactment of s 31 of the 1980 Act the only way in which a public highway could be created was, at common law, by express dedication by the landowner over whose land it was to be created or by implied dedication by him, to be implied from the public's user of the way over an appreciable period of time and to be treated as accepted by the public as a result of that use. See the judgment of Wills J in *Eyre v New Forest Highway Board* (1892) 56 JP 517 at 517:

> 'All highways, all rights of passage over the property of individuals, have their actual or presumed origin, although it is not often the origin in point of fact, in a dedication by the owner of the soil, that is to say he either says in so many words, or he so conducts himself as to lead the public to infer

that he meant to say: "I am willing that the public should have this right of passage." If a man has actually conceded that right of passage to the public it is irrevocable, and that is expressed by the maxim with which we are all familiar, I suppose, "once a highway always a highway." Up till the year 1835, when the Highway Act, which is the foundation of our present system, was passed, if there was a dedication of a road to the public by the owner either expressed by deed, as occasionally happens, or inferred from public user for such a time as to any tribunal who judges the case will appear sufficient to found that inference, if the proper inference was that he had said or so conducted himself as to imply that he had granted that right of passage to the public; and the public had on their part accepted it and used the road, from that moment there was not only a right of passage on the part of the public, but there was the liability to repair on the part of the parish ...'

[55] Thus the creation of a right of way at common law involved a two-stage process: the first-stage dedication by the landowner express or to be implied from his acquiescence in public use of the way over an appreciable period of time, and second, acceptance by the public by use of the way after dedication.

[56] Section 31 of the 1980 Act provides for an alternative route to the creation of a public highway so that a way could be established where such a way 'has been actually enjoyed by the public as of right and without interruption for a full period of 20 years'.

[57] It is not in issue that the fundamental cause of the inspector's change of mind between the publication of the interim letter and the final letter was a re-evaluation by him of documentary evidence of proceedings in relation to Sandy Lane caused by the provisions of the 1910 Act which imposed a tax on the values of land holdings. A landowner could not be taxed in respect of land which comprised a public highway or could obtain relief from tax in respect of land that was his property but which was subject to public highway rights. In the present case there was documentary evidence which established that Sandy Lane had a separate OS number and was excluded from the valuation of Sir Anthony Cope's land tax although it had plainly formed part of the estate of which he was owner being the route which his father, Sir William Cope, in the late nineteenth century had tried but failed to make into a public road.

[58] It is common ground that the inspector's re-evaluation was not as a result of any fresh evidence being put before him, but as a result of fresh submissions as to how the existing evidence before him should be treated.

[59] In the final letter the inspector reviewed the Finance Act 1910 evidence between paras 29 and 36. He says this at para 30:

'30 **Uncoloured**. I have researched the use of large scale maps in relation to Finance Act documentation. Two sets of plans (i.e. base maps with annotations) were produced for each area—Field Plans (working copies) and Official Plans. The base map strips submitted in this case were almost certainly Field Plans. I have discovered that on these, the boundaries of hereditaments were often carelessly delineated and only outlined with coloured crayon. The Official Plans, thought to be held in the Public Records Office at Kew, have each hereditament carefully filled in with colour wash. They could have helped to clarify this case. It is unusual that on the Field Plan submitted, Hereditament 34 was not given

at least an outline colour. However, taking the evidence of the Plan and the associated Field Book together, I think it reasonable to conclude that Hereditament 34 consisted of those OS plots enumerated in the Field Book extract and probably did not include the area of Sandy Lane ...'

[60] He continues at para 33:

'33 **Bridleway or Footpath rights over Sandy Lane**. I have researched the objectors' contention that Sandy Lane might have been excluded from valuation because commoners had rights of footway along it and it was therefore considered to be a public footpath. If Sandy Lane had been a private carriageway with a public right of way on foot, normal practice would have been inclusion of the Lane in valuation and a deduction made for "Public Rights of Way or User". Such appears to have been the case with the Footpath shown as "F.P." on the Field Plan to the west of Sandy Lane, and with any other paths crossing Hereditaments 34, 84, 98 and 694 ...'

[61] The inspector's conclusions on this part of the final letter are at paras 37 and 38 as follows:

'37 **Dedication by Sir Anthony Cope**. From paras 29–36 two facts emerge and I now have more confidence in their implications than I did last year. First, Sandy Lane has a unique parcel number on the 1909 base map (no. 52, as on the 1894 OS 1:2500 map). Secondly, this plot was not included in the list of those valued in the Field Book extract. Such exclusion normally indicates public rights, sometimes bridleway but usually vehicular. It could not be reasonably alleged that the exclusion of Sandy Lane from valuation was a "powerful" indication of public carriageway rights along it if the circumstances before and around 1910 suggested otherwise. But they do not. The "Road" was intended to be part of a through route between Hazeley etc and Wokingham (para 19). It was described as a Road in the Book of Reference for the 1871 OS 1:2500 map and shown as a way without obstructions across it on that map, and the 1894 and 1909 OS 1: 2500 maps (para 20). In 1885 it was "a public convenience, being a direct communication between Odiham and Wokingham ..." (para 21). Vehicles were used along it (para 22). There is evidence of its reputation as an uninterrupted highway and of vehicular user along it (paras 24, 26). The evidence of its reputation as a "Road" is supported by small scale map evidence (paras 27, 28). I therefore conclude that exclusion of Sandy Lane from valuation does show that, on the balance of probabilities it was considered to be a public carriageway in 1910. I consider it unlikely, in the context of this case and in the light of para 33 above, that it was bridleway or footpath rights that existed along the Order route, as contended by the objectors.

38 There is no evidence to suggest that the procedures laid down for the completion of assessment under the Finance Act were not applied in the case of the Bramshill Estate. These included checks by the landowner of the Field Book entries and of the provisional valuation. Accordingly, the omission of Sandy Lane from valuation and the public carriageway implications of this were open to Sir Anthony Cope's scrutiny. This leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public

carriageway. There then follows a considerable amount of evidence against this allegation and I address it carefully before determining the Order.' *a*

[62] The inspector summarised that documentary evidence at para 46 as follows:

'The documentary evidence supporting the claim can be summarised briefly. Between 1866 and 1871 Sir William Cope built a road over a part of his Estate, intended to be a section of a through route between Odiham, Hazeley etc and Wokingham. The public were using it by 1885 but Sir William did not expressly dedicate it as a highway because the Highway Authority did not accept his condition for such dedication: that it should be adopted as publicly maintainable. Finance 1909/10 Act evidence was consistent with Sandy Lane being considered a public carriageway and the circumstances of this evidence indicated that on the balance of probabilities, the Lane was dedicated as such by Sir Anthony Cope ...' *b c*

[63] The inspector's conclusion is at para 53 of the final letter as follows: *d*

'**The Order route as a Vehicular Highway**

Paras 26 and 49–52 summarise the evidence of continuous public vehicular user along Sandy Lane from 1918. This was neither challenged nor obstructed until 1958. There is no evidence to show that the gates placed across the Lane in that year and from time to time thereafter were erected with the owners' permission or on their instructions: the public vehicular user continued despite the gates. This record of user is evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway. The maxim "once a highway, always a highway" has to be applied to the claims of Captain Cope and Lord Brocket that, between 1921 and 1961, the Lane was private.' *e f*

[64] The claimants' initial submission is that the passages from the final letter which I have set out above, and, in particular the last but one sentence of para 38, show that the inspector was proceeding under a fundamental mistake of law, namely that Sir Anthony Cope's acquiescence in the preparation and submission of documents and plans required by the 1910 Act, which excluded Sandy Lane, constituted dedication by him of Sandy Lane as a public highway. Mr Morshead's answer for the defendant is the suggestion that, when the inspector used the word 'dedication' in these passages from the final letter, he was not using that word in its technical legal sense to describe a landowner making an oral or written express dedication of the land as a public highway but rather as describing acceptance of a situation which had already come into existence as a result of public user of the way before 1910 from which dedication by Sir Anthony or his father could be implied and which his acquiescence in the exclusion of Sandy Lane from the 1910 Act returns confirmed as having taken place. *g h*

[65] I am unable to accept Mr Morshead's submission. It is absolutely inconsistent with the words in para 38, '[t]his leads to the reasonable allegation that, in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway' when read with the words in para 53: *j*

> 'Paras 26 and 49–52 summarise the evidence of continuous public vehicular user along Sandy Lane from 1918 ... This record of user is evidence that the public accepted dedication, in 1910, of Sandy Lane as a vehicular highway.'

It is true that there are passages in the final letter which support Mr Morshead's submission such as the penultimate sentence in para 46 which I have set out above. However it seems to me to be incontrovertible from para 53 that the inspector was coming to his changed conclusion to confirm the council's order adding Sandy Lane as a BOAT on the basis of a finding 'that in completing the procedures required by the Finance Act, Sir Anthony Cope dedicated the Order route as a public carriageway'.

[66] Mr Morshead does not suggest that the evidence of what took place to complete the Finance Act 1910 procedures could possibly support a conclusion that Sir Anthony Cope's part in those procedures amounted to an express dedication of Sandy Lane as public highway.

[67] It follows that the inspector's change of mind was based on a finding which is shown to be erroneous in law.

[68] I turn to consider the claimants' head 3.

[69] In *Fairmount Investments Ltd v Secretary of State for the Environment* [1976] 2 All ER 865, [1976] 1 WLR 1255 the House of Lords were considering a case where a local authority had made a compulsory purchase order in respect of certain buildings. That order was challenged and an inquiry held by an inspector appointed by the Secretary of State. The inspector, after the conclusion of the hearing, conducted his own inspection of the premises as a result of which he formed the view that the foundations were defective. His decision letter revealed the fact that this was a ground upon which he came to the conclusion that the compulsory purchase order should stand. Viscount Dilhorne says ([1976] 2 All ER 865 at 869, [1976] 1 WLR 1255 at 1260):

> 'It was on account of his belief as to the inadequacy of the foundations that the inspector, taking that into account with the other defects, ruled out rehabilitation. So it appears that the inspector attached great weight to a factor which formed no part of the council's case, of which the respondents had not been given notice and with which they had been given no opportunity of dealing. In my opinion there is great substance in the respondents' complaints. Just as it would have been contrary to natural justice if the Secretary of State in making his decision had taken into account evidence received by him after an inquiry without an objector having an opportunity to deal with it, so here in my view it was contrary to natural justice for his decision to confirm the order to be based to a very considerable extent on an opinion, which investigation might have shown to be erroneous, that the foundations were not taken down deep enough, and an opinion, which also might have been shown to be erroneous, that the inadequacy of the foundations showed that rehabilitation was impractical.'

[70] The claimants complain that the inspector's conclusions are vitiated by procedural unfairness on two grounds: the first that the suggestion that Sandy Lane became a public right of way as a result of express dedication by Sir Anthony Cope in 1910 was a point which was not raised at the first inquiry and they had no notice was being raised in the course of the second inquiry by

the written submissions passed to the inspector for that purpose. Their second complaint is that the text of the final letter reveals, in the passages which I have quoted above, that the inspector conducted his own investigations into the Finance Act 1910 procedures and documents, and into how that material should be treated for the purpose of his inquiry, without notifying the parties and without giving them an opportunity to comment upon the material which he turned up.

[71] Mr Morshead for the defendant does not seriously suggest that once it is established that the inspector based his conclusions in the final letter on a finding of express dedication as a result of the Finance Act 1910 material then the conclusion should not follow that it was a breach of natural justice by him, and so procedural error, not to give the claimants notice of this and of any fresh material resulting from his investigations so that they could deal with it.

[72] As to the claimants' fourth ground, in the light of the conclusions which I have already reached it is unnecessary for me to deal with this issue which would involve a substantial investigation of the evidence and needlessly prolong this judgment.

[73] For these reasons it appears to me clear that the order confirmed by the defendant's decision through her inspector of 15 September 2003 must be quashed.

Application allowed.

Dilys Tausz Barrister.

APPENDIX I

CHRONOLOGY

Date	Event
1850s	Sir William Cope took up residence on his Bramshill Estate (which included the route of Sandy Lane)
15.12.1866	Letter written by Sir William Cope and Mr Mark Wyeth proposing to make a road along the route of Sandy Lane if sufficient subscriptions could be obtained

a	7.1885	Letter from Sir William Cope to the Hartley Wintney rural sanitary authority (as highway authority) stating that a road (Sandy Lane) had been made (principally at his expense) and indicating an intention to dedicate it to public use conditional upon its being formally adopted by the authority
b		Report by the surveyor of highways that the road was too narrow and ended 30 yards short of New Mill Lane
c	1.9.1885	Eversley vestry meeting (attended by the surveyor and Sir William Cope): following Sir William's promise to gravel the sides of the road and extend it to New Mill Lane, resolution to apply to the justices to declare Sandy Lane a public highway passed [no evidence that such application was made]
d		
	8.1888	Surveyor reported to the authority that Sir William had not done the promised gravelling
e		
	1892	Death of Sir William Cope Ownership of the Bramshill Estate passed to his son Sir Anthony Cope
f		
	1910	Enactment of the Finance (1909–10) Act requiring a survey and valuation of all land in England and Wales to be carried out by the Inland Revenue for the purposes of a tax on land values to be levied on each occasion of a transfer of ownership
g		
	1910	The year in which the inspector found it reasonable to allege that 'in completing the procedures required by the Finance
h		Act, Sir Anthony Cope dedicated the Order route as a public carriageway'
j	1918	The first year in which the inspector found there to be evidence of public vehicular use of Sandy Lane having occurred

Date unknown	Transfer of ownership of the Bramshill Estate to Sir Anthony Cope's son Captain Denzil Cope
18.6.1921	Acquisition report prepared for the Forestry Commission by one of its officers for the purposes of its proposal to take a lease of parts of the Bramshill Estate: Sandy Lane not mentioned as a public highway
5.4.1922	Lease by Captain Denzil Cope to the Forestry Commission of parts of the Bramshill Estate, including the land on both sides of Sandy Lane, together with the grant of a right of way for all purposes over Sandy Lane
1929	Transfer of responsibility for maintenance of highways maintainable at the public expense from rural district council to county council: handover map prepared for that purpose does not include Sandy Lane as a highway
1932	Death of Sir Anthony Cope
1936	Sale of Bramshill Estate to Lord Brocket
5.1949	Lord Brocket (in his capacity as chairman of Bramshill parish meeting) signed map (for sending to the county council) stating that the rights of way shown on it (not including Sandy Lane) were the only ones in Bramshill parish
1952	Bramshill Estate broken up and sold off in lots; some parts retained (it was common ground at the inquiry that these probably included the route of Sandy Lane)
1958	Forestry Commission first locked gates across Sandy Lane

9.9.1958	Letter from clerk to county council to Eversley parish council confirming acceptance of Lord Brocket's 1949 declaration for the purposes of the 1949 Act survey
1967	Bramshill parish meeting made representations to the county council claiming Sandy Lane as a public right of way: county council responded that it was not satisfied that Sandy Lane was a highway
1984	Application to county council by Bramshill parish council for addition of Sandy Lane to the definitive map as a byway open to all traffic
1985	Locked gate installed at northern end of Sandy Lane
1999	County council resolved to make an order in accordance with the application Bramshill parish council produced additional evidence and asked the county council to make an order adding Sandy Lane as a bridleway instead
26.5.2000	Making by the county council of the Hampshire (Hart District No 9) (Parishes of Bramshill and Eversley) Definitive Map Modification Order 2000 (the order), adding Sandy Lane as a byway open to all traffic
	Objections to the order made by the claimants and others (including the Bramshill and Eversley parish councils). Order submitted for confirmation to the defendant's predecessor, the Secretary of State for the Environment, Transport and the Regions
26-28.3.2002 5, 23.4.2002	Public local inquiry into the order held by the inspector

18.7.2002	Issue of inspector's interim decision letter proposing to confirm order subject to modification showing Sandy Lane as a bridleway (instead of a byway open to all traffic) (OD 2002)
	Objections to proposed modification
12.2002) 1. 2003)	Inquiry into proposed modification conducted by way of written representations
15.9.2003	Issue of inspector's final decision letter confirming order as originally made (OD 2003)
3.10.2003	Publication of notice of confirmation of order under para 11 of Sch 15 to the 1981 Act
12.11.2003	Issue of these proceedings

APPENDIX II

LIST OF PERSONS REFERRED TO

The Secretary of State for Environment, Food and Rural Affairs	The defendant, in her capacity as the Secretary of State responsible for definitive map modifications under the Wildlife and Countryside Act 1981 (the 1981 Act)
Hampshire County Council	The surveying authority for its area for the purposes of the 1981 Act; made the definitive map modification order under challenge (the order) adding Sandy Lane in the Parishes of Bramshill and Eversley as a byway open to all traffic

D Brook CB CBE	The inspector appointed by the defendant to conduct the public local inquiry into the order, whose decision to confirm it is under challenge
Philip Napier Todd	The first claimant: resident of Eversley, chairman of Eversley parish council, chairman of Forest of Eversley Trust and Secretary to the Hart & Rushmoor district group of the Campaign to Protect Rural England: objector to the order
Douglas Bradley	The second claimant: owner and occupier of Broom Cottage, New Mill Lane, Eversley, a property which adjoins Sandy Lane: objector to the order
Philip Graham Plumbe FRICS FCI Arb	Chartered surveyor and chartered arbitrator: acted as representative for the objectors to the order: maker of two witness statements in support of this claim
The Reverend Sir William Cope	12th Baronet of Bramshill: owner of the Bramshill Estate (including the route of Sandy Lane) from the 1850s to 1892
Sir Anthony Cope	Sir William Cope's son and heir: owner of the Bramshill Estate from 1892 until a date unknown prior to 18.6.1921
Captain Denzil Cope	Son of Sir Anthony Cope: acquired the freehold to the Bramshill Estate from his father prior to 18.6.1921 and owned it until 1936

Lord Brocket	Purchaser of the Bramshill Estate from Captain Denzil Cope in 1936: sold it off in 1952, in a number of lots none of which included Sandy Lane. Chairman of Bramshill parish meeting 1949
Forestry Commission	Lessee of the land adjoining Sandy Lane on both sides under a lease for 198 years of that and other land on the Bramshill Estate dated 5.4.1922; grantee of an all-purpose right of way over Sandy Lane for the duration of the lease

R (on the application of the Confederation of Passenger Transport UK) v Humber Bridge Board and another

[2003] EWCA Civ 842

COURT OF APPEAL, CIVIL DIVISION

AULD, CLARKE AND JONATHAN PARKER LJJ

19 MAY, 25 JUNE 2003

Statutory instrument – Construction – Anomalies – Correction of obvious drafting error – Conditions for giving rectifying construction to provision – Use of extraneous material – Humber Bridge (Revision of Tolls Vehicle Classification) Order 1997 (SI 1997/150) – Humber Bridge (Revision) Order 2000 (SI 2000/204) – Humber Bridge (Revision of Tolls) Order 2002 (SI 2002/786).

Where a statutory instrument made under a power conferred by primary legislation on a Secretary of State to make an order exercisable by statutory instrument contains a plain case of a drafting mistake the court must be sure, before adding or omitting or substituting words; (i) of the intended purpose of the order; (ii) that the draftsman and the Secretary of State failed by inadvertence to give effect to that purpose; and (iii) of the substance of the provision that would have been made but for the mistake. Where it is plain from the language used that a mistake was made by the maker of the order, and the order is neither clear nor unambiguous on its face it is permissible to use extraneous material, if it is clear and unequivocal, to identify the purpose of the order and the words omitted (see [36], [38], [47], [48], [52], [53], [81], [85], [86], below).

Jones v Wrotham Park Settled Estates (or Wentworth Securities Ltd) [1979] 1 All ER 286, *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195 applied.

Notes

For interpretation of an enactment by reference to its enacting history, and for the presumption favouring rectifying construction, see 44(1) *Halsbury's Laws* (4th edn reissue) paras 1419–1426, 1472.

Cases referred to in judgments

A-G v Wilts United Dairies Ltd (1921) 37 TLR 884, CA; *affd* (1922) 91 LKJB 897, HL.

Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] 1 All ER 810, [1975] AC 591, [1975] 2 WLR 513, HL.

Fothergill v Monarch Airlines Ltd [1980] 2 All ER 696, [1981] AC 251, [1980] 3 WLR 209, HL.

Inco Europe Ltd v First Choice Distribution (a firm) [2000] 2 All ER 109, [2000] 1 WLR 586, HL.

Jones v Wrotham Park Settled Estates (or Wentworth Securities Ltd) [1979] 1 All ER 286, [1980] AC 74, [1979] 2 WLR 132, HL.

Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd [1970] 2 All ER 871, [1971] AC 850, [1970] 3 WLR 287, HL.

McCarthy & Stone (Developments) Ltd v Richmond upon Thames London BC [1991] 4 All ER 897, [1992] 2 AC 48, [1991] 3 WLR 941, HL.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

Pickstone v Freemans plc [1988] 2 All ER 803, [1989] AC 66, [1988] 3 WLR 265, HL.

R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 4 All ER 654.

R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.

Slough Estates Ltd v Slough BC (No 2) [1970] 2 All ER 216, [1971] AC 958, [1970] 2 WLR 1187, HL.

Western Bank Ltd v Schindler [1976] 2 All ER 393, [1977] Ch 1, [1976] 3 WLR 341, CA.

Cases referred to in skeleton arguments

Farrell v Alexander [1976] 2 All ER 721, [1977] AC 59, [1976] 3 WLR 145, HL.

Luke v IRC [1963] 1 All ER 655, [1963] AC 557, [1963] 2 WLR 559, HL.

Maunsell v Olins [1975] 1 All ER 16, [1975] AC 373, [1974] 3 WLR 835, HL.

Tiverton and North Devon Rly Co v Loosemore (1884) 9 App Cas 480, HL.

Trent River Authority v National Coal Board, Newark Area Internal Drainage Board v National Coal Board [1970] 1 All ER 558, [1971] AC 145, [1970] 2 WLR 531, HL.

Appeal

The Confederation of Passenger Transport UK appealed from the decision of Newman J on 1 November 2002 ([2002] EWHC 2261 (Admin), [2002] All ER (D) 09 (Nov)) refusing the confederation's application for judicial review of the power of the Humber Bridge Board to levy tolls on large buses under any or all of the Humber Bridge (Revision of Tolls Vehicle Classification) Order 1997, the Humber Bridge (Revision) Order 2000, and the Humber Bridge (Revision of Tolls) Order 2002, being orders made by the Secretary of State for Transport, Local Government and the Regions or the former relevant minister. The facts are set out in the judgment of Clarke LJ. The Secretary of State took no part in the proceedings.

Elisabeth Laing (instructed by *Pellys*, Bishop's Stortford) for the confederation.

Frances Patterson QC (instructed by *Margaret Taylor*, on behalf of Humber Bridge Board, Kingston-upon-Hull) for the board.

Cur adv vult

25 June 2003. The following judgments were delivered.

CLARKE LJ (giving the first judgment at the invitation of Auld LJ).

INTRODUCTION

[1] This is an appeal from an order made by Newman J on 1 November 2002 ([2002] EWHC 2261 (Admin), [2002] All ER (D) 09 (Nov)) refusing an application by the appellant for judicial review of a decision of the second respondent with costs. The judge refused permission to appeal but permission was subsequently granted by Kay LJ.

THE PARTIES

[2] The appellant is the Confederation of Passenger Transport UK (the confederation) which is an organisation representing the majority, but not all, of the operators of public service vehicles (PSVs) in the United Kingdom. The first respondent is the Humber Bridge Board (the board), which is a statutory body having the power to administer the Humber Bridge. The board's powers are contained in two Acts, namely the Humber Bridge Act 1959 and the Humber Bridge Act 1971. The bridge opened to traffic on 24 June 1981. The second respondent is the Secretary of State for Transport, Local Government and the Regions, who has played no part in these proceedings.

THE ISSUES

[3] The issues are whether the board was authorised to levy tolls on large buses under any or all of three tolls revision orders made in 1997, 2000 and 2002 (the Humber Bridge (Revision of Tolls Vehicle Classification) Order 1997, SI 1997/1950, the Humber Bridge (Revision) Order 2000, SI 2000/204, and the Humber Bridge (Revision of Tolls) Order 2002, SI 2002/786) which were made by the relevant minister, now the Secretary of State for Transport, Local Government and the Regions. The judge held that the board was so authorised.

[4] The question arising under the orders of 1997 and 2000 is the same. In each case the judge held that the draftsman omitted a reference to large buses by mistake but that it is permissible to construe each order by appropriately reading in the words 'large bus'. The question is whether the court is entitled so to construe the orders. The question in the case of the 2002 order is somewhat different. Here the judge held that a reference to large buses had been deliberately omitted but that they were included within the definition of goods vehicles. The question is whether, on the true construction of the order, the board is entitled to levy tolls on large buses and, if so, on what basis.

THE LEGISLATIVE FRAMEWORK

[5] Section 61 of the 1959 Act provides:

> '(1) From and after the opening of the bridge for public traffic the Board may demand take and recover in respect of all traffic passing over or on the bridge tolls not exceeding those specified in an order (in this section referred to as "the order") made by the Board and confirmed by the Minister in accordance with the provisions of this section and for any other services rendered by the Board in connection with the bridge such reasonable charges as they may think fit: Provided that—(a) the Board may by resolution if and when they think fit—(i) cease to demand take and recover tolls in respect of traffic or certain classes of traffic passing over or on the bridge; and (ii) resume demanding taking and recovering such tolls; (b) the Board may also (if and when they think fit) allow traffic to use the bridge without paying tolls during such hours or on such occasions as they may from time to time determine.
>
> (2) The order when made by the Board shall be submitted to the Minister for confirmation and shall be confirmed by the Minister with or without modification not more than twelve months ... before the expected opening of the bridge for public traffic.
>
> (3) After submitting the order to the Minister for confirmation the Board shall furnish the Minister with such information and particulars certified in such manner as the Minister may require and shall publish in the London Gazette

and in such newspapers as the Minister may require a notice stating—(a) the general effect of the order; and (b) that within a period of forty-two days from the date of the first publication of the notice any person having a substantial interest may object to the order by giving notice to the Minister accompanied by the grounds of his objection and sending a copy thereof to the board.

(4) Before confirming the order the Minister shall if required by the Board or by any person who has objected to the order and has not withdrawn his objection and in any other case if he thinks fit cause a local inquiry to be held by such person as he may appoint for the purpose.

(5) In confirming the order with or without modification the Minister shall have regard to the financial position and future prospects of the undertaking and the order shall prescribe such maximum tolls as in the Minister's opinion shall not exceed by more than is reasonable the tolls estimated to be required to be demanded taken and recovered when the bridge is first opened for public traffic to produce an annual revenue not substantially less nor substantially more than adequate to meet such expenditure as is authorised for the several purposes mentioned in section 75 (Application of revenue) of this Act.

(6) The power of the Minister to confirm the order shall be exercisable by statutory instrument.'

[6] Section 63 provides for a list of the tolls to be appropriately exhibited. Section 64 provides for the recovery of tolls as a civil debt and s 65 provides that the board may in some circumstances refuse to permit the use of the bridge by those who knowingly and wilfully refuse or neglect to pay the tolls. Section 68 provides for certain exemptions from the tolls.

[7] The judge summarised the position under the 1959 Act in this way ([2002] All ER (D) 09 (Nov)):

'[5] The following particular points can be made in connection with the above sections and the power of the board to levy a toll. The power conferred is an originating power which gives rise to a duty on the minister to consider confirmation or modification of the order made by the board. The power to levy is contingent upon confirmation being given by the minister. The power is expressed in terms which contemplate the board recovering a toll "in respect of all traffic passing over or on the bridge". The Act can be taken to contemplate that, where revenue is required for the purposes set out in s 75 (Application of revenue), all traffic will be charged where it is reasonable to do so or a specific power is exercised not to do so, or the traffic is exempt. The Act envisages that there will be classes of traffic specified in the order. Thus the proviso at s 61(1)(a)(i) contemplates that where the board has the power to demand a toll, the toll having been confirmed by the minister, the board may by resolution cease to demand and recover the toll which may be in respect of "traffic", or certain classes of traffic passing over or on the bridge. Section 75 of the Act imposes an obligation on the board to apply its revenue in the manner therein specified, laying down the order of priority for its application. Priorities one to eight comprise the working and establishment expenses and costs of the undertaking, interest on borrowed money and so forth. Ninthly, the section provides: "Ninthly, in a reduction of tolls which may be demanded taken and recovered under this Act or for such other purpose as may be approved by the Minister ..."

[6] It follows that for the exercise of the power to levy tolls, both by the board and the minister, to be lawful, it must be exercised reasonably and for the

purposes specified in the Act. Subject to the power by resolution to cease to demand to take a toll which can be lawfully demanded, and subject to the exemptions from tolls which are set out in s 68, the 1959 Act contemplates that the purpose in levying tolls is to raise the revenue necessary for the purposes of the undertaking and in a manner which the minister regards as reasonable.'

[8] Section 10 of the 1971 Act provides, so far as relevant:

'(1) If at any time—(a) it is represented in writing to the Secretary of State—(i) by any person or body representative of persons appearing to the Secretary of State to have a substantial interest in the use of the bridge; or (ii) by the Board; or (b) it appears to the Secretary of State after consultation with the Board to be expedient; that in the circumstances then existing or in prospect (including the opening to public traffic of the bridge) all or any of the tolls authorised in pursuance of the Humber Bridge Acts or any classification of vehicles specified in any order for the time being in force under those Acts should be revised, the Secretary of State may, if he thinks fit make an order revising all or any of such tolls or any classification of vehicles as aforesaid and may fix the date as from which such order shall be observed until the same expires or is revoked or modified by a further order of the Secretary of State made in pursuance of this section: Provided that the Secretary of State shall not make an order pursuant to paragraph (b) of this subsection at any time except when the Board have borrowed money from the Secretary of State under section 5 (Borrowing from Secretary of State) of this Act and have not repaid the whole of the money so borrowed.

(2) As soon as may be after the receipt by the Secretary of State of a representation pursuant to subsection (1) of this section from any person or any body other than the Board the Secretary of State shall send a copy of the representation to the Board.

(3) Before making an order under this section the Secretary of State shall if required by—(a) any such person or body as is referred to in sub-paragraph (i) of paragraph (a) of subsection (1) of this section, being a person or body who either has made a representation to the Secretary of State pursuant to that subsection or has pursuant to section 11 (Further provisions as to revision of tolls) of this Act objected to the representation made to, or the proposals of, the Secretary of State and has not withdrawn the objection, or (b) the Board; and may in any other case, if he thinks fit, cause a local inquiry to be held by such person as he may appoint for the purpose.

(4) In the exercise of the powers conferred upon him by this section, the Secretary of State shall have regard to the financial position and future prospects of the undertaking and any order made by him under this section shall prescribe such tolls as in the opinion of the Secretary of State are reasonably required to be demanded, taken and recovered so as to produce an annual revenue not substantially less, nor substantially more, than is adequate to meet such expenditure as is authorised for the purposes of the first eight purposes mentioned in section 75 (Application of revenue) of the Act of 1959, as amended by this Act.'

[9] Section 11(4) provides:

'The power of the Secretary of State to make an order under the said section 10 shall be exercisable by statutory instrument and the Secretary of State may by any order made by him under the said section 10 amend, vary or revoke

any of the provisions of any order made by him under section 61 (Tolls) of the Act of 1959 or under the said section 10.' a

THE 1979/1980 AND 1989 ORDERS

[10] No tolls order was made by the board until 1979. As the judge observed, no order was necessary since the bridge was not open for traffic until June 1981. Only one order was made under the 1959 Act. It was entitled the Humber Bridge Tolls Order 1979 Confirmation Instrument 1980, SI 1980/1137. It provided, so far as relevant: b

'1. The Humber Bridge Tolls Order 1979, which is an Order made by the Humber Bridge Board in exercise of their powers under the said section 61, prescribing the tolls which the Humber Bridge Board may, from and after the opening of the Humber Bridge for public traffic, demand, take and recover in respect of traffic passing over or on the bridge is confirmed subject to modifications. c

2. The said Order (so modified) is set out in the Schedule hereto.'

[11] The Schedule provided: d

'1. This Order may be cited as the Humber Bridge Tolls Order 1979.

2. The tolls which the Humber Bridge Board may, from and after the opening of the Humber Bridge for public traffic, demand, take and recover in respect of traffic passing over or on the bridge shall be tolls not exceeding those specified in column 2 of the Schedule to this Order in relation to the particular classes of traffic specified in column 1 of that Schedule.' e

Column 1 set out what it called classes of traffic and column 2 set out the maximum tolls. Column 1 included pedestrians and pedal cycles, each of which had a maximum toll of nil. There followed cars and the like, with appropriate maximum tolls, and the Schedule continued: f

'(1)	(2)
Class of Traffic	*Maximum Toll*
Heavy commercial vehicles (over 3 tons):	g
Class A (two axle)	£5·20
Class B (three axle)	£6·60
Class C (four or more axles)	£8·00 h
Mini-buses with a seating capacity of more than 8 but not more than 16 passengers	£2·90
Buses and coaches with a seating capacity of 17 and over	£5·20' j

[12] It can thus be seen that, so far as buses were concerned, there were express references, first to 'mini-buses' with a seating capacity of more than eight but not more than 16 passengers and secondly to buses and coaches with a

seating capacity of 17 and over. There was, however, no separate definition section in the 1979/1980 order.

[13] The next statutory instrument was the Humber Bridge (Revision of Tolls and Vehicle Classification) Order 1989, SI 1989/1353. Like all subsequent orders, it was made directly by the Secretary of State under s 10 of the 1971 Act. The order revoked previous orders and provided, so far as relevant:

> '2. From and after the coming into force of this Order (i) for the purpose of the tolls authorised in pursuance of the Humber Bridge Acts 1959 and 1971, vehicles shall be classified in accordance with the classes specified in items 1 to 6 and 8 in column (1) of the scale of charges set out in the Schedule to this Order; and (ii) the tolls which the Humber Bridge Board may demand, take and recover in respect of traffic passing over or on the bridge shall be tolls not exceeding those specified in column (2) of the scale of charges set out in that Schedule respectively in relation to each class of traffic specified in column (1) of that scale.'

[14] Paragraph 1 of the schedule provided, so far as relevant: 'In this Schedule "bus", "small bus" and "large bus" have the same meanings as in section 19 of the Transport Act 1985.' In that section 'bus' was defined as meaning 'a vehicle which is adapted to carry more than eight passengers', 'large bus' was defined as meaning 'a vehicle which is adapted to carry more than sixteen passengers' and 'small bus' was defined as meaning 'a vehicle which is adapted to carry more than eight but not more than sixteen passengers'. Paragraph 1 of the schedule defined 'goods vehicle' as meaning 'a mechanically propelled vehicle constructed or adapted for use for the carriage of goods or burden of any description'.

[15] Paragraph 2 of the schedule provided for the maximum scale of charges as follows:

'(1) *Class of Traffic*	(2) *Maximum Toll*
1. Motor cycle with or without sidecar	70p
2. Car Goods vehicle having a maximum weight exceeding 3·5 tonnes	£1·60
3. Goods vehicle having a maximum weight exceeding 3·5 tonnes but not exceeding 7·5 tonnes Vehicle within class 2 above with trailer Small bus Motor caravan	£2·90
4. Goods vehicle having a maximum weight exceeding 7·5 tonnes with two axles Large bus	£6·50

5.	Goods vehicle having a maximum weight exceeding 7·5 tonnes with three axles	£8·70
6.	Goods vehicle having a maximum weight exceeding 7·5 tonnes with four or more axles	£10·90
7.	Pedestrian	Nil
8.	Pedal cycle	Nil'

[16] The position was thus quite clear under the 1979/1980 and 1989 orders. Large buses were expressly included and with maximum tolls of £5·20 and £6·50 respectively.

THE 1997 ORDER

[17] The next order was the Humber Bridge (Revision of Tolls Vehicle Classification) Order 1997, SI 1997/1950. The order was made on 6 August 1997 and expressed to come into force on 7 August 1997. It revoked the 1989 order. By para 2 it provided:

> 'From and after the coming into force of this Order for the purposes of the tolls authorised in pursuance of the Humber Bridge Acts 1959 and 1971, the tolls which the Humber Bridge Board may demand, take and recover in respect of traffic passing over or on the bridge shall be tolls not exceeding those specified in column (2) of the scale of charges set out in the Schedule to this Order with respect to each class of traffic specified in column (1) of that scale.'

The definitions were the same as in the 1989 order and, as in that order, the schedule provided that 'in this Schedule "bus", "small bus" and "large bus" have the same meanings as in section 19 of the Transport Act 1985'. Unfortunately, although there was a reference in the operative part of the order to 'small bus' there was no reference to 'bus' or, more importantly for present purposes, to 'large bus'.

[18] Paragraph 2 of the schedule provided:

> 'The scale of charges referred to in article 2 of this Order shall be as follows:

(1)	(2)
Class of Traffic	*Maximum Toll*
1. Motor cycle with or without sidecar	£1·00
2. Car Goods vehicle having a maximum weight not exceeding 3·5 tonnes	£2·30

3.	Goods Vehicle having a maximum weight exceeding 3·5 tonnes but not exceeding 7·5 tonnes Vehicle in class 2 above with trailer Small bus (up to 16 passengers excluding driver) Motor caravan	£4·10
4.	Goods vehicle exceeding 7·5 tonnes maximum weight with two axles	£9·20
5.	Goods vehicle exceeding 7·5 tonnes maximum weight with three axles	£12·30
6.	Goods vehicle exceeding 7·5 tonnes maximum weight with four or more axles	£15·40'

[19] There can, to my mind, be no doubt that the draftsman omitted a reference to 'large bus' by mistake, not only because of the reference to 'large bus' in the definition but also because of its historical context (to which I return below) and because the explanatory note states that one of the 'changes now made' is: '(c) the toll for good [sic] vehicles over 7·5 tonnes maximum weight with two axles and buses and coaches with 17 or more seats is increased from £6·50 to £9·20.' To my mind that makes it clear beyond a peradventure that the draftsman omitted a reference to large buses by mistake and that, had he not made a mistake, he would have included them in class 4 with a new maximum toll of £9·20.

[20] I shall return below to the question what materials it is permissible to have regard to in deciding whether a mistake was made and, if a mistake was made, what it was, but it is convenient to refer here to the historical context of the 1997 order.

[21] In accordance with the provisions of the 1959 and 1971 Acts public inquiries were held before the 1979/1980, 1989 and 1997 orders, as indeed one was held prior to the 2002 order. The report of the inspector who held the first inquiry in 1980, Mr Holden, included the following in para 252 of his report:

> 'The Order proposes that buses and coaches of whatever size, other than mini-buses, should pay the same toll as goods vehicles over 3 tonnes with two axles. If tolls are to be charged, I see no reason why they should not be levied on all vehicles. In my view the toll on a bus is as much part of the operator's running costs as his licence fee or his fuel. Whether the toll should be passed on to the passengers using the service affected or treated as part of the operator's overall costs is a matter for him.'

[22] The inspector recommended the order made by the board to the Secretary of State, subject only to drafting changes which the Secretary of State adopted. Paragraph 180 of the inspector's report included this:

> 'To remove any doubt about the meaning of the various categories of vehicle mentioned in the Order, the board asked that the descriptions in the Order be modified as follows ... (e) after mini-buses add "with seating

capacity of 7 to 16 passengers inclusive"; (f) after buses and coaches add "with a seating capacity of 17 and over".' a

[23] The inspector's report after the inquiry before the 1989 order included the following in para 91:

'The opportunity has now been taken to seek to amend vehicle classifications in the proposed new tolls Order in order to make the terminology consistent with vehicles descriptions currently found in other legislation.' b

[24] In 1996 the inspector conducting the inquiry prior to the 1997 order received a representation for the creation of a new class of bus, called a 'midi-bus', which could be established for the 17 to 35-seat vehicle and for a toll to be charged somewhere between classes 3, the mini-bus, and 4, the large bus. The inspector concluded: c

'I am not persuaded that there is any justification for creating a new class of midi-bus, between class 3 and 4. In all classes there will be vehicles on the borderline and a claim could be made for a reduced rate for them. The present classes fit national legislation and there is certainty and practicality in retaining the recognised classes. I had no breakdown of the number of vehicle journeys that would fall into the midi-bus category and I have to have regard to the overriding need to increase income.' d

[25] The Secretary of State accepted the inspector's report in a decision letter dated 6 August 1997, the very day on which the 1997 order was made. Paragraph 2 of the letter included the following: e

'The tolls charged and proposed to be charged at the bridge are as follows:

f

Category of Vehicle		Present Toll	Proposed Toll
Class	*Vehicle*	£	£
4	Goods vehicle exceeding 7·5 tonnes maximum weight with two axles Large bus (17 or more passengers including driver)	6·50	9·20'

g

h

[26] As the judge observed ([2002] All ER (D) 09 (Nov) at [17]):

'It will be obvious that, despite the expressed intention of the Secretary of State to implement the inspector's recommendations, which included "large bus" within class 4, the 1997 order did not do so.' j

The decision letter is to my mind further powerful evidence, if any such evidence were needed, that an express reference to 'large bus' was omitted from the 1997 order by mistake.

DISCUSSION RE 1997 ORDER

[27] It is common ground before us, as it was before the judge, that the board cannot change tolls in respect of large buses, or indeed anything else, unless there is clear and distinct statutory authority to do so (see eg *McCarthy & Stone (Developments) Ltd v Richmond upon Thames London BC* [1991] 4 All ER 897 at 900, [1992] 2 AC 48 at 67–68 per Lord Lowry, applying *A-G v Wilts United Dairies Ltd* (1921) 37 TLR 884, Court of Appeal especially at 885 per Scrutton LJ; affirmed (1922) 91 LKJB 897, House of Lords.

[28] The question is whether there is such authority in the 1997 order. If the words of the order are given their ordinary and natural meaning there is on the face of it no such authority because there is no reference to 'large bus' in the operative part of the order despite the reference to 'large bus' in the definition section of it.

[29] Ms Patterson QC submits on behalf of the board that even if it were held that 'large bus' was omitted and cannot be read into the order, the order can be read as prescribing maximum tolls for those classes of traffic which it identifies and that vehicles in unidentified classes can be charged at the maximum rate specified for the nearest equivalent class, which in the case of large buses was that of goods vehicles over 7·5 tonnes maximum weight with two axles. She says that this is what in fact happens in the case of, say, combine harvesters, which are not mentioned in the order.

[30] I am bound to say that, for my part, I have difficulty in accepting that submission. There is nothing in the 1997 order (and there had been nothing in the two earlier orders) which suggests that it was open to the board to charge vehicles of a class not mentioned in the order at the nearest equivalent rate. In my opinion, if the board wishes to charge tolls on that basis it should ask the Secretary of State to make an order which so provides. However, that was not the basis on which the judge decided the case. I therefore return to his reasoning.

[31] The judge accepted Ms Patterson's submission on behalf of the board that in para 2 of the schedule the words 'large bus' should be treated as being added to or read into class 4 under the reference to 'Goods vehicle exceeding 7·5 tonnes maximum weight with two axles'.

[32] He applied the principles stated in two House of Lords cases. The first is *Jones v Wrotham Park Settled Estates (or Wentworth Securities Ltd)* [1979] 1 All ER 286 at 289, [1980] AC 74 at 105, where Lord Diplock said:

> 'My Lords, I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language would lead to results which would clearly defeat the purpose of the Act. In doing so the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it. *Kammins Ballroom Co Ltd v Zenith Investments (Torquay) Ltd* ([1970] 2 All ER 871, [1971] AC 850) provides an instance of this; but in that case the three conditions that must be fulfilled in order to justify this course were satisfied. First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission

before the Bill passed into law. Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation. It becomes a usurpation of a function which under the constitution of this country is vested in the legislature to the exclusion of the courts.'

[33] The second case, which is of particular significance for present purposes, is *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, [2000] 1 WLR 586, where Lord Nicholls of Birkenhead, with whom the other members of the House agreed, set out the relevant principles. He did so in the context of a case in which the House of Lords had to decide whether an appeal lay to the Court of Appeal from a decision made at first instance under s 9 of the Arbitration Act 1996. Section 18 of the Supreme Court Act 1981 as amended by s 107 and para 37(2) of Sch 3 to the 1996 Act provided a relevant saving but, on its literal construction, the saving did not apply and s 9 itself was silent on the point. Lord Nicholls pointed out that read literally the provisions gave rise to an argument which was unanswerable, but (as the judge observed) he concluded that it was clear beyond a peradventure that 'Homer, in the person of the draftsman of Sch 3 to the Act of 1996, nodded'.

[34] Lord Nicholls examined the legislation and the history of the legislation and expressed the relevant principles in this way ([2000] 2 All ER 109 at 115, [2000] 1 WLR 586 at 592–593):

'I freely acknowledge that this interpretation of s 18(1)(g) involves reading words into the paragraph. It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross' admirable opuscule, *Statutory Interpretation* (3rd edn, 1995) pp 93–105. He comments (p 103): "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intention of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role." This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation (see per Lord Diplock *Jones v Wrotham Park Settled Estates* [1979] 1 All ER 286

at 289, [1980] AC 74 at 105–106). In the present case these three conditions are fulfilled.'

[35] The judge quoted those paragraphs from the speech of Lord Nicholls. However, Ms Laing has drawn our attention to the fact that the judge did not quote the next paragraph of his speech, which she says qualifies what had gone before:

'Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provisions in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd v Schindler* [1976] 2 All ER 393 at 404, [1977] Ch 1 at 18 Scarman LJ observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here the court is able to give a construction of the statute which accords with the intention of the legislature.'

[36] In my opinion the principles stated by Lord Nicholls in those passages are indeed the relevant principles to apply in this case. The House of Lords was considering primary legislation but it appears to me that the same or very similar principles must apply to statutory instruments like the 1997 order. The judge held that each of the conditions identified by Lord Nicholls was satisfied here.

[37] He summarised his reasons in his judgment ([2002] All ER (D) 09 (Nov)):

'[24] It was common ground that two words "large bus" have been omitted from the two orders because the draftsman had slipped up. It is clear from the terms of the two decision letters that the minister intended to confirm the board's exercise of power and to make large buses liable to pay the toll specified in class 4. It is obvious from the inclusion of a definition of "large bus" in the instrument that "large bus" was envisaged as a category or class. The explanatory note is not a legitimate aid to the interpretation of the instrument, but this being delegated legislation at the hand of the minister, which is not required to be laid before Parliament, it seems to me that the court commits no impropriety in having regard to the plain intention of the maker of the instrument, and the content of the instrument, which confirms the intention but nevertheless by omission, fails to fully implement it. There being a general power contained in s 61(1) of the 1959 Act, reaffirmed as a continuing power for revisions to take place pursuant to s 10 of the 1971 Act, notwithstanding that the power is an inchoate power until confirmed by the minister, there can, in my judgment, be no basis for concluding that the court would be stepping outside its constitutional role by rectifying the omissions so as to include large buses as traffic liable to a levy. Since the omission of "large bus" from class 4 in the two orders is to be regarded as an omission, there is no rational basis for concluding that there being a power to charge all traffic passing over the bridge, "large bus" should be treated by the court as exempt. In my judgment the board's intention to classify "large bus" as being liable to a toll is sufficiently plain from the general power in s 61(1), the orders drawn by the board to include it, the respective decision letters of the Secretary of State to confirm them as laid before him, and the inclusion in the definition section of the instruments of "large bus". I thus have no doubt as to the first of the three matters referred to by Lord Nicholls,

namely the intended purpose of the statute or provision in question. I have no doubt as to the second, that it arose by inadvertence on the part of the draftsman, and as to the third, there is no difficulty in concluding upon the precise words which would have been used by the draftsman (in effect by the Secretary of State), because he had used them in his decision letters, namely "large bus". In my judgment the court should exercise its powers to correct the obvious drafting errors in the two orders so as to regard the two words "large bus" as being included in class 4 of the classification in the scale of charges in each of those instruments.'

[38] I entirely agree with those conclusions. If anything, I would go further and make more use of the explanatory note than the judge did. However, quite apart from the explanatory note, there are two key considerations which show that a mistake was made. First, it seems to me that if the 1997 order is construed in its historical context, which includes the 1979/1980 and 1989 orders, it is inconceivable that either the board or the Secretary of State intended to exclude large buses from the classes of vehicle expected to pay tolls, especially since the purpose of the tolls was to help to recoup the very substantial costs of building the bridge. Secondly, the 1997 order itself shows that it was intended to include large buses because there would otherwise have been no purpose in including a provision which expressly stated that 'in this Schedule "bus", "small bus" and "large bus" shall have the same meanings as in the Transport Act 1985'. It seems to me to be plain from that provision alone that the draftsman intended to include large bus in one of the classes of traffic identified in the schedule.

[39] Thus it can be seen from the terms of the instrument itself that a mistake was made by or on behalf of the Secretary of State who made it. The next question is what materials can be used by the courts to identify the nature of the mistake which was made. Ms Laing submits on behalf of the confederation that none of the materials deployed by the judge can properly be used. She says that if this is a hard case so be it, but hard cases make bad law.

[40] Ms Laing submits that the approach adopted by the judge was wrong in principle. She submits that his approach involves inserting words into the 1997 order in order to reflect the subjective intention of the draftsman and not his intention ascertained objectively or, as it is sometimes put, the objective intention of the maker of the instrument. She submits that the general rule is that the court will focus only on material contained in the instrument itself or expressly incorporated within it and that it will only rarely permit reference to be made to extraneous material.

[41] She gave as one example the court's approach to planning permission, by reference to *Slough Estates Ltd v Slough BC (No 2)* [1970] 2 All ER 216 at 218, [1971] AC 958 at 962 per Lord Reid. However, I do not for my part think that any real assistance is to be gained from examples in so different a field.

[42] More importantly for present purposes, Ms Laing relies upon the approach of the House of Lords to the use of extraneous material as an aid to construction as exemplified for example by the decision in *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 AC 349, where there was considerable discussion (and some disagreement) as to the use to be made of parliamentary materials as an aid to the construction of a statute, albeit in the context of a consolidating statute, which the tolls orders are not. It is not I think necessary for us to express a view upon such points of disagreement as there were in *Ex p Spath Holme Ltd*.

[43] Ms Laing relies upon the statement of Lord Bingham of Cornhill ([2001] 1 All ER 195 at 208, [2001] 2 AC 349 at 388) that the overriding aim of the court must always be to give effect to the intention of Parliament 'as expressed in the words used'. He also stressed ([2001] 1 All ER 195 at 211, [2001] 2 AC 349 at 391) the principles identified in Lord Browne-Wilkinson's speech in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593, namely that statements made in Parliament were only permissible as an aid to construction where: (a) legislation was ambiguous or obscure, or led to an absurdity, (b) the materials consisted of statements by the minister or promoter of the Bill together with such other material as might be necessary to understand such statements and their effect and (c) the effect of such statements was clear.

[44] Ms Laing also relies upon a number of statements in the speech of Lord Nicholls of Birkenhead in *Ex p Spath Holme Ltd*. Indeed both Ms Laing and Ms Patterson referred in some detail to what Lord Nicholls described as first principles, which are set out [2001] 1 All ER 195 at 216–217, [2001] 2 AC 349 at 396–398. I cannot of course set out the whole of that passage here but it does seem to me that his approach points the way in the instant case. He first stressed that the role of the courts is one of interpretation of the relevant statutory provision. Thus he said ([2001] 1 All ER 195 at 216, [2001] 2 AC 349 at 396–397):

> 'The purpose for which a power is conferred, and hence its ambit, may be stated expressly in the statute. Or it may be implicit. Then the purpose has to be inferred from the language used, read in its statutory context and having regard to any aid to interpretation which assists in the particular case. In either event, whether the purpose is stated expressly or has to be inferred, the exercise is one of statutory interpretation. Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context. The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the "intention of Parliament" is an objective concept, not subjective. The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used. It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman ... As Lord Reid said in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 All ER 810 at 814, [1975] AC 591 at 613: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used."'

[45] Lord Nicholls then considered various aids to interpretation, first internal aids and then external aids. As to the latter he said:

> 'Or the aids may be external to the statute, such as its background setting and its legislative history. This extraneous material includes reports of Royal Commissions and advisory committees, reports of the Law Commission ... and a statute's legislative antecedents ... Nowadays the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool.'

[46] In the next passage of his speech Lord Nicholls stressed that that approach is subject to an important caveat because, as Lord Diplock put it in *Fothergill v Monarch Airlines Ltd* [1980] 2 All ER 696 at 704, [1981] AC 251 at 279–280 (in a passage relied upon by Ms Laing):

> 'The source to which Parliament must have intended the citizen to refer is the language of the Act itself. These are the words which Parliament has itself approved as accurately expressing its intentions. If the meaning of those words is clear and unambiguous and does not lead to a result that is manifestly absurd or unreasonable, it would be a confidence trick by Parliament and destructive of all legal certainty if the private citizen could not rely upon that meaning but was required to search through all that had happened before and in the course of the legislative process in order to see whether there was anything to be found from which it could be inferred that Parliament's real intention had not been accurately expressed by the actual words that Parliament had adopted to communicate it to those affected by the legislation.'

[47] Lord Nicholls then considered the possible use of external aids in order to determine whether the words of a statute are clear and unambiguous or indeed in order to displace meanings which are otherwise clear and unambiguous and not productive of absurdity. It is not, however, to my mind necessary for us to consider such problems in the instant case because it is plain from the language used that a mistake was made by the maker of the 1997 order and it seems to me that the order is neither clear nor unambiguous on its face because it does not state where in the schedule large buses are to be included. Moreover, it seems to me that without adding a reference to large buses at an appropriate place, the order is in this respect (as the cases put it) productive of absurdity.

[48] Ms Patterson submits that in these circumstances it is permissible to use the explanatory note, the Secretary of State's decision letter and indeed the inspector's report as legitimate extraneous aids to identify the purpose of the 1997 order and the words omitted. I agree.

[49] As to the explanatory note, I recognise that it has been held that an explanatory note is not part of a statutory instrument, but I see no reason why it should not be used to help to resolve the question whether any words were omitted from the statutory instrument by mistake. In *Pickstone v Freemans plc* [1988] 2 All ER 803 at 818, [1989] AC 66 at 127 Lord Oliver of Aylmerton said that, while the explanatory note is not part of the regulations, it is of use in identifying the mischief which the regulations were attempting to remedy. If that is so, I do not see why it cannot be used to help decide both whether any words were omitted from the draft by mistake and, if so, what those words were. The sole purpose of the order was to increase the tolls paid by vehicles using the bridge, one class of which was large buses. The explanatory note shows that one of the purposes of the order was to increase the maximum tolls which the board could levy on large buses to £9·20.

[50] That approach seems to me to be entirely consistent with the views expressed by Lord Steyn in *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38, [2002] 4 All ER 654, especially at [5], although it is right to have in mind that the opinions expressed there were obiter and related to the type of explanatory notes of the kind which, as he put it, now accompany most public Bills in their progress towards enactment by Parliament (see [3] and [4] of his speech).

[51] As to the decision letter and the inspector's report, again they seem to me to be admissible extraneous materials since they provide the immediate context for the 1997 order and in particular they make clear that one of its statutory purposes was to increase the maximum tolls for large buses to the same as those for goods vehicles exceeding 7·5 tonnes maximum weight with two axles, namely to £9·20.

[52] In the somewhat different context of ministerial statements to Parliament, the cases, including *Pepper v Hart* and *Ex p Spath Holme Ltd*, stress that the parliamentary statement relied upon must be clear and unequivocal. Applying a similar principle here, it seems to me that the explanatory note, whether by itself or taken together with the decision letter and the inspector's report, makes it clear beyond a peradventure what was intended.

[53] For all these reasons, I would not accept Ms Laing's submissions and would hold that the judge was right, essentially for the reasons which he gave. I would hold that, on its true construction, the 1997 order should be read as including the words 'large bus' in class 4 of column 1 of the schedule to the order. In particular I agree with the judge that the court can be abundantly sure of the three matters identified by Lord Nicholls in the *Inco Europe Ltd* case, namely (1) the intended purpose of the order, (2) that the draftsman and the Secretary of State failed by inadvertence to give effect to that purpose and (3) the substance of the provision that would have been made but for the mistake. Moreover none of the considerations adverted to by Lord Nicholls and which are quoted at [35], above but not referred to by the judge applies here. It follows that I would dismiss the appeal in so far as it relates to the 1997 order.

THE 2000 ORDER

[54] The Humber Bridge (Revision) Order 2000, SI 2000/204 was made on 8 February 2000 and came into force on 1 April 2000 and was in the same terms as the 1997 order, which it revoked. The explanatory note was also in the same terms as that attached to the 1997 order. The only difference in each case was the figures. Thus in the body of the order the maximum toll in respect of a class 4 vehicle, namely a 'Goods vehicle exceeding 7·5 tonnes maximum weight with two axles' was £9·60 and in the explanatory note it was stated that 'the toll for goods vehicles over 7·5 tonnes maximum weight with two axles and buses and coaches with 17 or more seats is increased from £9·20 to £9·60'.

[55] The Secretary of State's decision letter was also dated 8 February 2000 and included the following:

> '2. Although there are no formal objections outstanding the bus operators who withdrew their objections asked the Secretary of State to give careful consideration to their representations about bus tolls. The Secretary of State has therefore determined your toll application without a public inquiry held but, in doing so, has given careful consideration to the representations of the bus operators.
>
> 3. The tolls charged and proposed for the bridge are as follows …'

There then followed a box containing classes of vehicles which included in class 4: 'large bus (17 or more passengers including driver)'.

[56] In these circumstances precisely the same considerations apply to the 2000 order as apply to the 1997 order. It was accepted on all sides that the appeal relating to the 2000 order should be determined in the same way as the appeal relating to

the 1997 order. It follows that I would also dismiss the appeal in so far as it relates to the 2000 order, for substantially the same reasons as in the case of the 1997 order.

THE 2002 ORDER

[57] The 2002 order is not in the same terms as those that preceded it and presents somewhat different problems for the court. It is entitled the Humber Bridge (Revision of Tolls) Order 2002, SI 2002/786 was made on 22 March 2002 and came into force on 1 April 2002. It revoked the 2000 order. By para 2 it provides:

> 'From and after the coming into force of this Order for the purposes of the tolls authorised in pursuance of the Humber Bridge Acts 1959 and 1971, the tolls which the Humber Bridge Board may demand, take and recover in respect of traffic passing over or on the bridge shall be tolls not exceeding those specified in column (2) of the scale of charges set out in the Schedule to this Order with respect to each class of traffic specified in column (1) of that scale.'

[58] Paragraph 1 of the schedule provides, so far as relevant:

> 'In this Schedule: "bus" and "small bus" shall have the same meanings as in section 19 of the Transport Act 1985 ... "goods vehicle" means a mechanically propelled vehicle constructed or adapted for use for the carriage of goods of burden of any description ...'

Thus, unlike the schedules in the earlier orders, para 1 of the schedule to the 2002 order makes no reference to large bus.

[59] Paragraph 2 of the schedule includes the following:

> 'The scale of charges referred to in article 2 of this Order shall be as follows:

'(1) *Class of Traffic*	(2) *Maximum Toll*
2. Motor car Motor caravan Goods vehicle having a maximum weight not exceeding 3·5 tonnes	£2·50
3. Goods vehicles having a maximum weight exceeding 3·5 tonnes but not exceeding 7·5 tonnes Vehicle in class 2 above with trailer Small bus (up to 16 passengers excluding driver)	£4·50
4. Goods vehicle exceeding 7·5 tonnes maximum weight with two axles	£10·00'

[60] There were two other classes, namely goods vehicles exceeding 7·5 tonnes maximum weight with three and with four or more axles with a

maximum toll of £13·40 and £16·70 respectively. The explanatory note explains the increases in each case and includes the following:

> '(b) The toll for goods vehicles over 3·5 and up to 7·5 tonnes maximum weight and for small buses (up to 16 passengers excluding the driver) is increased from £4·30 to £4·50.
>
> (c) The toll for good [sic] vehicles over 7·5 tonnes maximum weight with two axles is increased from £9·60 to £10·00.'

It contains no reference to large buses.

[61] The judge said ([2002] All ER (D) 09 (Nov) at [14]):

> 'It is plain from this order that the draftsman deliberately left out "large bus" from the definition in the Schedule and there is no mention of "large bus" at all. If a large bus, namely a bus having 17 people or more, is to fall within any category or classification under the order, it must be as a goods vehicle. It will do so if it can be said to be a mechanically propelled vehicle constructed or adapted for use for the carriage of a "burden" of some description. According to whether a bus has two axles, three axles or four axles, it will be charged accordingly.'

He then set out his conclusions with regard to the 2002 order in these terms:

> '[26] The case for the power to levy a toll on large buses according to whether they have two, three or more axles, depends solely upon the definition of "goods vehicle" in the 2002 Order. The definition has a long history in transport legislation and is thus not specifically devised to embrace buses. The converse appears to be the case; as a definition of goods vehicle it appears in legislation where buses are specifically categorised. A driver of a goods vehicle requires a Heavy Goods Vehicle (HGV) licence. A driver of a bus requires a Public Service Vehicle (PSV) licence. Despite the ease with which the Secretary of State could have covered past error or omission by including "large bus" in each of the categories 4, 5 and 6, as the court has done in connection with the 1997 and 2000 orders, he did not do so in 2002. The drafting must be regarded as deliberate, without error. What one can discern is that, in the light of the earlier drafting, it was intended that the classification of "bus" and "small bus" should have specific relevance to the 2002 order. It can be discerned by reason of the amendment to exclude the words "large bus" from the definition section, that it was intended that it should not be regarded as a category on its own. The simple question which arises, therefore, is whether a bus carrying passengers falls within the definition of a mechanically propelled vehicle carrying "burden of any description". Although the definition of goods vehicle which has been employed may have a long established history, it seems to me that the words "burden of any description" must be given the broad meaning which the word "any" itself suggests. Having regard to the clear purpose behind the Board having the power to levy a toll on all traffic passing over the bridge, where words are used which are according to their ordinary meaning (as opposed to prior statutory use) wide enough to embrace a "large bus" it seems to me effect should be given to the underlying intention and purpose of this legislation. To describe passengers as "burden of any description" may have an antiquated ring about it, but passengers can be regarded as burden in this context because they create a weight which the vehicle has to

carry. Further, since the class is capable of being defined by the weight of the vehicle and the number of axles, a classification by reference to the number of persons carried or particular "burden" would be otiose. There is in my judgment no strain to the language used to include "large bus" within the definition of goods vehicle. I have concluded that the order as drawn and made includes large buses within each of the categories, class 4, 5 and 6, according to how may axles a bus has.'

[62] It can thus be seen that the judge held that the effect of the order was that the Secretary of State had introduced a new regime for large buses which depended upon their weight and the number of axles. That was different from the previous approach, which was that large buses should be charged at the same maximum rate as goods vehicles over 7·5 tonnes maximum weight with two axles. Moreover the maximum toll had throughout been four times the maximum toll for cars. It follows that the effect of the 2002 order on the judge's approach is that for large buses with three or more axles the maximum toll was significantly increased. I am bound to say that it seems to me be most unlikely that that was what intended.

[63] Further, Ms Laing submits that it would be surprising and incongruous if, as the judge held, a large bus is a goods vehicle for the purpose of the 2002 order but not for the purpose of the earlier orders, which (as she puts it) are in pari materia, or for the purpose of national and European Union transport legislation. That is in my opinion a powerful point. So too is her submission that it is not natural in this context to include passengers in the expression 'burden of any description'.

[64] On the other hand I agree with the judge that, in the light of the earlier drafting, it was intended that the classification of 'bus' and 'small bus' should have specific relevance to the 2002 order. The reference to 'bus' as well as 'small bus' suggests that the draftsman intended to include a reference to a bus as well as to a small bus, since there would otherwise be no purpose in referring to 'bus' at all. More importantly (as stated at [38], above with regard to the earlier orders), it seems to me to be inconceivable that the Secretary of State intended to exclude large buses from the classes of vehicles expected to pay tolls, especially since the purpose of the tolls was to help recoup the very substantial costs of building the bridge.

[65] In these circumstances, it seems to me that the 2002 order as drafted makes no real sense. It makes no sense to conclude, as Ms Laing submits, that the Secretary of State intended to exclude large buses altogether. Equally it makes no sense to conclude that the Secretary of State intended to treat large buses (but not small buses) as 'goods vehicles' within the meaning of para 1 of the Schedule to the order or, for the first time, to charge by reference to number of axles. In these circumstances, I would hold that, as drafted, the 2002 order is ambiguous or obscure and, indeed productive of absurdity.

[66] In these circumstances, it seems to me to be permissible to have regard to the extraneous materials to which I referred earlier in order determine what was objectively intended by the maker of the instrument. I recognise that this is in some respects less straightforward than in the case of the 1997 and 2000 orders because the explanatory note does not help to identify where large buses should be included. Indeed, on its own it might suggest that large buses were excluded. However, the other materials seem to me to point the way.

[67] The sequence of events which led to the 2002 order was similar to the events which led to the earlier orders. So far as I can see, it was broadly as follows. The board prepared a detailed case for further increases and submitted it to the Secretary of State. In a letter dated 1 March 2001 it sought increases in each of the various classes and, although we have not seen a copy of that letter, the board's position can be seen from the report of the inspector, Mr Tipping, who held an inquiry on 19 December 2001.

[68] His report was dated 30 January 2002. The section of it which set out the board's case, included the following:

> '3.5 The increases now proposed would take effect, if confirmed, on 1 April 2002, and apply during the period to 31 March 2004. The 2000 order retained eight classes of bridge user and these would remain unchanged. Of these, two classes, pedestrians and cyclists, would continue to use the bridge free of charge. The toll chargeable to motorists would increase by 10p to £1·10, representing the smallest convenient increase compatible with current coinage. The tolls chargeable to the remaining five classes would increase, with some limited rounding, by 4%, representing the board's best estimate of inflationary trends during the period 1 April 2002 to 31 March 2004. This estimate had been formulated combining experience of past inflation with government estimates of future inflation.
>
> 3.6 Thus the toll chargeable to motor cars would increase by 10p or 4·16% to £2·50. Since 1989, the tolls chargeable to heavier vehicular traffic had been based on weight and number of axles, irrespective of type of vehicle. Coaches and large buses (those carrying more than 16 passengers excluding the driver) were thereby included in class 4: "Goods vehicle exceeding 7·5 tonnes maximum weight with two axles". The board's current proposal was to increase the toll currently chargeable to such vehicles, £9·60, by 40p to £10·00, an increase of 4·16%.'

It is thus clear that the board was seeking an increase to £10·00 for large buses on the basis that they would be included in class 4, not on the basis that they might be included in a higher class according to the number of axles.

[69] In the section of his report dealing with the case for the objectors, the inspector set out the case for the PSV operators. It included the following:

> '4.2 The very high existing bridge tolls imposed on PSVs, that is, on large buses and coaches, using the bridge were unacceptable and were causing operators to reduce crossings. The proposed toll increases would accelerate this trend. Reducing the toll would encourage an increase in bridge crossings by PSVs and increase toll revenue from that source.
>
> 4.3 The tolls charged for use of the bridge were the highest for any estuarial crossing in Britain ... Moreover, the toll charged for a coach or large bus was four times that charged to a motor car, again the highest differential imposed on any British estuarial crossing. This fourfold differential had been applied since the inception of the bridge, but had always been onerous and unfair. If the board's toll proposal were implemented, the cash difference between the undiscounted tolls for a single crossing by a car (£2·50) and a large bus (£10·00) would rise to £7·50. The average car:large bus ratio for all other UK crossings was 1:1·87.'

It is thus plain that the PSV operators concerned understood the board's proposals. They correctly appreciated that the proposal was to charge large buses at four times the rate for cars, as had been done since the inception of the bridge, and to charge them £10·00, which was the rate for class 4 vehicles.

[70] It is true that that was before it was appreciated that there was a problem with the 1997 or 2000 orders. It appears that it was only while preparing for the inquiry that the confederation appreciated that there was a problem with the levying of tolls on large buses under the 2000 order. At the hearing of the inquiry the confederation submitted that the board was not entitled to levy tolls on large buses for the reasons discussed above and told the inspector that it was preparing an application for judicial review. It was also submitted to him that, since the advertisement did not refer to large buses, operators of them might have been misled into believing that they had no interest in the proposals made by the board to the inquiry.

[71] In the circumstances the confederation invited the inspector to adjourn the inquiry. He declined. He said this in his report:

> '2.4 The submission relating to the lawfulness of the levying of tolls on large buses is not a matter for me. As to the adjournment application, this was not renewed at the inquiry and, indeed, was expressly withdrawn by the representative of the objector on whose behalf the application had been made.
>
> 2.5 I nevertheless considered carefully whether failing to adjourn the inquiry might prejudice operators of large buses who had not objected to the board's proposal. Whether lawfully or not, these vehicles have been subject to a toll for using the bridge since its inception, a period of some 20 years. In these circumstances, it was not credible, in my view, that operators of such vehicles would not have been alerted by the advertisement of the board's proposal to the fact that their interests were in issue in the proposal and therefore at the inquiry. I was reinforced in the conclusion by the fact that six of the seven objections to the proposal were made by bus and/or coach operators. I concluded accordingly that it was neither desirable nor necessary to adjourn the inquiry.'

There is, so far as I am aware, no evidence that any relevant bus operator thought that the proposals did not affect him. Any such suggestion would have been, as the inspector put it, incredible.

[72] The inspector rejected the PSV operators' objections. He did so in these terms:

> '6.7 I deal first with the objection relating to all PSVs, including but not therefore restricted to scheduled local bus services. I have considered the claim that the fact that coaches and buses carry human cargo distinguishes them in some way from other commercial vehicles. I am unable to accept this argument. A decision whether to use the bridge in the course of a journey carrying passengers on a day trip to Scarborough or Whitby seems to me no different in character from a decision in relation to a goods vehicle of the same weight (and therefore in the same toll class) carrying vegetables across the bridge to Hull. The toll payable for the use of the bridge is an alternative to the cost, including wages, fuel and vehicle wear and tear, or the longer drive to the next available crossing of the Humber to the west ...'

[73] The inspector thus thought it right to include PSVs and therefore large buses. It is to my mind quite clear from his report, however, that he did not intend to recommend any greater maximum than had been sought by the board. This can be seen from para 6.10:

> 'I do not therefore accept that any reduction in the toll proposed for all PSVs is appropriate. It follows that there is no purpose to be served by establishing a separate PSV toll class, as urged by the objectors ... Charging for PSVs by weight and number of axles seems to me to be fair, having regard to my conclusion above as to the essentially commercial nature of these operations in general ...'

[74] Although there is a reference in that paragraph to charging PSVs by weight and number of axles, I do not read the report as a whole as recommending a new maximum toll calculated by reference to the number of axles. The inspector was considering and rejecting the objectors' case that there should be a reduction in the 'toll proposed', which (as already stated) was £10·00 for all large buses on the basis that they should be treated as class 4 vehicles, as they had been in the past. This is also clear from later paragraphs of the report in which the inspector considered the previous figures, namely an increase of over 40% from £6·50 to £9·20, in 1997 and an increase of 4·3%, from £9·20 to £9·60, in 2000. He rejected the objectors' suggestion that the ratio of cars to large buses should be 1:1·87, which (as he put it in para 6.18) would result in a proposed toll of £4·67 (ie £2·50 x 1·87), as against the proposed non-discounted toll of £10·00.

[75] Finally, the inspector recommended—

> 'that the Secretary of State make a Tolls Order pursuant to section 10 of the Humber Bridge Act 1971 to implement the proposals contained in the application of the board dated 1 March 2001.'

He thus recommended an increase of the maximum toll for large buses to £10·00. The Secretary of State considered the inspector's report and issued a decision letter dated 25 March 2002, which was three days after the date of the order but there can I think be no doubt that the order was intended to reflect the Secretary of State's decision in the letter.

[76] In the letter the Secretary of State referred to the board's proposals, to the objections of the PSV operators. In para 5 he expressly accepted the opinions of the inspector on the representations made by the bus operators. In para 6 he stated that he believed that the proposed application for judicial review should be treated separately from the 2002 order and in para 7 he recorded that the inspector recommended that the Secretary of State make an order in the terms applied for by the board. The Secretary of State added (in para 8):

> 'On the basis of the evidence before him and having regard to section 10 of the 1971 Act, the Secretary of State is satisfied that the proposed toll revisions are justified. The Secretary of State has, therefore, decided to make the Order.'

[77] It is to my mind plain from the letter that the Secretary of State intended to make an order implementing the inspector's recommendation that the board's proposals be adopted. It follows that he intended that large buses be charged under class 4 at a maximum rate of £10·00, which was four times the £2·50

maximum toll for cars. He plainly did not intend that they should be charged at a greater rate if they had more than two axles.

[78] How then did the 2002 order come to be in the form in which it was, without any reference to large buses at all, even in the definition section? It appears to me that the explanation can only be that, notwithstanding para 6 of the letter, the draftsman was concerned about the possible application for judicial review. However that may be, for the reasons I have given, it is clear that it was intended that large buses be charged under class 4. I note in passing that, as I understand it, after the decision of the judge the board continued to charge large buses at £10·00 and not at any greater rate. That is consistent with the board's intentions throughout.

[79] The Secretary of State's letter set out in para 2 the 'existing and proposed tolls' which included under class 4: 'Goods vehicle exceeding 7·5 tonnes maximum weight with two axles' with maximum tolls of £9·60 and £10·00 for existing and proposed tolls respectively. That formulation was reflected in the 2002 order as set out above.

[80] The question is whether in these circumstances it is permissible to construe the 2002 order as authorising a maximum toll for large buses on the basis that they are to be treated as falling within class 4. In my opinion, in the light of the principles identified above, it is permissible to do precisely that. I have already expressed the view at [65], above that the 2002 order as drafted makes no real sense. It makes no sense to conclude that the Secretary of State intended to exclude large buses altogether. Equally it makes no sense to conclude that the Secretary of State intended to treat large buses (but not small buses) as 'goods vehicles' or, for the first time, to charge by reference to the number of axles. The 2002 order is ambiguous or obscure and, indeed productive of absurdity.

[81] In my opinion, the principles identified in *Jones v Wrotham Park Settled Estates (or Wentworth Securities Ltd)* [1979] 1 All ER 286, [1980] AC 74, *Inco Europe Ltd v First Choice Distribution (a firm)* [2000] 2 All ER 109, [2000] 1 WLR 586 and *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 1 All ER 195, [2001] 2 AC 349 are satisfied here. It is permissible to have regard to the Secretary of State's letter and the inspector's report to which it refers, construed in their historical context, in order to resolve the ambiguity in the 2002 order and to determine what sum it was intended should be included as maximum toll for large buses. The answer is £10·00.

[82] In all the circumstances, I would hold that the court can be abundantly sure of the three matters referred to by Lord Nicholls in the *Inco Europe Ltd* case. First, the intended purpose of the 2002 order was to increase the maximum tolls across the board, including for large buses. Secondly, if the order does not provide a maximum toll for large buses, that can only have been the result of an inadvertent, or perhaps incompetent or inept, failure to do so. That is, to my mind, true even if (as is likely) the reference to 'large bus' in the definition section was omitted deliberately because the draftsman cannot have intended that the board should not be permitted to charge for large buses at all. Thirdly, it is clear from the extraneous materials, which seem to me on the authorities to be legitimate aids to construction of the 2002 order, that the substance of the provision which the Secretary of State intended to make (and would have made if he had appreciated that the wording chosen did not achieve it) is that the maximum toll for large buses was to be the class 4 toll of £10·00.

[83] In my opinion this approach is to be preferred to the view expressed by the judge that the maximum tolls for large buses should depend upon the number

of axles. In these circumstances I would dismiss the appeal against the judge's refusal to grant the confederation's application for judicial review in so far as it related to the 2002 order, but would hold that on the true construction of the order the maximum toll for all large buses is £10·00.

CONCLUSION

[84] I would dismiss the appeal and hold that the board was entitled to charge a maximum of £9·20 under the 1997 order, £9·60 under the 2000 order and £10·00 under the 2002 order.

JONATHAN PARKER LJ.

[85] I agree.

AULD LJ.

[86] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Re Crown Forestry Rental Trust
Latimer and others v Commissioner of Inland Revenue
[2004] UKPC 13

PRIVY COUNCIL

LORD NICHOLLS OF BIRKENHEAD, LORD MILLETT, LORD WALKER OF GESTINGTHORPE, SIR MARTIN NOURSE AND SIR KENNETH KEITH

24, 25 NOVEMBER 2003, 25 FEBRUARY 2004

New Zealand – Income tax – Exemption – Income derived by trustees in trust for charitable purposes – Crown settling tax-exempt income on trust for use for charitable purposes with ultimate trust of undistributed income in favour of the Crown – Whether income liable to tax – Income Tax Act 1976 (New Zealand), s 61(25).

The Waitangi tribunal entertained claims by Maori that they had been prejudicially treated by conduct on the part of the Crown inconsistent with the principles of the Treaty of Waitangi. The New Zealand government proposed to sell the Crown's commercial forest assets, including growing trees and the right to fell them, while retaining ownership of the land. Concern was expressed that this would prejudice Maori claims to these assets. Eventually a trust was established by the Crown to receive the rental proceeds from licensees to whom the Crown had sold the existing tree crop and other forestry assets together with a licence to use the forest land and to make the interest earned from the investment of the forest rentals available at the discretion of the trustees to assist Maori in claims before the Waitangi tribunal which involved licensed forest land. Successful claimants to whom ownership of licensed land was to be returned would be entitled to receive from the trust fund the amount of rental payments received in respect of that land and future rental payments directly from the licensee. Any ultimate surplus of income was payable to the Crown on the final winding up of the trust. Under s 61(25)[a] of the Income Tax Act 1976 (New Zealand) (replaced in almost identical terms by s CB 4(1)(c) of the Income Tax Act 1994 (New Zealand)) income derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes was exempt from tax. The Commissioner considered that the income of the trust was liable to tax. The trustees applied to the High Court which ruled that the trust was not 'established for charitable purposes' because it had two purposes, the charitable purpose of assisting Maori claimants and the purpose of holding trust investments until the eventual determination of claims affecting the licensed land, and was therefore not exempt. On appeal the New Zealand Court of Appeal confirmed the judge's ruling that the purpose of assisting Maori claimants was charitable, but held that the existence of the ultimate trust in favour of the Crown deprived the trust of charitable status. The trustees appealed. The Commissioner contended that to attract exemption from tax, the trust had to be established for charitable purposes.

a Section 61, so far as material, is set out at [21], below

Held – It was not necessary that a trust be established for charitable purposes in order to qualify for exemption from tax under s 61(25) of the 1976 Act; it was sufficient that the trust funds were applicable for exclusively charitable purposes. In the instant case the trustees were not obliged to apply the whole of the trust income as it arose to be used for the charitable purpose of assisting Maori claims. The balance of any income not wholly expended when the trust came to an end was to be returned to the Crown. That residual trust was neither a means of furthering the trust's charitable purpose nor an incidental consequence of carrying out that purpose. Such an ultimate trust in favour of a private individual would render the claim to tax beyond challenge. However, it was a critical feature that the ultimate trust was in favour of the Crown, which had been the settlor. The trust deed allowed the Crown to make its funds available for a specified purpose, and in so far as not required for that purpose, to remain throughout its own property. The Crown had settled tax-exempt income (the forest rentals). The income of the trust consisted of the income derived by the trustees by investing the forest rentals. In so far as such income was needed for the purpose of assisting Maoris to prosecute their claims, it was to be devoted to charitable purposes and so exempt from tax; in so far as it was not applied for such purposes it remained beneficially the tax-exempt income of the Crown and never came within the scope of the tax at all. The appeal would, accordingly, be allowed (see [30], [33], [36], [37], [40]–[42], [44], below).

Barclays Bank Ltd v Quistclose Investments Ltd [1968] 3 All ER 651 and *Twinsectra Ltd v Yardley* [2002] 2 All ER 377 considered.

General Communications Ltd v Development Finance Corp of New Zealand Ltd [1990] 3 NZLR 406 approved.

Notes

For charitable purposes, see 5(2) *Halsbury's Laws* (4th edn) (2001 reissue) paras 1–15.

For the Crown exemption from income tax, see 23(2) *Halsbury's Laws* (4th edn reissue) para 1165.

Cases referred to in judgment

Ashton v Lord Langdale (1851) 4 De G & Sm 402.

Barclays Bank Ltd v Quistclose Investments Ltd [1968] 3 All ER 651, [1970] AC 567, [1968] 3 WLR 1097, HL.

Chichester Diocesan Fund and Board of Finance Inc v Simpson [1944] 2 All ER 60, [1944] AC 341, HL.

General Communications Ltd v Development Finance Corp of New Zealand Ltd [1990] 3 NZLR 406, NZ HC and CA.

New Zealand Maori Council v A-G [1987] 1 NZLR 641, NZ HC and NZ CA.

Newland v A-G (1809) 3 Mer 684.

Nightingale v Goulbourn (1848) 2 Ph 594, [1843–60] All ER Rep 420, LC.

Peel's (Sir Robert) School at Tamworth, Re, ex p Charity Comrs (1868) LR 3 Ch App 543.

Public Trustee v Comr of Inland Revenue [1971] NZLR 77, NZ CA.

Royal College of Surgeons of England v National Provincial Bank Ltd [1952] 1 All ER 984, [1952] AC 631, HL.

Smith, Re, Public Trustee v Smith [1932] 1 Ch 153, [1931] All ER Rep 617, CA.

Thellusson v Woodford (1799) 4 Ves 227, 31 ER 117, LC; *affd* (1805) 11 Ves 112, 32 ER 1030, [1803–13] All ER Rep 30, HL.
Twinsectra Ltd v Yardley [2002] UKHL 12, [2002] 2 All ER 377, [2002] 2 AC 164, [2002] 2 WLR 802.

Cases also cited in argument

Clarke, Re, Bracey v Royal National Lifeboat Institution [1923] 2 Ch 407, [1923] All ER Rep 607.
Comr of Inland Revenue v Medical Council of New Zealand [1997] 2 NZLR 297, NZ CA.
Coxen (decd), Re, MacCallum v Coxen [1948] 2 All ER 492, [1948] Ch 747.
Gibson v South American Stores (Gath & Chaves) Ltd [1949] 2 All ER 985, [1950] Ch 177, CA.
Institution of Professional Engineers New Zealand Inc v Comr of Inland Revenue [1992] 1 NZLR 570, NZ HC.
IRC v City of Glasgow Police Athletic Association [1953] 1 All ER 747, [1953] AC 380, [1953] 2 WLR 625, HL.
McPhail v Doulton [1970] 2 All ER 228, [1971] AC 424, [1970] 2 WLR 1110, HL.
Ulverston and District New Hospital Building Fund, Re, Birkett v Barrow and Furness Hospital Management Committee [1956] 3 All ER 164, [1956] Ch 622, [1956] 3 WLR 559, CA.

Appeal

Sir Graham Stanley Latimer and the other trustees of the Crown Forest Rental Trust appealed with leave of the New Zealand Court of Appeal (Richardson P, Gault and Blanchard JJ) from its decision on 4 June 2002 ([2002] 3 NZLR 195) confirming the decision of O'Regan J on 7 August 2001 ([2002] 1 NZLR 535) in favour of the Commissioner of Inland Revenue that the trust's investment income arising in the tax years 1994–1996 was not exempt from income tax. The facts are set out in the judgment of the Board.

Lindsay McKay QC and *David Randal* (both of the New Zealand bar) (instructed by *Alan Taylor & Co*, agents for *Buddle Findlay*, New Zealand) for the trustees.
Brendan Brown QC and *Rebecca Ellis* (both of the New Zealand Bar) (instructed by *Moon Beever*, agents for the *Crown Law Office*, Wellington, New Zealand) for the Commissioner.

The Board took time for consideration.

25 February 2004. The following judgment of the Board was delivered.

LORD MILLETT.

[1] The issue in this appeal is whether or not investment income of the trustees of the Crown Forestry Rental Trust (the trust) arising in the tax years 1994–1996 is exempt from income tax. This ultimately turns on the construction of the relevant (New Zealand) statutory provision (s 61(25) of the Income Tax Act 1976, replaced in almost identical terms by s CB 4(1)(c) of the Income Tax Act 1994) and of the trust instrument, that is the trust deed dated 30 April 1990 (the trust deed) setting up the trust. But the circumstances in

which the trust was established are of a very unusual character, and give rise to an issue which, so far as their Lordships are aware, has not previously been considered by the courts either in New Zealand or in England. The arguments have ranged far and wide and have varied from time to time during the course of the proceedings, but the ground upon which their Lordships propose to dispose of the appeal surfaced at a very late stage and after the conclusion of oral argument before the Board. The parties were of course informed of this development and availed themselves of the opportunity they were given to make full written submissions on the question.

THE BACKGROUND FACTS

[2] Waitangi is on the shore of the Bay of Islands in the northernmost part of the North Island. The Treaty of Waitangi (the treaty) was entered into on 6 February 1840, in the sense that it was then first signed by Captain Hobson, the newly-appointed Lieutenant-Governor, and by many of the Maori chiefs in the northern part of the North Island. Other signatures were later obtained from chiefs from other parts of the country, making in all 512 signatures of men and women chiefs. The treaty was a very important event in New Zealand's history. It was hurriedly translated into the Maori language shortly before it was debated by the chiefs, and there have been difficulties in reconciling the two texts. Even apart from translation difficulties, the English text of the second article could be recognised as likely to lead to disputes. A re-translation of the Maori text of the whole treaty is conveniently contained in the judgment of Cooke P in *New Zealand Maori Council v A-G* [1987] 1 NZLR 641 at 662–663.

[3] The acquisition of land and other actions which followed the introduction of British rule led to armed conflict especially in the 1860s, to generations of grievances, agitation, negotiations, inquiries and some settlements, and ultimately to the Treaty of Waitangi Act 1975 which established the Waitangi Tribunal (the tribunal). The tribunal entertains claims by Maori that they have been prejudicially affected by conduct on the part of the Crown which was inconsistent with the principles of the treaty and may make recommendations for remedial action. The tribunal has played, and continues to play, a very important part in public life in New Zealand.

[4] During the 1980s the New Zealand government adopted a policy of corporatisation, that is of divesting central government of assets and undertakings which were not regarded as core activities. Some of these assets were to be transferred to new corporate entities (called state enterprises) including the Land Corporation and the Forestry Corporation. The assets involved included about 14 million hectares (just over half of the land surface of New Zealand) previously administered by the Department of Lands and Survey and the New Zealand Forest Service. For these and similar purposes a Bill entitled the State-Owned Enterprises Bill was introduced into the House of Representatives on 30 September 1986.

[5] The tribunal then made an interim report on a series of claims by five Maori tribes. The report expressed concern that the proposed legislation would make it impossible for the Crown to return land to Maori in accordance with any recommendation made by the tribunal. That led to legal proceedings by the New Zealand Maori Council. The upshot was the Waitangi (State Enterprises) Bill introduced into the House of Representatives on 8 December 1987.

[6] The scope of the state enterprises legislation, and the extent of the tribunal's statutory remit, were by no means limited to Crown forests. They went much wider. But it was the proposals affecting Crown forests which particularly concerned the Maori Council and led to further litigation. Much of these forests consisted, not of long-lived native hardwoods, but of exotic softwoods which reached maturity in about 40 years, and yielded a good commercial return. The government proposed to sell the Crown's commercial forest assets, including growing trees and the right to fell and remove them, while retaining ownership of the land. Concern was expressed that this would prejudice Maori claims to these assets. After interlocutory proceedings had reached the Court of Appeal negotiations took place to reach a settlement.

[7] The outcome of the negotiations was a written agreement dated 20 July 1989 (the compromise agreement) between the Crown on the one side and the Maori Council and the Federation of Maori Authorities Incorporated on the other. This provided for, and for present purposes was replaced by, the trust deed; it was not contended that the trust deed failed to give effect to the compromise agreement; and it is common ground that in the event of any inconsistency the trust deed must prevail. The only relevance of the compromise agreement is as evidence that the trust deed originated as part of a negotiated settlement of a potentially serious constitutional dispute.

[8] Under the compromise agreement the Crown was to sell the existing tree crop and other forestry assets with a licence for the purchaser to use the land for a period sufficiently long to make his investment commercially feasible. The consideration was to include an annual rental for the use of the land. Where land was subject to treaty claims, the parties agreed—

> 'that they will jointly use their best endeavours to enable the Waitangi Tribunal to identify and process all claims relating to forestry lands and to make recommendations within the shortest reasonable period.'

When the tribunal made a recommendation determining treaty claims, the ownership of the Crown or the claimants as the case might be would be confirmed. The Crown would make any necessary transfers to successful claimants and would pay compensation for the fact that the land was being returned subject to encumbrances. From the time of the tribunal's recommendation for the return of his land a successful claimant was to be entitled to rental payments under existing licences; to resume possession as and when the tree crop was felled; and to payment of an amount equal to all past rental payments for the land.

[9] The compromise agreement provided:

> 'The provisions of this agreement are to be reflected and embodied where appropriate in draft legislation and in any event in a trust deed and consent order, the terms of each of which are to be agreed by the parties, in accordance with this agreement.'

Legislation for this purpose was duly enacted as the Crown Forest Assets Act 1989, s 34 of which also provided for the responsible ministers, on behalf of the Crown, to 'establish by deed a forestry rental trust'.

THE TRUST DEED

[10] The trust deed was made by the Crown and executed by Her Majesty The Queen in right of New Zealand acting by her ministers. The trust deed recited the compromise agreement and s 34 of the 1989 Act. It contained (in cl 1) a number of definitions including 'Claimants' (treaty claimants recognised by the trustees); 'Beneficiaries' (the Crown, the claimants and any other person who registered a claim to Crown forest land); 'Confirmed Beneficiaries' ('those Beneficiaries who attain a vested interest in the Trust by virtue of Clause 11'); and 'Rental Proceeds' (basically rental or licence fees payable under the licences of forest land to be granted by the Crown). Clause 2.1 and 2.2 must be set out in full:

> '2.1 A trust is hereby established under this Deed, to be a forestry rental trust referred to in section 34 of the Crown Forest Assets Act 1989, to be known as the "Crown Forestry Rental Trust". The Trust is established to: (a) receive the Rental Proceeds from Licences; and (b) make the interest, earned from investment of those Rental Proceeds, available to assist Maori in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, Licensed Land.
>
> 2.2 Upon the execution of each Licence the Crown shall then hold the interest of the Crown in all Rental Proceeds, payable to the Crown under that Licence, on behalf of the Trustees. The Crown shall pay the Rental Proceeds to the Trustees, after deduction of Goods and Services Tax or any other tax payable on the Rental Proceeds by the Crown as licensor, within 10 working days after the Crown receives them.'

[11] Clause 4 provided for an 80-year perpetuity period and for the trust to terminate, at the latest, at the end of that period. It is common ground that at its inception all parties expected or at least hoped that the duration of the trust would be very much shorter. Other clauses related to the number, the appointment, the administrative powers and duties and the liability of the trustees. There were normally to be six trustees, three appointed by the Minister of Finance and three by the Maori authorities.

[12] Clause 9 set out the trusts on which the forestry rentals were to be held:

> 'APPLICATION OF RECEIPTS
>
> 9.1 Rental Proceeds received by the Trustees shall be capital of the Trust.
>
> 9.2 Interest earned from investment of the Trust Fund shall be accumulated by the Trustees to be applied at the Trustees' sole discretion:
>
> 9.2.1 To pay the expenses of the Trustees and of the Trust, including the remuneration of the Trustees and all taxes and other levies on income or assets of the Trust; then
>
> 9.2.2 Subject to Clause 10, to assist any Claimant in the preparation, presentation and negotiation of claims before the Waitangi Tribunal which involve, or could involve, Licensed Land.
>
> 9.3 The Trustees need not distribute in any one year the whole or any part of the income for that year but may at their discretion retain the whole or any part of the income.

9.4 Any surplus income may be distributed in a later year, or accumulated from year to year. Any surplus income remaining upon winding up the Trust shall be paid to the Crown, free from the Trust.

9.5 The Trustees shall not distribute any part of the capital, except in accordance with Clause 11 or on the determination of the Trust in accordance with Clause 4. For the purposes of this Deed Section 41 of the Trustee Act 1956 [statutory power of advancement] shall not apply.'

[13] Clause 10 set out the principles and procedures by which the trustees should recognise claimants. Clause 11 (headed 'ALLOCATION AND DISTRIBUTION OF TRUST FUNDS') provided as follows in cl 11.1:

'If the Waitangi Tribunal recommends under Section 8 HB (1)(a) of the Treaty of Waitangi Act 1975 that any particular Licensed Land be returned to Maori ownership, then: (a) the person or persons to whom ownership of that Licensed Land is to be returned shall from the date of that recommendation be Confirmed Beneficiaries of the Trust; (b) those Confirmed Beneficiaries shall be entitled to receive from the capital of the Trust the amount of the Rental Proceeds received by the Trustees in respect of that Licensed Land since the commencement of the Licence; (c) those Confirmed Beneficiaries shall be entitled to receive the Rental Proceeds in respect of that Licensed Land directly from the Licensee for the remaining term of the Licence.'

Clause 11.2 made corresponding provision for claims determined in favour of the Crown.

[14] Clause 12 (headed 'PROCEDURE ON WINDING UP') was as follows:

'12.1 The Trustees may retain out of any Assets of the Trust in its hands full provision for, and may pay out, all expenses and liabilities incurred and anticipated by the Trustees in connection with the Trust or arising out of the liquidation of the Trust, including the fees of any agents, solicitors, bankers, accountants or other persons whom the Trustees employ in connection with the winding up of the Trust. The Trustees shall be entitled, out of the Assets so retained, to be indemnified and saved harmless against any of those expenses and liabilities.

12.2 The Trustees shall, upon completion of any realisation of the Trust and after any retentions pursuant to Clause 12.1, distribute the net proceeds, together with all other cash forming part of the Trust Fund: (a) in respect of any capital to be distributed pursuant to Clauses 11.1 or 11.2, to the Confirmed Beneficiaries or legal representatives of the Confirmed Beneficiaries; and (b) in respect of any other money, to the Crown.'

[15] Clause 13 provided for the Crown to lend to the trustees by instalments a total of $NZ5m, to be used as if it were income of the trust fund, and to be repaid, interest-free, out of future income of the trust fund. These loans, which were intended to provide initial funding, were duly made and have all been duly repaid.

[16] The general structure of the trust, therefore, is that the Crown receives rental payments from its licensees (which are income in its hands) and promptly passes them on to the trustees in whose hands they become the capital of the trust. The trustees invest the rental payments and hold the investments until the eventual determination of claims affecting the land in respect of which the rental payments were made (or, at any rate in theory, the expiration of the 80-year period). This has been referred to in argument as the 'stakeholder' function. The dispute is not concerned with these trusts, which affect the capital of the trust, but with the trusts of income. Trust income, representing the income of the invested rental payments, is to be made available at the trustees' discretion to assist claimants in the preparation and pursuit of their claims before the tribunal. Any ultimate surplus of income is payable to the Crown, but only on the final winding up of the trust.

THE FUNCTIONING OF THE TRUST: EXPECTATION AND REALITY

[17] Much of the argument in the lower courts, and some argument before the Board, was devoted to the parties' expectations, at the time when the trust was set up, as to the manner in which it would function, and how far those expectations have been fulfilled. It is understandable that a great deal of attention was paid to those matters below, since in both lower courts there was a dispute as to whether the primary purpose of the trust (assisting Maori claims before the tribunal) was a charitable purpose under the law of New Zealand. But that is no longer an issue before the Board. It is therefore unnecessary to spend time on these questions.

[18] Their Lordships would however make three general observations about the evidence and the judge's findings. First, it is apparent that at the inception of the trust there was, inevitably, great uncertainty on almost every aspect of how the trustees would set about fulfilling the trust's primary purpose. That is not a point of criticism; the compromise agreement and the trust deed represented a bold and imaginative attempt at resolving a very difficult problem. The fact is, however that many matters were unpredictable. These included the number and complexity of the claims to which the trust might give financial assistance; the degree to which that assistance would be provided by the trust's own personnel (either employed or on contract) rather than by simply distributing money; the degree to which assistance on different individual and tribal claims could be integrated and so made more efficient; the speed with which claims would be settled or determined by the tribunal; and the amount of income to be generated by the investment of rental proceeds. The income's debateable liability to income tax has since emerged as a further uncertainty. Their Lordships are satisfied that it would have been impossible for anyone to determine, at the trust's inception, whether or not the net income (after paying the trust's expenses and tax, so far as due) would exceed what would be needed to carry out its primary purpose. The judge made no finding on that point, and in their Lordships' view he could not possibly have done so.

[19] Secondly, the present financial position of the trust was not predictable and is not in any case strictly relevant to the issues which have to be decided. But since both counsel referred to it their Lordships briefly record that the gross annual investment income (that is, the income generated by the fund representing undistributed rental receipts) has, for the period covered by the

evidence, been of the order of $NZ18m. The trustees had at 31 March 2000, the most recent accounting date covered by the evidence, retained income of over $NZ17m, but notes to the financial statements referred to over $NZ23m of unpaid and disputed tax not recognised in the financial statements. The sums at stake on this appeal are therefore substantial.

[20] Thirdly, counsel for the Commissioner has expressed some temperate criticism of some of the projects on which the trustees have spent trust money, and questioned whether such expenditure was within the trust's permitted purposes. Their Lordships express no view on the matter, which is not relevant to anything they have to decide. In New Zealand (unlike the United Kingdom) the relevant tax exemption does not depend on income actually being applied for the intended charitable purposes. Any alleged deviation from the terms of the trust would be a matter for the Attorney General, who has taken no part in the proceedings.

THE STATUTORY EXEMPTION FOR CHARITY

[21] Section 61(25) of the 1976 Act was part of a long list of categories of income which are exempt from income tax. Its terms were as follows:

> 'Income derived by trustees in trust for charitable purposes or derived by any society or institution established exclusively for charitable purposes and not carried on for the private pecuniary profit of any individual, except where that income so derived is income to which paragraph (27) of this section applies ...'

Paragraph (27) contained a more specific and more limited exemption for certain business income which it is not necessary to consider. Section CB (1)(c) of the 1994 Act is not materially different.

[22] By s 2 of the 1976 Act 'charitable purpose' is defined as including—

> 'every charitable purpose, whether it relates to the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community.'

The same definition appears in s OB 1 of the 1994 Act.

THE PROCEEDINGS BELOW

[23] The judge ruled in favour of the Commissioner on the ground that the trust was not 'established for charitable purposes' because it had two purposes, assisting Maori claimants and acting as stakeholder, the latter being a separate stand-alone purpose which was not charitable ([2002] 1 NZLR 535). That concluded the matter in favour of the Crown but the judge went on to consider the remaining issue on which he had heard argument and held that the purpose of assisting Maori claimants was charitable.

[24] The judge briefly addressed the significance of the Crown's right to any ultimate surplus, and observed that it was not relevant to the issue before him, being essentially a declaration of the trust which would have arisen in any case even if it were not included expressly in the trust deed. Their Lordships think that in saying that the trust was not relevant to the issue before him the judge may have overlooked or underestimated the significance of the trustees' power to refrain from distributing the whole of the income.

[25] The trustees appealed to the Court of Appeal and the Commissioner cross-appealed on the issue whether the provision of assistance to Maori claimants was a charitable purpose.

[26] The judgment of the court was delivered by Blanchard J ([2002] 3 NZLR 195). It shows that the court entertained an argument by the Commissioner that the existence of the ultimate trust in favour of the Crown deprived the trust of charitable status.

[27] It was this argument which was ultimately decisive in the Court of Appeal with the consequence that the judgment for the Commissioner in the High Court was confirmed. The court dismissed both the trustees' appeal and the Commissioner's cross-appeal. It confirmed the judge's ruling that the trust's primary purpose of assisting Maori claimants was charitable, but held that the ultimate trust carrying surplus income to the Crown was fatal to the trustees' case. The Court of Appeal held: (i) that what was important was the terms of the trust deed, not the parties' expectations; (ii) that in any case there was no evidence of an expectation that the return of surplus income to the Crown would be minimal nor was the possibility so minor as to be dismissed as ancillary; and (iii) that the return of surplus, if it took place, would not be given to the Crown for a charitable purpose.

THE APPEAL TO THE BOARD

[28] The trustees now appeal to the Board with the leave of the Court of Appeal. The Commissioner does not challenge the decision of the judge and the Court of Appeal that assisting Maori claimants to pursue their claims is a charitable purpose. He does, however, maintain his contention that, to attract exemption from tax, the trust must be *established* for charitable purposes, a contention on which he succeeded before the judge but failed in the Court of Appeal.

[29] Their Lordships would begin by stating some general principles. It is of the essence of a charitable trust that it is a trust for the promotion or advancement of social purposes rather than a trust for individual beneficiaries. Of course, individuals may benefit from the application of trust moneys, but they are not, as individuals, the beneficiaries of the trust and may not enforce its terms. If the purposes of the trust are charitable, they may be enforced by the Attorney General; if they are not charitable then, with certain anomalous exceptions, they are not enforceable and the trust is not valid. Whether the purposes of the trust are charitable does not depend on the subjective intentions or motives of the settlor, but on the legal effect of the language he has used. The question is not: what was the settlor's purpose in establishing the trust? but: what are the purposes for which trust money may be applied?

[30] A charity may take the form of a corporation, an unincorporated society or a trust. Section 61(25) draws a distinction, to which the Court of Appeal rightly attached significance, between a society or other institution on the one hand and a trust on the other. Societies and institutions may be established for purposes which are wholly or partly charitable, but they normally hold their property beneficially and not in trust. Their Lordships consider that this is a sufficient explanation of the distinction drawn in s 61(25) between income derived by trustees 'in trust for charitable purposes' and the income derived by any society or institution 'established exclusively for charitable purposes'. Their Lordships agree with the Court of Appeal that, in

order to qualify for exemption from tax, it is not necessary that a trust, as distinct from a society or institution, be established for charitable purposes; it is sufficient that the trust funds are applicable for charitable purposes. That requires them to be applicable for exclusively charitable purposes, for to qualify as a charitable trust its purposes must be exclusively charitable.

[31] This does not preclude a charitable trust from co-existing with a private trust either (so to speak) vertically or horizontally. For instance a testator may leave his estate to be held (by the same trustees) as to part on charitable trusts and as to part on private trusts (*Public Trustee v Comr of Inland Revenue* [1971] NZLR 77 is a striking example, since the annuities and the income used for scholarships were derived from a single unappropriated fund). Alternatively a trust instrument may provide for trustees to pay or apply income for charitable purposes for 21 years, and then to hold it on non-charitable trusts for individual beneficiaries. *Re Sir Robert Peel's School at Tamworth, ex p Charity Comrs* (1868) LR 3 Ch App 543 is a good example of the latter case. It concerned a trust under which income was, until exercise of a power of revocation, if valid, subject to a mandatory trust for expenditure on the maintenance of a school. The Court of Appeal in Chancery held that, unless and until the power of revocation if any was duly exercised, the trust was a valid charitable trust. Any revocation would not be retrospective, and pending revocation the income was to be devoted to exclusively charitable purposes. The judge was, therefore, wrong to conclude that the fact that the capital of the trust is held in trust for a non-charitable purpose (the 'stakeholder function') deprived the trust of charitable status quoad the income of the trust.

[32] A trust may, however, authorise the trustees to apply the trust income for a number of different purposes. In such a case the trust is not a valid charitable trust unless every purpose is wholly charitable. Where the trustees are authorised to apply trust money for a range of charitable and non-charitable purposes it cannot be said with certainty of any particular sum that it will be applied to charitable purposes: it may be applied to non-charitable purposes. Thus a trust 'for charitable or benevolent purposes' is not charitable: see *Chichester Diocesan Fund and Board of Finance Inc v Simpson* [1944] 2 All ER 60, [1944] AC 341.

[33] Accordingly, and following the decision in the *Peel* case, their Lordships are satisfied that, had the trust deed required the whole of the net income (after expenses) to be used for assisting Maori claims, the trust would have qualified for exemption under s 61(25). But the trustees are not obliged to apply the whole of the trust income as it arises. They may carry it forward and apply it in future years; and in so far as it is not wholly expended when the trust comes to an end any remaining balance is to be returned to the Crown. It follows that it cannot be said of any sum of income in the hands of the trustees that it will be applied for charitable purposes; it may be retained and ultimately become payable to the Crown. The ultimate trust in favour of the Crown is a substantial trust in its own right, and unless the Crown is a charity or holds on charitable trusts or the trust in its favour can be dismissed as merely ancillary or incidental to the primary trust to assist the Maori claimants its existence makes it impossible to contend that the trust income is applicable to exclusively charitable purposes.

[34] Trustees of a charitable trust may be authorised to charge their own fees and expenses to the trust without causing the loss of the trust's charitable

status. It cannot be said to be a purpose of the trust to enable the trustees to charge fees and expenses; such expenditure may be justified only if it helps to further the trust's charitable purpose, and may accordingly be classified as ancillary to that purpose.

[35] Again, some trusts for charitable purpose cannot help but confer incidental benefits on individuals; they do not thereby lose their charitable status: *Royal College of Surgeons of England v National Provincial Bank Ltd* [1952] 1 All ER 984, [1952] AC 631 provides a good example of this. The college was established to promote and encourage the study and practice of the art and science of surgery. The professional protection of members of the college (not a charitable purpose) was held to be an incidental though an important and perhaps necessary consequence of the work of the college in carrying out its main object.

[36] The distinction is between ends, means and consequences. The ends must be exclusively charitable. But if the non-charitable benefits are merely the means or the incidental consequences of carrying out the charitable purposes and are not ends in themselves, charitable status is not lost. The residual trust in favour of the Crown in the present case, however, is neither a means of furthering the trust's charitable purpose nor an incidental consequence of carrying out that purpose. The trust may never take effect, but if it does it will do so only after the primary trust has come to an end. It cannot be dismissed as merely ancillary or incidental to the trust's charitable purpose. If the ultimate trust were in favour of a private individual, therefore, the Commissioner's claim to tax would be beyond challenge.

[37] Accordingly, the critical feature of the present case is that the ultimate trust is in favour of the Crown. Their Lordships cannot accept the trustees' contention that the Crown is itself a charity, or that it holds all its funds to be applied exclusively for charitable purposes. If either were true there would be no need to exempt the Crown from income tax. But like other public authorities (which have their own exemption) its money is applicable and is applied for numerous non-charitable purposes. It is true that these are public purposes rather than private purposes; but this means only that the government of the day considers it expedient to make public funds available for such purposes. It cannot be doubted that the Crown was entitled to establish a trust to assist the Maori to bring their claims, and would have been entitled to do so whether or not this was a charitable purpose. Governments can and do make public money available for a variety of non-charitable purposes. All charitable purposes (with well-known exceptions) are public purposes; but not all public purposes are charitable purposes.

[38] It is sometimes possible to impress a gift in favour of a recipient which is not itself a charity with an implied trust which limits the application of the property comprised in the gift to charitable purposes. In *Re Smith, Public Trustee v Smith* [1932] 1 Ch 153, [1931] All ER Rep 617, a gift unto my country England was construed as a gift for the benefit of the inhabitants of England and, by analogy with the cases on gifts to a parish, town or city, as impressed with a trust that it be applied for charitable purposes only. In *Thellusson v Woodford* (1799) 4 Ves 227, 31 ER 117 a gift over to the Crown was held to be impressed with a charitable trust for the relief of the national debt and so charitable (see also *Newland v A-G* (1809) 3 Mer 684; *Ashton v Lord Langdale* (1851) 4 De G & Sm 402; and *Nightingale v Goulbourn* (1848) 2

Ph 594, [1843–60] All ER Rep 420, where a testamentary gift to the Chancellor of the Exchequer was expressly impressed with a trust for Great Britain). a

[39] Their Lordships do not question the proposition that an ostensibly outright gift to the Crown may be subject to an implied trust in favour of charity. The difficulty in the present case is that, as the Court of Appeal observed, it does not concern a gift to the Crown. The Crown is merely resuming its own property; and the idea that it should be taken to have limited b the purposes for which it may apply its own money when it is no longer needed for the purpose for which it was made available is unrealistic. Before the trust deed was executed the income of the forest rentals (like the forest rentals themselves) belonged beneficially to the Crown and was at its free disposal. It did not commit itself by the trust deed to the application of the whole of the income for charitable purposes; and it remained at its free disposal subject only c to the prior trusts in favour of charity. As the judge rightly observed, the ultimate trust in favour of the Crown merely provided expressly for what would occur under a resulting trust if it were not included.

[40] In their Lordships' opinion there is a real distinction between a gift by a third party to the Crown, which can sensibly be made subject to an implied d limitation in favour of charity; and a gift by the Crown for charitable purposes which do not exhaust the fund, with the result that, so far as not applied in favour of charity, the fund remains at the free disposal of the Crown. In the former case the Crown takes as donee; in the latter it resumes possession of its own. In the present case the Crown is the designated beneficiary under the e ultimate trust, not because it is the object of the settlor's bounty, but because it is the settlor.

[41] But in their Lordships' opinion this very distinction supports the trustees' case. The trust deed is an elaborate mechanism which serves much the same purpose as a *Quistclose* trust: see *Barclays Bank Ltd v Quistclose Investments Ltd* [1968] 3 All ER 651, [1970] AC 567 and *Twinsectra Ltd v Yardley* f [2002] UKHL 12 at [13], [81], [99]–[100], [2002] 2 All ER 377 at [13], [81], [99]–[100], [2002] 2 AC 164. It allows the Crown to make its funds available for a specified purpose and, in so far as not required for that purpose, to remain throughout its own property: see *General Communications Ltd v Development Finance Corp of New Zealand Ltd* [1990] 3 NZLR 406. The only difference is that g in the present case a resulting trust in favour of the settlor is express; whereas it is more usually implied.

[42] What the Crown settled in the present case, ie the forest rentals, was tax-exempt income. This constitutes the capital of the trust. In so far as the forest rentals are not otherwise applicable, they remain beneficially the property of the Crown. The income of the trust consists of the income derived h by the trustees by investing the forest rentals. In so far as such income is needed for the purpose of assisting Maoris to prosecute their claims, it is to be devoted to charitable purposes and so exempt from tax; and in so far as it is not applied for such purposes it remains beneficially the tax-exempt income of the Crown. In their Lordships' opinion it never comes within the scope of the tax at all. j

[43] The Commissioner observes that the issue is not the tax treatment of sums in the hands of the Crown but the tax treatment of the interest earned by and in the hands of the trust. This is true; but the distinction is not a relevant one. Liability to income tax depends on the status for tax purposes of the person beneficially entitled to the income in question; and the Crown is exempt

from income tax in respect of all its income whether such income is simple or compound interest, that is to say whether it is income which it derives directly from capital or income which it derives from its invested income. To succeed in his claim to tax, the Commissioner must show that the income in question is not the income of the Crown, which is exempt, but the income of some other party not being a charity. He cannot do this.

[44] For these reasons their Lordships will humbly advise Her Majesty that the trustees' appeal should be allowed and the Commissioners' cross-appeal dismissed with costs before the Board and in the lower courts.

Appeal allowed.

Kate O'Hanlon Barrister.

R (on the application of G) v Westminster City Council

[2004] EWCA Civ 45

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, ARDEN AND DYSON LJJ

25 NOVEMBER 2003, 30 JANUARY 2004

Education – Local education authority – Statutory duty to make arrangements for the provision of suitable education for children who by reason of illness, exclusion from school or otherwise may not receive suitable education – Parent unreasonably refusing to allow child to return to school after period of exclusion – Whether child not receiving suitable education by reason 'otherwise' than illness or exclusion – Education Act 1996, s 19(1).

The claimant, who was fifteen years old, was involved in a fight with another pupil at his school. He was excluded from the school for seven days as the school concluded that he had been predominantly to blame for the incident. The claimant's parent did not accept that he was to blame. The claimant did not return to the school at the end of the exclusion period. At a meeting with the head teacher, the deputy head, and the local education authority's education welfare officer, the claimant's father declared that he was removing the claimant from the school. He wrote to the authority alleging that the claimant had been constantly bullied at the school, that the school had failed to take appropriate steps, and that he had no option but to withdraw him from the school. He called upon the authority to provide the claimant with suitable education by way of home tuition on the basis that the claimant was out of school for an 'or otherwise' reason within s 19(1)[a] of the Education Act 1996, which provided that each local education authority was to make arrangements for the provision of suitable education for those children of compulsory school age who 'by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education' unless such arrangements were made for them. The claimant remained on the register of his school and the authority considered that the availability of a place in that school satisfied its obligation under s 19 of the 1996 Act to make arrangements for the provision of suitable education for him. The claimant applied for permission to apply for judicial review. His application was refused at first instance, following which a single Lord Justice granted permission and directed that the Court of Appeal hear the substantive application.

Held – Section 19 of the 1996 Act required an authority to make provision for suitable alternative education, otherwise than in the specified cases of illness or exclusion, in any situation in which it was not reasonably possible for a child to take advantage of any existing suitable schooling. Where a child was not receiving suitable education and there was no suitable education available that was reasonably practicable for the child, the authority would be in breach of s 19. In assessing what was reasonably practicable the unreasonable objections of parents to their child attending a particular school had to be disregarded. In the

a Section 19, so far as material, is set out at [1], below

instant case the claimant's father had not acted reasonably in refusing to allow the claimant to return to the school when there was no alternative school available. The application would therefore be dismissed (see [21], [42], [46], [47], [49], [50], below).

Per curiam. If a school is unable to prevent a child being subjected to persistent bullying it may be reasonable for the parents to withdraw that child from the school. In such circumstances it will not be reasonably practicable for the child to continue to attend that school (see [49], below).

Notes

For the provision of education in pupil referral units, see 15(1) *Halsbury's Laws* (4th edn reissue) para 307.

For the Education Act 1996, s 19, see 15 *Halsbury's Statutes* (4th edn) (2001 reissue) 473.

Cases referred to in judgments

McDonnell v Congregation of Christian Brothers Trustees (formerly Irish Christian Brothers) [2003] UKHL 63, [2004] 1 All ER 641, [2004] 1 AC 1101, [2003] 3 WLR 1627, HL.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

Cases referred to in skeleton arguments

Botta v Italy (1998) 4 BHRC 81, ECt HR.

Monck v Hilton (1877) 2 Ex D 268, DC.

R v East Sussex CC, ex p Tandy [1997] 3 FCR 542, [1998] AC 714, [1997] 3 WLR 884; *rvsd* [1998] 2 All ER 769, [1998] AC 714, [1998] 2 WLR 884, HL.

R v Secretary of State for the Home Dept, ex p Salem [1999] 2 All ER 42, [1999] AC 450, [1999] 2 WLR 483, HL.

R (Howard League for Penal Reform) v Secretary of State for the Home Dept [2002] EWHC 2497 (Admin), [2003] 1 FLR 484.

R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.

X v Netherlands (1985) 8 EHRR 235, [1985] ECHR 8978/80, ECt HR.

Application for judicial review

The claimant, G, with permission of Carnwath LJ given on 13 October 2003, following the refusal of permission by George Bartlett QC, sitting as a deputy judge of the High Court, on 28 August 2003, applied for judicial review of the decision of Westminster City Council, as local education authority, made on 16 July 2003, declining to make arrangements for the provision of education for G other than at St George's School, Westminster. Carnwath LJ directed that the application be heard by the Court of Appeal. The facts are set out in the judgment of the court.

Ian Wise (instructed by *Ashok Patel & Co*) for G.

Sarah-Jane Davies (instructed by *Colin Wilson*) for the council.

Cur adv vult

30 January 2004. The following judgment of the court was delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR.

INTRODUCTION

[1] The claimant, G, is a 15-year-old-boy. With the permission of Carnwath LJ, granted on 13 October 2003, he seeks judicial review of a decision of the Westminster City Council (the council) that was made on 16 July 2003. By that decision the council declined to make arrangements for the provision of education for G other than at St George's School, Westminster (St George's). G contends that this decision constituted a breach of the duty imposed on the council by s 19 of the Education Act 1996, which, so far as material, provides:

> '**19.** *Exceptional provision of education in pupil referral units or elsewhere.*—(1) Each local education authority shall make arrangements for the provision of suitable ... education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them ...
>
> (6) In this section "suitable education", in relation to a child or young person, means efficient education suitable to his age, ability and aptitude and to any special educational needs he may have.'

[2] No evidence from G himself has been placed before the court. The principal evidence of fact given on his behalf has been provided by his father, in two witness statements. The principal evidence given on behalf of the council is contained in witness statements provided by Pauline Bastick, the council's acting head of social inclusion, and Alison Toia, the deputy head teacher of St George's. There is little conflict of evidence.

[3] G started attending St George's on 10 December 2001 and was then placed on the register of the school. He remains on that register, and the council contends that the availability of a place in this school satisfies its obligation under s 19 of the 1996 Act to make arrangements for the provision of suitable education for G. On 3 October 2002 G was excluded from St George's for a period of seven days. His father has declined to send him back to the school. He contends that it is not reasonable to expect him to do so, having regard to the fact that his son had experienced repeated incidents of bullying in the school.

[4] G's case, as advanced by his counsel, Mr Ian Wise, is as follows. G is someone who, 'by reason of illness, exclusion from school or otherwise' will not receive suitable education unless arrangements for this are made at a school other than St George's. He contends G is precluded from continuing to attend St George's in consequence of illness—namely depression and stress brought on by the bullying that he has received at St George's. Alternatively, he submits that circumstances embraced by the word 'otherwise' are preventing G from receiving suitable education, so that s 19 obliges the council to make arrangements for the provision of this.

[5] On behalf of the council, Miss Sarah-Jane Davies challenges G's contention that illness has prevented his continued attendance at St George's. Nor does she accept that his father has acted reasonably in refusing to allow him to continue his schooling at St George's. She contends that a reasonable parent would send G back to that school. She further contends, however, that even if G's father acted reasonably in withdrawing him from St George's, s 19 imposes no duty on

the council to arrange for the provision of alternative education. Provided that the council offers a place at a school that satisfies the criteria in s 19(6) and that G is physically able to attend the school, it is the duty of G's father to send G to that school or, himself, to arrange suitable alternative schooling. Miss Davies submits that this proposition is established when s 19 is considered in conjunction with other relevant provisions of the 1996 Act.

[6] The issues explored before us can be summarised as follows. (i) Is G unable to attend St George's by reason of illness? (ii) Is G's father acting unreasonably in refusing to permit G to continue to attend St George's? (iii) Does s 19 require the council to arrange for the provision of suitable education other than St George's if G's father is acting unreasonably in refusing to permit G to continue to attend that school? (iv) Does s 19 require the council to arrange for the provision of suitable education other than St George's if G's father is acting reasonably in refusing to permit G to continue to attend that school?

THE FACTS

[7] Before turning to the issues set out above, we propose to summarise the material facts. We are assisted in this task by an analysis of the evidence prepared by Miss Davies, to most of which Mr Wise assented.

[8] We will deal first with G's family background. His parents are separated, and initially he lived with his mother. His relationship with her was bad and life both at home and at school was stormy and unhappy. The former culminated in his mother deciding 'to throw him out of her house'. Custody was transferred to his father with whom he went to live. The change was beneficial and he has become devoted to his father, who, unhappily, enjoys poor health.

[9] G changed schools on a number of occasions. He finally moved to St George's as the result of a managed transfer from Barnhill School in the London Borough of Hillingdon. A School Referral Form, completed by the Marlborough Education Unit (as to which see below) records both physical and verbal violence to other pupils at this school and occasional verbal violence towards teachers. There was at least one occasion on which he was excluded from this school.

[10] From the outset special steps were taken to manage G's transfer to St George's and his integration into the school. Mr Lewis, then the deputy head teacher responsible for inclusion, was established as his mentor. In January 2002 G's father approached Mr Lizandro Torres, the council's Education Welfare Officer, requesting assistance in relation to unresolved incidents of bullying at St George's.

[11] Two incidents occurred at the school on 28 February 2002, though the precise nature of these is not agreed. They led, however, to G being referred by his doctor to the Marlborough Family Service, which forms part of the Mental Health NHS Trust. There he was seen by Dr Varchevker, a consultant psychiatrist, and Ms Salman, a mental health worker. On 10 June 2002, the latter reported to G's doctor:

> '[G] had also considerable difficulties at school. He was bullied by fellow students and felt singled out by some teachers. I have not formed the impression of a paranoid reaction, what seems more plausible is that [G]'s attitude invite him becoming target of been bullied (sic) by his peers and rejected by teachers. [G] is a big boy, self-conscious and with a low self-esteem that he tries to hide by adopting an air of superiority. I find him

insightful and easy to relate to ... My impression is that there is some improvement at school in terms of how he handles himself under pressure and in the father-son relationship.'

[12] There is no record of any further incident involving G until September 2002. Then an incident took place, which resulted in a fight between G and a girl called B. G sustained a cut lip. No action was taken as both children were considered equally to blame. G complained that he was being picked on by girls in his class, so he was moved to a higher set. Despite this G was, on 18 September, assaulted by a different female pupil. The pupil was excluded for two days and sent for counselling.

[13] On 3 October 2002 there was a considerable fracas involving a fight between G and a girl called C. This was carefully investigated by the school and it was concluded that G was predominantly to blame, although G's father does not accept this. G was excluded from the school for seven days. The school made plans for reintegrating G on his return, which included the use of a learning mentor, a modified timetable and a pastoral support plan. G did not, however, return at the end of the seven-day period. With some difficulty a meeting was arranged on 15 October between the head teacher, Ms Toia, Mr Torres and G's father to discuss the position. Little discussion took place, for G's father declared firmly that he was removing his son from the school.

[14] G's father then consulted solicitors who, on 18 October, wrote to the council alleging that G had been constantly bullied at St George's and continuing:

'In light of the incidents that our client was experiencing at the school, our client's father had no option but to withdraw him from the school in or around October 2002 following his fixed term exclusion of seven days. Our client has no intention of returning to St George's School as the relationship between our client and the school has broken down. The school failed to take any positive steps in ensuring that the consistent bullying would not continue. Our client is out of school. You will be aware that the Local Education Authority has a non-delegable duty pursuant to section 19 of the Education Act 1996 (as amended) to provide suitable education for our client whilst out of school. Our client is out of school for an "or otherwise" reason and it is incumbent upon the LEA to provide him with suitable education by way of home tuition.'

The letter called for a response within seven days, failing which court proceedings would be initiated.

[15] Thereafter, such steps as were taken by the council in an attempt to assist with G's education were taken against a backdrop of adversarial legal correspondence. While attempting to assist in providing G with alternative education, the council has always maintained that, by keeping G on the roll at St George's, they were discharging their duty under s 19 to arrange for the provision of suitable education.

[16] We can deal briefly with the steps taken by the council after G had been withdrawn by his father. While Miss Davies submitted that they amounted to best endeavours by the council to arrange for the provision of suitable alternative education, she did not submit that this goal was in fact achieved. A place was offered at the school's learning support unit in conjunction with a placement at the Skills for Work Training Programme based in Camden, but this was not acceptable to G's father. After a period a place was offered for a therapeutic

course at the Marlborough Education Institute. G was unable to take this up as it was an essential requirement for the therapy that his father should attend with him and this was not compatible with the demands of treatment for G's father's own medical problems. Meanwhile, up to the summer of 2003, a limited amount of tuition was provided to G by the Westminster Home and Education Service. This was intended to be an interim measure with a view to re-integrating G into mainstream education.

[17] Efforts were made to find a place for G in an alternative school, but without success. At the time of the hearing before us it seemed likely that a place would be offered to him by Quintin Kynaston School, which would have been acceptable to G and his father. The parties have provided the court with information as to what transpired after the hearing in relation to this possibility. The position is best demonstrated by setting out the letter written to G's father by the Director of Learning at Quintin Kynaston School on 1 December.

'Thank you for attending a further meeting at Quintin Kynaston on Wednesday, 26 November 26 and for your very frank and open description of the educational predicament you and [G] find yourselves in. It was particularly good to hear [G] gain confidence during the course of the meeting and express his own view of his ideas for his educational future. I would summarise our discussion as follows. I hope you find it an accurate record:

- Even with support, [G] has a lot of ground to make up and would probably benefit from a phased re-integration.
- Given his traumatic emotional history as described by you, your comments on his behaviour and the instances of aggression in his recent school placements, [G] will require considerable emotional support in his return to education.
- GCSEs are not a realistic goal for this school year but it is important that [G] has appropriate educational goals to work towards, and progression routes for post-16 education.
- As you are aware, year 11 at Quintin Kynaston is full at present. However, we can offer him a gradual re-integration package. Having met with you, and considered [G]'s school records we are prepared to offer a package of measures as set out below.
- [G] is to attend school on Thursday 11 December at 10.30 initially to meet with my colleague Ms Sheel. A timetabled programme is being prepared for the remainder of the day, which will include [G] meeting with three members of the Inclusion Department and an Educational Welfare Officer.
- A uniform consisting of a t-shirt and sweatshirt will be provided on 11 December. He must come in wearing black trousers and black shoes.
- I understand that the LEA is arranging for an educational psychologist to assess [G]. We will liase with the LEA in respect of this assessment.
- One of the options we consider may well be appropriate is Work Related Learning, which would mean that [G] came to our school two days a week and worked in the Inclusion Unit, goes to college one day per week, and spends two days per week in a work placement. We can discuss this further on 11 December.
- [G] will remain on roll at St. George's until such time as the re-integration has been successfully completed.

I do feel it is important to have all appropriate support in place for when [G] returns to full-time education, thus the proposed re-integration package set out in this letter. I hope you accept the proposal contained in this letter and that [G]'s educational future can be resolved as quickly as possible. If there is any further assistance we can offer please do not hesitate to contact me.'

This letter represents the latest information with which we have been provided.

IS G UNABLE TO ATTEND ST GEORGE'S BY REASON OF ILLNESS?

[18] On 30 January 2003 Mrs Salman and Dr Varchevker wrote to the council in the following terms:

'[G] has experienced physical and emotional abuse (hostility and rejection) which eventually resulted in [G] living with his father. [G] has been self-conscious of his physical appearance. He has a history of being bullied at school and this has had a detrimental effect on his ability to socialize at school. We are monitoring his mental state as we are aware he was seriously depressed and had suicidal ideation two years ago. The recent incident which resulted in [G] being suspended for a week has had a strong effect on his mental state. The combination of early abuse and shaky self-esteem makes him vulnerable emotionally. He is extremely sensitive to perceived rejections, teasing and bullying and responds impulsively by hitting out. [G] is aware of these issues and wants individual therapy. This is an important step forward in terms of acknowledging his difficulties. Our impression is that he has been making serious efforts to control his anger when he feels provoked and undermined. In the last few sessions he has reported an improvement in this respect. Unfortunately it appears that in the last incident where he was teased and taunted by girls, he lost control. He has been out of school for three months. His father is trying to find a suitable school using the list of five schools recommended to him by the education department. In the meantime [G] is not receiving any formal education. [G] has lost hope that a school will be found for him. He is worried about being behind with his course work and that he would not manage to go through any of the GCSE exams. He is anticipating failing educationally. We strongly recommend that [G] receives some tuition that would help him towards being re-integrated into mainstream education. This would also improve his self-esteem and faith in the educational system.'

[19] This letter is the most recent medical evidence in relation to G's mental state. To this should be added a number of positive comments in G's summer term report from the hospital and home education service. In particular, his English report commented:

'There has been a massive improvement in maturity and attitude. I feel that [G] has the potential to achieve greatly and would like to see him push himself further to get the education he needs.'

[20] The evidence suggests to us that G will require special assistance of the type suggested in the letter from the director of learning at Quintin Kynaston if he is to be successfully re-integrated into mainstream education. That is the position whatever school he attends. As we understand the position St George's is as well placed to provide a 're-integration package' as is Quintin Kynaston. Special assistance of this kind is intended to compensate for the educational and

social detriment that G has suffered as a result of not attending school for over a year. It has never been part of G's case that he is not sufficiently fit to go to school. The evidence does not establish this to be the case. Accordingly we conclude that G is not prevented from attending St George's by reason of illness.

IS G'S FATHER ACTING UNREASONABLY IN REFUSING TO PERMIT G TO CONTINUE TO ATTEND ST GEORGE'S?

[21] This question has to be answered objectively. We are in no doubt that St George's is a school able to provide G with suitable education, as defined in s 19(6). G's past history and the evidence provided by St George's suggest that the problems that he experienced at that school were attributable, at least in part, to his own personality. It is a sad fact that some children are more susceptible to bullying than others, and G plainly has a problem in relating peaceably to his classmates. He got off to a bad start at St George's, but the school was prepared to persevere with him and to put in place special measures to help him to become satisfactorily integrated in the school. We have sympathy for the predicament in which G's father found himself. We do not think that he was unreasonable in attempting to find another school where G could make a fresh start. We do, however, consider that he acted unreasonably in withdrawing G from St George's when there was no alternative school available. Had he acted reasonably, he would have considered what the school had to propose at the meeting of 15 October, discussed G's needs with the staff and allowed the school to attempt to cater for those needs. Since then he has resolutely set his face against returning G to St George's, although no suitable alternative placement has been provided. We do not consider that in so doing he has acted reasonably.

THE DUTY UNDER SECTION 19

[22] The final two issues involve consideration of the ambit of the duty imposed on the council by s 19 of the 1996 Act and we shall consider them together. G's statement of grounds filed in support of his claim make the following contentions:

> 'Section 19 imposes a duty "shall" to children individually in a wide range of circumstances ("or otherwise"). "Or otherwise" is designed to cover unforeseen situations such as this one where normal arrangements break down for some reason or another. It is submitted that Parliament's intention and the intention of the statute is to ensure that there is [a] complete safety net for pupils who are out of school ... This net is [in] place to address the needs of all children whether they are out of school through their own fault or through no fault of their own. In this case it is submitted that the claimant is out of school out of no fault of his own.'

[23] In argument, Mr Wise argued that, whether or not the more extreme proposition in the grounds of appeal was correct, a duty under s 19 will undoubtedly arise where a father acts reasonably in withdrawing his child from a school.

[24] Miss Davies argued that s 19 had to be construed having regard to its statutory context, and summarised the relevant provisions in her skeleton. It is convenient to set out part of that summary at this point.

LEGISLATIVE FRAMEWORK

[25] Local Education Authorities (LEAs) and their general functions are dealt with in Ch III of Pt I of the 1996 Act. Under the heading 'General functions', s 13

of the Act sets out the general responsibility of LEAs for education in their area, s 13A imposes on them a duty to promote high standards in primary and secondary education and s 14 imposes on them a duty to secure that sufficient schools for providing primary and secondary education are available for their area.

[26] The next heading is 'Establishment etc. of schools' and, by virtue of s 16 of the 1996 Act, an LEA has power to establish, maintain and assist primary and secondary schools and by virtue of s 17 it has power to establish, maintain and assist nursery schools. We have already set out the provisions of s 19.

[27] By virtue of s 7 of the 1996 Act, responsibility for causing a child of compulsory school age to receive efficient full-time education either by regular attendance at school or otherwise is imposed on the child's parents:

> *'Compulsory education*
>
> **7.** *Duty of parents to secure education of children of compulsory school age.*—The parent of every child of compulsory school age shall cause him to receive efficient full-time education suitable—(a) to his age, ability and aptitude, and (b) to any special educational needs he may have, either by regular attendance at school or otherwise.'

School attendance is dealt with in Ch II of Pt VI of the Act. Where a parent fails to perform his or her duty under s 7 to ensure that a child of compulsory school age receives efficient full-time education whether by regular attendance at school or otherwise, s 437 imposes a duty on the LEA to serve a school attendance order on the parent, as follows:

> '**437.** *School attendance orders.*—(1) If it appears to a local education authority that a child of compulsory school age in their area is not receiving suitable education, either by regular attendance at school or otherwise, they shall serve a notice in writing on the parent requiring him to satisfy them within the period specified in the notice that the child is receiving such education.
>
> (2) That period shall not be less than 15 days beginning with the day on which the notice is served.
>
> (3) If—(a) a parent on whom a notice has been served under subsection (1) fails to satisfy the local education authority, within the period specified in the notice, that the child is receiving suitable education, and (b) in the opinion of the authority it is expedient that the child should attend school, the authority shall serve on the parent an order (referred to in this Act as a "school attendance order"), in such form as may be prescribed, requiring him to cause the child to become a registered pupil at a school named in the order.'

[28] Sections 438 and 440 give a parent a right to make arrangements for a child to attend an alternative suitable school to the school originally named in an attendance order.

[29] Section 443 makes it an offence to fail to comply with a school attendance order, as follows:

> '**443.** *Offence: failure to comply with school attendance order.*—(1) If a parent on whom a school attendance order is served fails to comply with the requirements of the order, he is guilty of an offence, unless he proves that he is causing the child to receive suitable education otherwise than at school.

(2) If, in proceedings for an offence under this section, the parent is acquitted, the court may direct that the school attendance order shall cease to be in force.

(3) A direction under subsection (2) does not affect the duty of the local education authority to take further action under section 437 if at any time the authority are of the opinion that, having regard to any change of circumstances, it is expedient to do so.

(4) A person guilty of an offence under this section is liable on summary conviction to a fine not exceeding level 3 on the standard scale.'

Two further offences relating to the failure to secure the regular attendance at school of a registered pupil are created by s 444 of the 1996 Act, which provides, so far as material, as follows:

'**444.** *Offence: failure to secure regular attendance at school of registered pupil.*—(1) If a child of compulsory school age who is a registered pupil at a school fails to attend regularly at the school, his parent is guilty of an offence.

(1A) If in the circumstances mentioned in subsection (1) the parent knows that his child is failing to attend regularly at the school and fails without reasonable justification to cause him to do so, he is guilty of an offence.

(2) Subsections (3) to (6) below apply in proceedings for an offence under this section in respect of a child who is not a boarder at the school at which he is a registered pupil.

(3) The child shall not be taken to have failed to attend regularly at the school by reason of his absence from the school—(a) with leave, (b) at any time when he was prevented from attending by reason of sickness or any unavoidable cause, or (c) on any day exclusively set apart for religious observance by the religious body to which his parent belongs.

(4) The child shall not be taken to have failed to attend regularly at the school if the parent proves—(a) that the school at which the child is a registered pupil is not within walking distance of the child's home, and (b) that no suitable arrangements have been made by the local education authority for any of the following—(i) his transport to and from the school, (ii) boarding accommodation for him at or near the school, or (iii) enabling him to become a registered pupil at a school nearer to his home.'

THE COUNCIL'S CONTENTIONS

[**30**] Miss Davies submitted that the words 'or otherwise' in the expression 'by reason of illness, exclusion from school or otherwise' in s 19 should be construed consistently with the preceding items listed in s 19. Illness and exclusion were what might be termed 'unavoidable' reasons why a child might not receive suitable education. The expression 'or otherwise' should be construed as being confined to such circumstances. Such an approach accorded with an established canon of statutory construction—see *Bennion on Statutory Interpretation* (4th edn, 2002) section 382, p 1062.

[**31**] Miss Davies further submitted that s 19 must be construed in its statutory context. She contended that the task of construing s 19 was assisted by consideration of the provisions of the school attendance regime under ss 437 to 444 of the 1996 Act. We can summarise her argument as follows. Where an attendance order has been made, the onus is on the parent to comply with the order or to find suitable alternative education for the child. Under s 444 a parent whose child fails to attend regularly at the school at which it is registered commits

an offence unless the child is prevented from attending 'by reason of sickness or any unavoidable cause'. It is not a defence under s 444 for a parent to contend that the school in which the child is registered is not suitable, or that the parent has good reason for declining to send it to that school. It is inconsistent with this scheme for a LEA to be under a s 19 duty to provide alternative suitable education where it remains possible for the child to continue to attend its existing school. Parliament cannot have intended that, at one and the same time, an education authority can be in breach of its s 19 duty to provide suitable education and a parent can be in breach of the s 444 duty to ensure that its child attends school. On its true construction, s 19 only imposes a duty on a LEA to provide suitable alternative education where, by reason of sickness, illness or otherwise, *it is not possible* for the child to attend its existing school.

G'S CONTENTIONS

[32] Mr Wise invited us to seek guidance in relation to the meaning of 'otherwise' in s 19 by reference to parliamentary material under the principle in *Pepper (Inspector of Taxes) v Hart* [1993] 1 All ER 42, [1993] AC 593. The material in question consisted of statements made by Baroness Blatch, the Minister of State for the Department of Education, when moving an amendment to an Education Bill on 4 May 1993 (545 HL Official Report (5th series) col 601 et seq). This Bill became the Education Act 1993 and the amendment in question was to a clause which was the precursor of s 19 of the 1996 Act.

[33] Mr Wise also relied upon circular 11/99 issued by the Department for Education and Employment headed 'Social Inclusion: the local education authority role in Pupil Support'. He submitted that this had particular relevance by virtue of sub-s (4A) to s 19, introduced by amendment in 1997 by s 47(4) of the Education Act 1997, which provides:

> '(4A) In determining what arrangements to make under subsection (1) or (4) in the case of any child or young person a local education authority shall have regard to any guidance given from time to time by the Secretary of State.'

[34] Mr Wise submitted that these aids to construction of s 19 clearly indicate that 'otherwise' has a wide ambit. He further submitted that art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), when read in conjunction with art 3 of the United Nations Convention on the Rights of the Child 1989 (New York, 20 November 1989; TS 44 (1998); Cm 1976), imposed a positive obligation on the council to provide suitable education for G by way of an alternative to St George's.

DISCUSSION

[35] Both Miss Davies and Mr Wise have invited us to have regard to extrinsic material when construing s 19 and we will first address their respective submissions in relation to this.

PARLIAMENTARY MATERIAL

[36] We consider that there is sufficient ambiguity, or uncertainty, as to the scope of the word 'otherwise' in s 19 to render admissible parliamentary material that satisfies the criteria laid down in *Pepper v Hart*. Giving that decision its wider application, as to which see the comments of Lord Steyn in *McDonnell v Congregation of Christian Brothers Trustees (formerly Irish Christian Brothers)* [2003]

UKHL 63 at [29], [2004] 1 All ER 641 at [29], [2004] 1 AC 1101, a clear ministerial statement as to the meaning of that word is required. We have concluded that no such statement is to be found in the debate upon which Mr Wise relies. The first problem is that Baroness Blatch was not merely moving an amendment to the clause that was to become the precursor to s 19, but was also speaking to 13 other amendments. The nature of those amendments was not explored before us. The second problem is that the clause in question, with the proposed amendment, differs somewhat from the wording of s 19. The third problem is that there is not clarity and consistency in the statements made by Baroness Blatch as to the object of the clauses to which she was speaking. At times she addressed the needs of all children who were not receiving education for any reason whatever. This contrasts with a statement that:

> 'The sentiment that unites the whole Committee is that no child who is out of school, whether by reason of sickness or truancy *or other excluded reasons*, shall fall through the net (emphasis added).' (See 545 HL Official Report (5th series) col 608.)

[37] For these reasons we do not consider that the Parliamentary material assists in the task of construction of s 19.

CIRCULAR 11/99

[38] We think it questionable whether this is a legitimate aid to construction. Section 19(4A) requires LEAs to have regard to guidance given by the Secretary of State as to the arrangements to be made for those children who are covered by s 19. We are not persuaded that such guidance can properly be relied upon as showing which children fall into this category. Nor do the contents of the circular afford Mr Wise much assistance. The section dealing with s 19 comments:

> '4.1 Children and young people may not attend school regularly for a variety of reasons: illness, pregnancy, behavioural difficulties, fixed period or permanent exclusions. LEAs' behaviour support plans should cover the arrangements for educating children otherwise than at school (see DfEE Circular 1/98 Behaviour Support Plans).'

The circular goes on to identify, as groups who need particular help, teenage parents, sick children and young people over compulsory school age. The reference to children with 'behavioural difficulties' could well refer to children whose behaviour is such as to render mainstream education impractical. Certainly the circular lends no support to the proposition that s 19 imposes a duty on councils to arrange for the provision of alternative education for those whose absence from school is voluntary. The earlier part of the circular is devoted to measures to improve the attendance at schools of children who fall into this category.

ARTICLE 8 OF THE CONVENTION

[39] There are circumstances in which art 8 of the convention can impose positive obligations on a state. We are, however, concerned with one of a large number of statutory provisions which impose positive obligations that are designed to promote the interests of children and that go beyond any positive obligations that might be imposed by art 8. We do not see that art 8 adds anything to G's case.

STATUTORY CONTEXT

[40] Miss Davies contended that s 19 dovetails neatly with ss 43–444 of the 1996 Act. If there is a suitable school that is both available and accessible to a child, the authority's duty under s 19 is discharged and the parents are under a duty to ensure that the child attends that school, or to arrange alternative education. If it is impossible for the child to attend the school, the authority has an obligation to arrange for the provision of alternative education and the parents are not criminally liable for their failure to ensure that their child attends school.

[41] We do not consider that the respective provisions of the 1996 Act dovetail as neatly as Miss Davies suggests. The possibility always exists that the school at which a child is registered is, or becomes, unsuitable for the child's educational needs. In such a situation the LEA will be under a duty under s 19 to arrange for the provision of suitable alternative education while the parents will remain under a duty under s 444 to see that their child continues regularly to attend the school in question. We think, however, that Miss Davies is right to emphasise the overall scheme of the legislation.

CONCLUSIONS

[42] In the absence of any case precedent, or any extrinsic aid to construction, we shall seek to give s 19 a meaning that accords with the natural meaning of the language used and makes sense, having regard to the overall scheme of the legislation. Section 19 covers the situation where there exists at least one suitable school which, for one reason or another, a child is unable to attend. 'Illness', which is one of the specified reasons, is likely, if it prevents a child from attending a particular school, to prevent that child from attending any school. In such a situation, s 19 requires the LEA to arrange for the provision of suitable education 'otherwise than at school'. 'Exclusion' prevents a child from attending a particular school. In that situation, s 19 requires the authority to make provision for suitable alternative education, 'at school or otherwise than at school'. In the case of both 'illness' and 'exclusion' the authority has to arrange for the provision of suitable education where it is impossible for the child to attend an existing school. It seems to us that 'otherwise', where used for the second time in s 19, is intended to cover any other situation in which it is not reasonably possible for a child to take advantage of any existing suitable schooling. This conclusion is supported by the 'eiusdem generis' canon of construction, which is no more than an approach which gives a word the natural meaning that it bears having regard to its context.

[43] This meaning of 'otherwise' is one that makes sense. If the LEA has arranged for the provision of education which is suitable for a child and which it is reasonably practicable for the child to enjoy, it would not seem logical that the authority should be under a duty to provide alternative suitable education, simply because, for one reason or another, the child is not taking advantage of the existing facility.

[44] This meaning of 'otherwise' also accords well with the overall scheme of the legislation. A LEA and, more widely, the social services owe many duties in relation to the welfare of children. This appeal has focussed on only one of these—the duty to arrange for the provision of suitable education. This is a duty to ensure that there is available for each child an efficient educational facility that is suitable for the child's age, ability and aptitude and any special educational needs that the child may have. If the LEA makes available a school that does not please the parents, it is for the parents to arrange for alternative suitable

education—see ss 438 and 440 of the 1996 Act. The primary duty of seeing that a child goes to school lies on that child's parents—see s 7 of the 1996 Act. If the parents fail to perform this duty, the LEA has power to take coercive action. Miss Davies has drawn attention to ss 443 and 444 of the Act. In her skeleton argument she has submitted that:

> 'Where a child is "avoidably" out of school the means of securing that he or she receives suitable education is through action by the local education authority to secure his or her attendance at school pursuant to its statutory powers and duties under ss 437, 443 and/or 444.'

[45] We agree with this proposition. We would add that, where a child is failing to attend, the authority also appears to have power under s 447 of the 1996 Act and s 36 of the Children Act 1989 to apply for a local education supervision order. Furthermore, in some cases where a child is not receiving education, this may be symptomatic of a state of affairs that calls for care proceedings.

[46] In any case where a child is not receiving suitable education it is necessary to consider the whole picture in order to decide in what respect, if any, this is attributable to a breach of duty by the LEA. If there is no suitable education available that is reasonably practicable for the child, the authority will be in breach of s 19. If suitable education has been made available which is reasonably practicable, but for one reason or another the child is not taking advantage of it, the local authority may well be in breach of duty in failing to exercise its powers to ensure that the child receives that education. It will not, however, be in breach of s 19.

[47] The fact that parents have misconceived objections to their child attending a particular school does not make the situation one in which it is not reasonably practicable for the child to receive education so as to give rise to an obligation on the part of the authority to provide alternative arrangements: in assessing what is reasonably practicable, the parents' unreasonable objections must be disregarded.

[48] It is possible to envisage exceptional situations where, although a school satisfies the criteria in s 19(6) and there is no physical impediment to the child attending that school, it is none the less not reasonable to expect the child to attend that school. Imagine, for instance, a situation in which three other children in the school were facing criminal charges, which they denied, of sexually assaulting that child. In such circumstances it might not be reasonably practicable for the child to continue to attend the school. The LEA would then come under a duty under s 19 to make alternative arrangements.

THE RESULT IN THIS CASE

[49] If a school is unable to prevent a child being subjected to persistent bullying it may be reasonable for the parents to withdraw that child from the school. In such circumstances it will not be reasonably practicable for the child to continue to attend that school. That is not this case. We have held that G's father has acted unreasonably in refusing to permit his son to continue to attend St George's. There is no doubt that he has been acting in what he considers to be his son's best interests. While we sympathise with him in the dilemma with which he has been confronted, we believe that he has taken the wrong decision. This claim is not, however, G's father's claim; it is the claim of his son. G has 'fallen through the net'. For over an academic year he has not received proper schooling. This was not attributable to any breach of the duty owed to G by the

council under s 19. At all times there has been available a place at St George's, which is a suitable school for G. It may be that a case could have been made out that the council were in breach of duty in failing to use their powers to see that G was sent to school at St George's. No such case has been advanced.

[50] For the reasons that we have given, we would dismiss this claim.

Application dismissed.

Kate O'Hanlon Barrister.

Chester v Afshar

[2004] UKHL 41

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD STEYN, LORD HOFFMANN, LORD HOPE OF CRAIGHEAD AND LORD WALKER OF GESTINGTHORPE

26–27 JULY, 14 OCTOBER 2004

Medical practitioner – Negligence – Causation – Failure to warn of risks of operation – Surgeon negligently failing to advise patient of risk inherent in operation – Patient suffering injury when risk materialising during operation – Patient establishing that she would not have had immediate operation if properly advised – Whether causation established only if patient also proving that she would never have had operation at any time if properly advised.

The claimant patient suffered from severe back pain. She was referred to the defendant, an eminent consultant neurosurgeon, who advised her to have surgery. Three days later, the surgeon conducted the operation with the patient's consent. Although the operation was properly performed, it resulted in significant nerve damage and left the patient partially paralysed. Such damage was known to be an inherent risk of the operation, in the region of 1%–2%. In subsequent proceedings for negligence, the patient alleged that the surgeon had failed to advise her of that risk, and that that breach of duty entitled her to damages. The judge found that the surgeon had indeed not informed the patient of the risk before the operation; that he had been negligent in not doing so; that if the patient had known of the risk, she would not have consented to the operation taking place at that time; and that she would instead have sought a second or, possibly, a third opinion before deciding what to do. On that basis, the judge concluded that the patient had established a causal link between the breach of duty and the injury, even though he made no finding, and was not invited to find, that, if properly advised, the patient would not have had the operation at some later date when the risk would have been exactly the same. The judge therefore gave judgment for the patient on the issue of liability, and his decision was affirmed by the Court of Appeal. The surgeon appealed to the House of Lords, contending that, in order to establish causation in the case of a surgeon's failure to warn a patient of a significant risk of injury, the patient had to prove not only that she would not have consented to run the relevant risk then and there, but also that she would not at any time have consented to run the relevant risk.

Held – (Lord Bingham and Lord Hoffmann dissenting) Where, in breach of duty, a surgeon failed to warn a patient about a risk of injury inherent in an operation, and, as a result of that failure, the patient had the operation and the risk materialised, she did not have to prove, for the purposes of establishing causation, that she would never have had the operation at any time if properly warned. Rather, it was sufficient for her to prove that, if properly warned, she would not have consented to the operation which was in fact performed and which resulted in the injury. Such a conclusion could not be based on conventional causation principles because the risk was not created or increased by the failure to warn, and the chances of avoiding it were not lessened by that failure. In such a case, however, justice

required the normal approach to causation to be modified. The law which imposed the duty to warn on the doctor had at its heart the right of the patient to make an informed choice as to whether, and if so when and by whom, to be operated on. Patients were entitled to have different views about those matters. For some the choice might be easy—simply to agree or to decline the operation. For many, however, the choice would be a difficult one, requiring time to think, to take advice and to weigh up the alternatives. The duty was owed as much to the patient who, if warned, would find the decision difficult as to the patient who would find it simple and could give a clear answer to the doctor one way or the other immediately. To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it might be needed most. That would discriminate against those who could not honestly say that they would have declined the operation once and for all if they had been warned. That result was unacceptable. The function of the law was to enable rights to be vindicated and to provide remedies when the duties had been breached. Unless that was done, the duty was a hollow one, stripped of all practical force and devoid of all content. It would have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. It followed that, on policy grounds, the test of causation was satisfied in the instant case. The injury was the product of the very risk that the patient should have been warned about when she gave her consent, and it could therefore be regarded as having been caused, in the legal sense, by the breach of the duty to warn. Accordingly, the appeal would be dismissed (see [24], [25], [27], [40], [81], [86]–[90], [93], [94], [101], below).

Chappel v Hart [1999] 2 LRC 341 adopted.

Decision of the Court of Appeal [2002] 3 All ER 552 affirmed.

Notes

For a doctor's duty to inform the patient of the risks involved in treatment and for causation generally, see respectively 30 *Halsbury's Laws* (4th edn reissue) para 39 and 33 *Halsbury's Laws* (4th edn reissue) para 603.

Cases referred to in opinions

Associated Portland Cement Manufacturers (1900) Ltd v Houlder Brothers & Co Ltd (1917) 86 LJKB 1495.

Bolam v Friern Hospital Management Committee [1957] 2 All ER 118, [1957] 1 WLR 582.

Bolitho (administratrix of the estate of Bolitho (decd)) v City and Hackney Health Authority [1997] 4 All ER 771, [1998] AC 232, [1997] 3 WLR 1151, HL.

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Appeal

The defendant, Fari Afshar, appealed with permission of the Appeal Committee of the House of Lords given on 18 November 2002 from the order of the Court of Appeal (Hale LJ, Sir Christopher Slade and Sir Denis Henry) on 27 May 2002 ([2002] EWCA Civ 724, [2002] 3 All ER 552, [2003] QB 356) dismissing his appeal from the order of Judge Robert Taylor, sitting as a judge of the High Court, on 21 December 2000 giving judgment for the claimant, Carole Gay Ogilvy Chester, for damages to be assessed in her proceedings for negligence against Mr Afshar. The facts are set out in the opinion of Lord Bingham of Cornhill, but more fully in the opinion of Lord Hope of Craighead.

Martin Spencer QC and *Kristina Stern* (instructed by *Hempsons*) for Mr Afshar.

Adrian Whitfield QC and *Jacqueline Perry* (instructed by *Eversheds LLP*, Newcastle) for Miss Chester.

Their Lordships took time for consideration.

14 October 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, the central question in this appeal is whether the conventional approach to causation in negligence actions should be varied where the claim is based on a doctor's negligent failure to warn a patient of a small but unavoidable risk of surgery when, following surgery performed with due care and skill, such risk eventuates but it is not shown that, if duly warned, the patient would not have undergone surgery with the same small but unavoidable risk of mishap. Is it relevant to the outcome of the claim to decide whether, duly warned, the patient probably would or probably would not have consented to undergo the surgery in question?

[2] I am indebted to my noble and learned friend Lord Hope of Craighead for his detailed account of the facts and the history of these proceedings, which I need not repeat.

[3] For some six years beginning in 1988 the claimant, Miss Chester, suffered repeated episodes of low back pain. She was conservatively treated by Dr Wright, a consultant rheumatologist, who administered epidural and sclerosant injections. An MRI scan in 1992 showed evidence of disc protrusions. In 1994, on the eve of a professional trip abroad, Miss Chester suffered another episode of pain and disability: she could 'hardly walk', and had reduced control of her bladder. Dr Wright gave another epidural injection, and Miss Chester was able to make the trip, using a wheelchair at Heathrow. But after the trip the pain returned. A further MRI scan revealed marked protrusion of discs into the spinal canal. After further conservative treatment which proved ineffective, Dr Wright referred Miss Chester to Mr Afshar, a distinguished consultant neurosurgeon with much experience of disc surgery, although Miss Chester was understandably reluctant to undergo surgery if this could be avoided.

[4] On accepting Miss Chester as a patient, Mr Afshar became subject to a legal as well as a professional duty to exercise reasonable care and skill in examining her; in assessing her case; and in advising on the need for surgery to alleviate her condition. If surgery was advised and accepted, he was bound to exercise reasonable care and skill in operating and in supervising her post-operatively. Mr Afshar did examine Miss Chester, did advise and did

undertake surgery. All these duties Mr Afshar duly performed. Miss Chester contended at trial that Mr Afshar had performed the operation negligently, but the judge rejected this complaint and in the event the Court of Appeal ([2002] EWCA Civ 724, [2002] 3 All ER 552, [2003] QB 356) was not asked to rule on that question.

[5] Mr Afshar was however subject to a further, important, duty: to warn Miss Chester of a small (1%–2%) but unavoidable risk that the proposed operation, however expertly performed, might lead to a seriously adverse result, known in medical parlance as cauda equina syndrome. The existence of such a duty is not in doubt. Nor is its rationale: to enable adult patients of sound mind to make for themselves decisions intimately affecting their own lives and bodies. There was a conflict of evidence at trial on what was said by Mr Afshar about the risk of an adverse outcome, but the judge resolved this conflict against him, holding that he had not given the warning which he should have given, and the Court of Appeal did not give him leave to challenge that conclusion. So it must be accepted that Mr Afshar did not give Miss Chester the warning which he should have given of the small but unavoidable risk that surgery might not improve Miss Chester's condition but might affect it adversely. As it was, the surgery, although skilfully performed, led to her suffering the cauda equina syndrome.

[6] Had the evidence entitled the judge to conclude, and had he concluded, that Miss Chester, if warned as she should have been, would probably not have agreed to surgery, she would on conventional principles have been entitled to recover damages. The measure of damages would have reflected the difference between Miss Chester's condition following surgery and the condition she would probably have been in without surgery, but there would have been no problem of causation. Had the warning been given, Miss Chester would (on such a finding) have acted differently, and her additional injury would be directly attributable to the absence of warning. The same would be true if the evidence had entitled the judge to conclude, and if he had concluded, that Miss Chester, if properly warned as she should have been, could and would have minimised the risk of surgery by entrusting herself to a different surgeon, or undergoing a different form of surgery, or (in another kind of case) losing weight or giving up smoking.

[7] But the judge made none of these findings. He concluded that, if duly warned, Miss Chester would not have undergone surgery three days after her first consultation with Mr Afshar, but would, very understandably, have wished to discuss the matter with others and explore other options. But he did not find (and was not invited to find) that she would probably not have undergone the surgery or that there was any way of minimising the small degree of risk inherent in surgery. As my noble and learned friend Lord Hope of Craighead observes at [61], below, the risk—

> 'was also liable to occur at random, irrespective of the degree of care and skill with which the operation was conducted by the surgeon. This means that the risk would have been the same whenever and at whoever's hands she had the operation ... it is difficult to say that his failure was the effective cause of the injury.'

[8] It is now, I think, generally accepted that the 'but for' test does not provide a comprehensive or exclusive test of causation in the law of tort. Sometimes, if rarely, it yields too restrictive an answer, as in *Fairchild v Glenhaven Funeral Services*

Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32. More often, applied simply and mechanically, it gives too expansive an answer: 'But for your negligent misdelivery of my luggage, I should not have had to defer my passage to New York and embark on *SS Titanic*.' But, in the ordinary run of cases, satisfying the 'but for' test is a necessary if not a sufficient condition of establishing causation. Here, in my opinion, it is not satisfied. Miss Chester has not established that but for the failure to warn she would not have undergone surgery. She has shown that but for the failure to warn she would not have consented to surgery on Monday 21 November 1994. But the timing of the operation is irrelevant to the injury she suffered, for which she claims to be compensated. That injury would have been as liable to occur whenever the surgery was performed and whoever performed it.

[9] Thus the question arises whether Miss Chester should be entitled to recover even though she cannot show that the negligence proved against Mr Afshar was, in any ordinary sense, a cause of her loss. I am of course impressed by the weight and distinction of the academic opinion supporting the decisions of the judge and the Court of Appeal in this case. But if failure to warn and the occurrence of injury which should have been the subject of the warning are, without more, enough to found a successful claim, the claimant would presumably succeed even in a case like *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285, where it is found on the balance of probabilities that the claimant would have consented to the operation even if properly advised. That seems to me, with respect to those who hold otherwise, to be a substantial and unjustified departure from sound and established principle. It is trite law that damage is the gist of the action in the tort of negligence. It is not suggested that it makes any difference whether a claim such as the present is framed in tort or in contract. A claimant is entitled to be compensated for the damage which the negligence of another has caused to him or her. A defendant is bound to compensate the claimant for the damage which his or her negligence has caused the claimant. But the corollaries are also true: a claimant is not entitled to be compensated, and a defendant is not bound to compensate the claimant, for damage not caused by the negligence complained of. The patient's right to be appropriately warned is an important right, which few doctors in the current legal and social climate would consciously or deliberately violate. I do not for my part think that the law should seek to reinforce that right by providing for the payment of potentially very large damages by a defendant whose violation of that right is not shown to have worsened the physical condition of the claimant. I would respectfully adopt the reasoning of McHugh J in his dissenting judgment in *Chappel v Hart* [1999] 2 LRC 341, (1998) 72 ALJR 1344.

[10] For these reasons, and also those given by my noble and learned friend Lord Hoffmann, I would allow this appeal.

LORD STEYN.

[11] My Lords, the facts of this case can be simplified. The claimant suffered from low back pain. A neurosurgeon advised her to undergo an elective lumbar surgical procedure. The procedure entails a 1%–2% chance of serious neurological damage arising from the operation. The claimant was entitled to be informed of this fact. In breach of the common law duty of care the surgeon failed to inform the claimant of the risk. The claimant reluctantly agreed to the

operation. Three days after her consultation with the surgeon the claimant underwent the surgery. The claimant sustained serious neurological damage. In the result the very injury about which she should have been warned occurred. The surgeon had not been negligent in performing the operation: he did not increase the risks inherent in the surgery. On the other hand, if the claimant had been warned she would not have agreed to the operation. Instead she would have sought further advice on alternatives. The judge found that if the claimant had been properly warned the operation would not have taken place when it did, if at all. The judge was unable to find whether if the claimant had been duly warned she would with the benefit of further medical advice have given or refused consent to surgery. What is clear is that if she had agreed to surgery at a subsequent date, the risk attendant upon it would have been the same, i e 1%–2%. It is therefore improbable that she would have sustained neurological damage.

[12] On these facts the judge found that the claimant had established a causal link between the breach and the injury she had sustained and held that the defendant was liable in damages. In a detailed and careful judgment the Court of Appeal (Hale LJ, Sir Christopher Slade and Sir Denis Henry ([2002] EWCA Civ 724, [2002] 3 All ER 552, [2003] QB 356)) upheld the conclusion of the judge.

[13] Counsel for the surgeon submitted that it is contrary to general principles of tort law to award damages when a defendant's wrong has not been proved to have increased the claimant's exposure to risk. He argued that in order to establish causation in a case of a surgeon's failure to warn a patient of a significant risk of injury, the patient must prove both that she would not have consented to run the relevant risk then and there, and that she would not, ultimately, have consented to run the relevant risk. The only qualification was the case where a claimant could prove an accelerated onset of injury. That the claimant could not do on the facts of the case. On analysis it was an all or nothing case. Counsel said that the injury that the claimant sustained was just a coincidence, a piece of abominable bad luck, like lightning striking a person. This was a powerful argument and persuasively presented.

[14] The legal context requires consideration of a number of other relevant factors. First, the nature of the correlative rights and duties of the patient and surgeon must be kept in mind. The starting point is that every individual of adult years and sound mind has a right to decide what may or may not be done with his or her body. Individuals have a right to make important medical decisions affecting their lives for themselves: they have the right to make decisions which doctors regard as ill advised. Surgery performed without the informed consent of the patient is unlawful. The court is the final arbiter of what constitutes informed consent. Usually, informed consent will presuppose a general warning by the surgeon of a significant risk of the surgery.

[15] In the case before the House a single cause of action is under consideration, viz the tort of negligence. How a surgeon's duty to warn a patient of a serious risk of injury fits into the tort of negligence was explained by Lord Woolf MR, with the agreement of Roch and Mummery LJJ, in *Pearce v United Bristol Healthcare NHS Trust* (1998) 48 BMLR 118. After reviewing a trilogy of decisions in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582; *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643, [1985] AC 871 and *Bolitho (administratrix of the estate of Bolitho (decd)) v City and Hackney Health Authority* [1997] 4 All ER 771, [1998] AC 232, Lord Woolf MR observed ((1998) 48 BMLR 118 at 124):

'In a case where it is being alleged that a plaintiff has been deprived of the opportunity to make a proper decision as to what course he or she should take in relation to treatment, it seems to me to be the law, as indicated in the cases to which I have just referred, that if there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or she should adopt.'

[16] A surgeon owes a legal duty to a patient to warn him or her in general terms of possible serious risks involved in the procedure. The only qualification is that there may be wholly exceptional cases where objectively in the best interests of the patient the surgeon may be excused from giving a warning. This is, however, irrelevant in the present case. In modern law medical paternalism no longer rules and a patient has a prima facie right to be informed by a surgeon of a small, but well established, risk of serious injury as a result of surgery.

[17] Secondly, not all rights are equally important. But a patient's right to an appropriate warning from a surgeon when faced with surgery ought normatively to be regarded as an important right which must be given effective protection whenever possible.

[18] Thirdly, in the context of attributing legal responsibility, it is necessary to identify precisely the protected legal interests at stake. A rule requiring a doctor to abstain from performing an operation without the informed consent of a patient serves two purposes. It tends to avoid the occurrence of the particular physical injury the risk of which a patient is not prepared to accept. It also ensures that due respect is given to the autonomy and dignity of each patient. Professor Ronald Dworkin *Life's Dominion: An Argument about Abortion and Euthanasia* (1993) p 224 explained these concepts:

'The most plausible [account] emphasizes the integrity rather than the welfare of the choosing agent; the value of autonomy, on this view, derives from the capacity it protects: the capacity to express one's own character—values, commitments, convictions, and critical as well as experiential interests—in the life one leads. Recognizing an individual right of autonomy makes self-creation possible. It allows each of us to be responsible for shaping our lives according to our own coherent or incoherent—but, in any case, distinctive—personality. It allows us to lead our own lives rather than be led along them, so that each of us can be, to the extent a scheme of rights can make this possible, what we have made of ourselves. We allow someone to choose death over radical amputation or a blood transfusion, if that is his informed wish, because we acknowledge his right to a life structured by his own values.'

[19] Fourthly, it is a distinctive feature of the present case that but for the surgeon's negligent failure to warn the claimant of the small risk of serious injury the actual injury would not have occurred when it did and the chance of it occurring on a subsequent occasion was very small. It could therefore be said that the breach of the surgeon resulted in the very injury about which the claimant was entitled to be warned.

[20] These factors must be considered in combination. But they must also be weighed against the undesirability of departing from established principles of

causation, except for good reasons. The collision of competing ideas poses a difficult question of law.

[21] That such problems do not necessarily have a single right answer is illustrated by the judgment of the Australian High Court in *Chappel v Hart* [1999] 2 LRC 341, (1998) 72 ALJR 1344. A surgeon failed to warn a patient of a small risk of an operation. She underwent the operation. In the result the very injury of which she should have been warned took place. As in the present case the position was that the patient would not have had the operation at the time and place when she did. If the patient had the operation on a subsequent occasion, the outcome would probably have been uneventful. On these facts the court decided by a majority of three (Gaudron, Gummow and Kirby JJ) to two (McHugh and Hayne JJ) that the patient was entitled to recover substantial damages from the surgeon for the physical injuries suffered as a result of the operation performed on her. The judgments are illuminating. For my part I found the dissenting judgment of McHugh J particularly powerful, and rightly counsel for the surgeon relied heavily on it. *Chappel v Hart* mirrors the issues and arguments in the present case. It will not serve any useful purpose to cite at length from the judgments. I also do not think a process of counting heads in a case such as *Chappel v Hart* is a particularly helpful exercise in regard to the issue before the House. At the very least, however, this Australian case reveals two fundamentally different approaches, the one favouring firm adherence to traditionalist causation techniques and the other a greater emphasis on policy and corrective justice.

[22] The House was referred to a valuable body of academic literature which discusses problems such as arose in *Chappel v Hart*, and in the present case, in some detail. Not surprisingly, the authors approach the matter from slightly different angles. It is, however, fair to say that there is general support for the majority decision in *Chappel v Hart*, and for the view which prevailed in the Court of Appeal in the present case (see Cane 'A Warning about Causation' (1999) 115 LQR 21; Grubb 'Clinical Negligence: Informed Consent and Causation' (2002) 10 Med LRev 322; Honoré 'Medical non-disclosure, causation and risk: *Chappel v Hart*' (1999) 7 Torts Law Journal 1; Jones '"But for" causation in actions for non-disclosure of risk' (2002) 18 PN 192; Stapleton 'Cause-in-Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388; Stauch 'Taking the Consequences for Failure to Warn of Medical Risks' (2000) 63 MLR 261)). The case note by the co-author of the seminal treatise on causation is particularly interesting. Professor Honoré said:

> '... does it follow that Mrs Hart should not recover? Or is this a case where courts are entitled to see to it that justice is done despite the absence of causal connection? I think it is the latter and for the following reason. The duty of a surgeon to warn of the dangers inherent in an operation is intended to help minimise the risk to the patient. But it is also intended to enable the patient to make an informed choice whether to undergo the treatment recommended and, if so, at whose hands and when. Dr Chappel violated Mrs Hart's right to choose for herself, even if he did not increase the risk to her. Judges should vindicate rights that have been violated if they can do so consistently with the authority of statutes and decided cases. In this case the High Court did just this, in effect by making Dr Chappel, when he operated on Mrs Hart, strictly liable for any injury he might cause of the type against which he should have warned her. For Dr Chappel *did* cause the harm that

> Mrs Hart suffered, though not by the advice he failed to give her. He did so by operating on her and, though he operated with due care, he slit open her oesophagus with disastrous consequences. Morally he was responsible for the outcome of what he did ... All the High Court has therefore done is to give legal sanction to an underlying moral responsibility for causing injury of the very sort against the risk of which the defendant should have warned her. Do the courts have power in certain cases to override causal considerations in order to vindicate a plaintiff's rights? I believe they do though the right must be exercised with great caution.' (See (1999) 7 Torts Law Journal 1 at 8.)

In my view Professor Honoré was right to face up to the fact that *Chappel v Hart*—and therefore the present case—cannot neatly be accommodated within conventional causation principles. But he was also right to say that policy and corrective justice pull powerfully in favour of vindicating the patient's right to know.

[23] It is true that there is no direct English authority permitting a modification of the approach to the proof of causation in a case such as the present. On the other hand, there is the analogy of *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32 which reveals a principled approach to such a problem. The facts were that claimants had developed mesothelioma after exposure to asbestos dust while employed by different and entirely separate employers. Breach of duty was established against all the employers. But on a balance of probabilities the employees could not prove the onset of the disease due to any particular or cumulative exposure. Given that each employer's wrongdoing had materially increased the risk of contracting the disease, the House of Lords held that a modified approach to proof of causation was justified. Lord Bingham of Cornhill ended his opinion by observing (at [35]): 'I prefer to recognise that the ordinary approach to proof of causation is varied than to resort to the drawing of legal inferences inconsistent with the proven facts.' Similarly, Lord Nicholls of Birkenhead expressly proceeded on the basis that the ordinary 'but for' standard of causation was not satisfied. He said (at [45]): 'Instead the court is applying a different and less stringent test.' Relying (at [63]) on 'the justice and the policy of common law and statute', Lord Hoffmann arrived at the same conclusion. Relying on policy reasons Lord Rodger of Earlsferry concluded (at [168]) that on policy grounds a lower threshold test was justified. *Fairchild*'s case is, of course, very different from the facts of the present case. A modification of causation principles as was made in *Fairchild*'s case will always be exceptional. But it cannot be restricted to the particular facts of *Fairchild*'s case. Lord Bingham of Cornhill observed in *Fairchild*'s case (at [34]): 'It would be unrealistic to suppose that the principle here affirmed will not over time be the subject of incremental and analogical development.' At the very least *Fairchild*'s case shows that where justice and policy *demand* it a modification of causation principles is not beyond the wit of a modern court.

[24] Standing back from the detailed arguments, I have come to the conclusion that, as a result of the surgeon's failure to warn the patient, she cannot be said to have given informed consent to the surgery in the full legal sense. Her right of autonomy and dignity can and ought to be vindicated by a narrow and modest departure from traditional causation principles.

[25] On a broader basis I am glad to have arrived at the conclusion that the claimant is entitled in law to succeed. This result is in accord with one of the most basic aspirations of the law, namely to right wrongs. Moreover, the decision announced by the House today reflects the reasonable expectations of the public in contemporary society.

[26] The result ought to come as no surprise to the medical profession which has to its credit subscribed to the fundamental importance of a surgeon's duty to warn a patient in general terms of significant risks: Royal College of Surgeons: *Good Surgical Practice* (2002) ch 4, guidelines on consent.

[27] For these reasons as well as the reasons given by my noble and learned friends Lord Hope of Craighead and Lord Walker of Gestingthorpe I would dismiss the appeal.

LORD HOFFMANN.

[28] My Lords, the purpose of a duty to warn someone against the risk involved in what he proposes to do, or allow to be done to him, is to give him the opportunity to avoid or reduce that risk. If he would have been unable or unwilling to take that opportunity and the risk eventuates, the failure to warn has not caused the damage. It would have happened anyway.

[29] The burden is on a claimant to prove that the defendant's breach of duty caused him damage. Where the breach of duty is a failure to warn of a risk, he must prove that he would have taken the opportunity to avoid or reduce that risk. In the context of the present case, that means proving that she would not have had the operation.

[30] The judge made no finding that she would not have had the operation. He was not invited by the claimant to make such a finding. The claimant argued that as a matter of law it was sufficient that she would not have had the operation at that time or by that surgeon, even though the evidence was that the risk could have been precisely the same if she had it at another time or by another surgeon. A similar argument has been advanced before this House.

[31] In my opinion this argument is about as logical as saying that if one had been told, on entering a casino, that the odds on no 7 coming up at roulette were only 1 in 37, one would have gone away and come back next week or gone to a different casino. The question is whether one would have taken the opportunity to avoid or reduce the risk, not whether one would have changed the scenario in some irrelevant detail. The judge found as a fact that the risk would have been precisely the same whether it was done then or later or by that competent surgeon or by another.

[32] It follows that the claimant failed to prove that the defendant's breach of duty caused her loss. On ordinary principles of tort law, the defendant is not liable. The remaining question is whether a special rule should be created by which doctors who fail to warn patients of risks should be made insurers against those risks.

[33] The argument for such a rule is that it vindicates the patient's right to choose for herself. Even though the failure to warn did not cause the patient any damage, it was an affront to her personality and leaves her feeling aggrieved.

[34] I can see that there might be a case for a modest solatium in such cases. But the risks which may eventuate will vary greatly in severity and I think there would be great difficulty in fixing a suitable figure. In any case, the cost of litigation over such cases would make the law of torts an unsuitable vehicle for distributing the modest compensation which might be payable.

[35] Nor do I agree with Professor Honoré's moral argument for making the doctor an insurer, namely that his act caused the damage. That argument seems to me to prove both too much and too little. Too much, because it is an argument for making a doctor the insurer of any damage which he causes, whether the patient knew of the risk or not. Too little, because it would excuse the doctor in a case in which he had a duty to warn but the actual operation was perfectly properly performed by someone else, for example, by his registrar.

[36] For these reasons and those given by my noble and learned friend Lord Bingham of Cornhill, I would allow the appeal and dismiss the action.

LORD HOPE OF CRAIGHEAD.

[37] My Lords, the appellant, Mr Fari Afshar, is an eminent consultant neurosurgeon. He carries on his practice both under the National Health Service and privately. The respondent, Miss Carole Chester, was formerly a working journalist specialising in travel writing. On 18 November 1994 she attended a consultation with Mr Afshar as a private patient in his consulting rooms in Harley Street. She had suffered for several years from back pain and had been referred to him by another medical practitioner with a view to surgery. Three days later, on 21 November 1994, Mr Afshar conducted an operation on Miss Chester's back, with her consent. It resulted in significant nerve damage and left her partially paralysed.

[38] Miss Chester's case that the operation was performed negligently was rejected by the trial judge (Judge Robert Taylor). He held that she had failed to establish that Mr Afshar was in any way negligent in his conduct of her surgery. But Miss Chester also claimed that Mr Afshar failed to advise her of the risks that were inherent in the operation and that this breach of duty too entitled her to damages. The trial judge found that the injury which she had sustained during surgery was caused by Mr Afshar's negligence in failing adequately to advise her of the risks of surgery and that on this ground she had established liability. The Court of Appeal (Hale LJ, Sir Christopher Slade and Sir Denis Henry ([2002] EWCA Civ 724, [2002] 3 All ER 552, [2003] QB 356)) dismissed Mr Afshar's appeal against this finding by the trial judge.

[39] The issue of law of general public importance which has brought this case before your Lordships rests upon two findings of fact by the trial judge. The first is his finding that Miss Chester was not told pre-operatively of the risk of nerve damage possibly resulting in paralysis. Mr Afshar said that, while he could not remember verbatim what he said to her, he thought that he spent a good deal of time spelling out what the risks were. But the trial judge was satisfied that she was not given adequate or proper advice about the risk of nerve damage possibly resulting in paralysis and that, despite her requests for information about such risks, she was given to understand in effect that there were none. He found that in this respect Mr Afshar was negligent under the principle which was established in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118, [1957] 1 WLR 582. The second was his finding that, if she had known of the actual risks of the proposed surgery, Miss Chester would not have consented to the operation taking place on 21 November 1994 and that before deciding what to do she would have sought a second, or possibly, a third opinion.

[40] The question of law which arises from these findings is whether it was sufficient for Miss Chester to prove that, if properly warned, she would not have consented to the operation which was in fact performed and which resulted in the injury, or whether it was necessary for her to prove also that she would never

have had that operation. The issue is essentially one of causation. It is not disputed that the failure to warn could be said to have caused the injury if Miss Chester's position had been that she would never have undertaken the operation at all if that warning had been given. But, as the trial judge observed, it was one of the signs of her truthfulness that Miss Chester did not attempt to go that far, as she had never claimed that, if adequately advised of the risks, she would never at any time have consented to surgery. Can it then be said on these facts that the test for causation is satisfied?

THE FACTS

[41] Miss Chester had been referred to Mr Afshar by a consultant rheumatologist, Dr Wright. He had been treating her for back trouble since 1988. His approach had been to treat it conservatively. This treatment had included a series of injections, but the pain and backache were not permanently relieved by them. In 1992 she had an MRI scan of her lumbar spine. It showed that there was an element of congenital stenosis between L2 and L5 and that there were degenerative changes and some fairly marked instances of disc protusion in this area. In September 1994 she had a recurrence of her back trouble, following which she had a second MRI scan in October 1994. This showed that her condition had worsened since 1992. She now had a very substantial central-lateral variation at L2/3 and central canal stenosis at L3 and L4/L5. Dr Wright advised Miss Chester that in the light of this report the time had come for her to consider surgery. She told him that she wished to avoid this if at all possible, as she had a general aversion to surgery. He agreed to treat her condition once again by injection, but this effected no clear improvement. So he repeated his advice about surgery. He mentioned Mr Afshar as one of the surgeons to whom she might go for this.

[42] Miss Chester said that she did not know when she went to see Mr Afshar on 18 November 1994 that only surgery was going to help her. She was looking for advice from him, not only about surgery but also as to whether any alternatives to surgery were possible. Dr Wright had mentioned in his letter of referral, at her request, that she was anxious to avoid surgery if possible, so there is no doubt that Mr Afshar was aware of this. He examined her for about 15 minutes and then spent about 30 minutes in conversation and discussion with her. He advised her that three intravertebral discs were the cause of her trouble and that they should be removed surgically.

[43] There was a conflict of evidence as to the detail of their conversation. Mr Afshar said that he discussed with Miss Chester the outcomes of having surgery and not having surgery, that he showed her where the disc was and what it was doing to the nerve roots and why he recommended surgery. He said that he explained that there was a small risk of disturbance to the cauda equina nerve root which could mean sensory disturbance leading to reduction in power in her legs and alterations in touch, temperature and position sense. Cauda equina syndrome can lead, at one end of the spectrum, to minor disturbance of nerve roots or, at the other end, to paralysis. He said that he thought that he told her about these risks and the problems which she would experience if she did not have surgery.

[44] Miss Chester's account, which was the version which the trial judge accepted, was that she told Mr Afshar that she had heard a lot of horror stories about surgery and that she wanted to know about the risks, but that none of this was explained to her. She did not mention paralysis specifically as one of the risks

that she wanted to be told about, and this was not mentioned as a risk of surgery by Mr Afshar. The reply which she got from him, as a throw away line, was that he had not crippled anybody yet. She agreed to the surgery because he made it all sound so simple. She said if she had been told of the risks as she now knew them to be she would not have had the operation the next Monday. She would have spoken to various journalist friends as to whom to go and see, would have spoken also to the BMA and would have wanted at least two further opinions as to whether an operation was necessary.

[45] The operation to which Miss Chester gave her consent was carried out by Mr Afshar on Monday 21 November 1994. It involved a microdiscectomy at all three disc levels, and it lasted just under two hours. There was no complication during the operation. When it was over Mr Afshar was satisfied that his objectives had been fully met by the techniques which he used. But as soon as Miss Chester recovered consciousness it was found that she had suffered both motor and sensory impairment below the level of L2. After an hour she had developed some knee extension and flexion and sensation to pain. But there was no real improvement of limb function, so Mr Afshar arranged for an urgent MRI scan which suggested that there was still some compression at the L2/L3 level.

[46] In the light of this finding Mr Afshar embarked on a second operation shortly after midnight on 22 November 1994. On this occasion he carried out a laminectomy. This meant that he was able to see the whole spinal canal. There was no sign of nerve root damage or of a break in the neural sac or of any fluid escaping. He was unable to find any explanation for Miss Chester's condition to his satisfaction. To make sure that nothing had escaped his attention a second post-operative scan was carried out. The only thing that was found was a small fragment which Mr Afshar did not think could have contributed to the profound change that had occurred. His conclusion was that the only explanation that could be given for it was one of cauda equina contusion during the routine medial retraction of the L3 root and cauda equinal dura during the L2/L3 disc removal during the first procedure. He told the trial judge at the end of his evidence that what happened to Miss Chester was a profound surprise to him and also a profound disappointment, as in all the years he had done neurosurgery he had never before or since had the same outcome.

[47] Miss Chester made some progress after the operation. Within about two or three weeks her right leg function had returned virtually to normal. But progress on her left side was much slower. Six years later, when her case came to trial, she was still suffering from disability in a number of areas. The extent of her disability and its consequences have yet to be determined, as that part of the trial was adjourned by the trial judge pending resolution of the dispute on liability.

THE DUTY TO WARN

[48] It was not in dispute that cauda equina damage was a known risk of the surgery which was performed by Mr Afshar. Mr Afshar said that the risk of such damage was about 0·9%. Mr Findlay, who gave expert evidence for the defence, said that nerve root injury or injury to the cauda equina was a recognised risk of lumbar surgery and that operation at three levels carried a higher overall risk because there was a risk at each level. He explained that, while the likelihood of risk of damage was no greater when operating at L3 level than when operating lower down the spine, the magnitude of the damage could be increased if it was suffered at the upper level. 'Most of us,' he said, 'would put a figure of 1%–2%

on the risk of nerve damage (including both single and multiple nerves) and other serious risks.'

[49] It was also common ground at the trial that it was Mr Afshar's duty, in accordance with good medical practice, to warn Miss Chester of the risk of damage involved in the surgery to which she was giving her consent and its possible consequences, including the risk of paralysis. The Court of Appeal was asked to give permission to appeal against the judge's factual findings on the issue as to whether she was told of these risks. But the court was of the opinion that the judge had given detailed and compelling reasons for preferring the claimant's account of her conversation with Mr Afshar. It held that there were no grounds that would justify interfering with his findings of fact (see [2002] 3 All ER 552 at [18], [2003] QB 356 at [18]).

[50] The trial judge explained his finding that Mr Afshar did not warn Miss Chester about the risks in this way in his judgment (at [65]):

> 'As has been recognised in many cases (including *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643, [1985] AC 871) it is often a difficult and delicate matter for a consultant to advise a patient about what he regards as comparatively minor risks, particularly when that patient is already suffering from stress, pain and anxiety. He will naturally be anxious to avoid alarming or confusing the patient unnecessarily. In the present case, as the defendant indicated in his evidence, he clearly thought that the risk of damage to the claimant was extremely small. Furthermore he knew that he personally had never caused any nerve damages in the many hundreds of operations he had carried out over 20–25 years. It may well be that he considered the claimant over-anxious or over-preoccupied with "horror stories" and the possibility of being crippled. In these circumstances I do not find it improbable that, in an attempt to reassure, he deflected her inquiries by answering them in the light-hearted terms which she has described—and which he accepts that he may have used at some stage. However understandable such a response may have been in psychological terms, it was not an adequate response in legal terms, as Lord Templeman indicated in *Sidaway*'s case.'

[51] The issue which is in dispute is now confined to the issue of causation. But the duty which, as is now accepted, was breached forms an essential part of the background to a discussion of that issue. Damage is the gist of the action of negligence, as Lord Scarman put it in *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643 at 650, [1985] AC 871 at 883. But damages can only be awarded if the loss which the claimant has sustained was within the scope of the duty to take care. And the issue of causation cannot be properly addressed without a clear understanding of the scope of the duty. So it is appropriate to reflect for a moment, before addressing the issue of causation, on the scope of the duty that was found to have been breached in this case and on the rationale for it that was established in *Sidaway*'s case.

[52] The question of principle that was decided in *Sidaway*'s case was that English law measures the doctor's duty of care to his patient when he is giving advice with respect to a proposed course of treatment by applying the standard of competent professional opinion. The test which was described by McNair J in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 at 121, [1957] 1 WLR 582 at 586 and approved in *Maynard v West Midlands Regional Health Authority* [1985] 1 All ER 635 at 637–638, [1984] 1 WLR 634 at 638 by Lord Scarman, is the standard of the ordinary skilled man exercising and professing to

have that special skill. Lord Bridge of Harwich ([1985] 1 All ER 643 at 660, [1985] AC 871 at 897) described the background to the issue of law which was before the House in *Sidaway*'s case, which was whether this test should be replaced by an objective one, in this way:

> 'It is clearly right to recognise that a conscious adult patient of sound mind is entitled to decide for himself whether or not he will submit to a particular course of treatment proposed by the doctor, most significantly surgical treatment under general anaesthesia. This entitlement is the foundation of the doctrine of "informed consent" which has led in certain American jurisdictions to decisions and, in the Supreme Court of Canada, to dicta on which the appellant relies, which would oust the *Bolam* test and substitute an "objective" test of a doctor's duty to advise the patient of the advantages and disadvantages of undergoing the treatment proposed and more particularly to advise the patient of the risks involved.'

[53] The decision that was mainly relied on in favour of an objective test which could be applied by the court independently of any medical opinion or practice was *Canterbury v Spence* (1972) 464 F 2d 772, in which Robinson J, delivering the judgment of the District of Columbia Circuit Court of Appeals, said (at 784):

> 'Respect for the patient's right of self-determination on particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves.'

The logical force of this approach was recognised by the majority in *Sidaway*'s case, but it was rejected in favour of the *Bolam* test. Lord Diplock said ([1985] 1 All ER 643 at 658, [1985] AC 871 at 893) that no convincing reason had been advanced which would justify treating the *Bolam* test as doing anything less than laying down a principle of English law that was comprehensive and applicable to every aspect of the duty of care owed by the doctor to his patient. As he put it ([1985] 1 All ER 643 at 659, [1985] AC 871 at 895), to decide what risks the existence of which a patient should be voluntarily warned and the terms in which such warning, if any, should be given, having regard to the effect that a warning might have, was as much an exercise of professional skill and judgment as any other part of the doctor's comprehensive duty of care to the individual patient, and expert medical evidence on that matter should be treated in just the same way. Lord Bridge, with whose speech Lord Keith of Kinkel agreed, drew attention to several reasons why the *Canterbury* doctrine was impractical in its application ([1985] 1 All ER 643 at 662, [1985] AC 871 at 899).

[54] Common however to all the speeches in *Sidaway*'s case was a recognition of the fundamental importance that must be attached to the right of the patient to decide whether he will accept or reject the treatment which is being proposed by the doctor. Lord Scarman, in his dissenting speech ([1985] 1 All ER 643 at 649, [1985] AC 871 at 882), said that the patient's right to make his own decision might be seen as a basic human right protected by the common law. In the passage which I have already quoted ([1985] 1 All ER 643 at 660, [1985] AC 871 at 897), Lord Bridge recognised that a conscious adult patient of sound mind was entitled to decide for himself whether or not he would submit to a particular course of treatment. Later in his speech ([1985] 1 All ER 643 at 663, [1985] AC 871 at 900), he referred to what was necessary for an informed choice on the part of the patient and to the patient's right of decision. Lord Templeman said ([1985]

1 All ER 643 at 665, [1985] AC 871 at 904) that he did not subscribe to the theory that the patient is entitled to know everything. Some information might confuse and other information might alarm the patient. So it was for the doctor to decide in the light of his training and experience what needed to be said, and how it should be said. But he went on to add these words ([1985] 1 All ER 643 at 666, [1985] AC 871 at 904):

> 'At the same time the doctor is not entitled to make the final decision with regard to treatment which may have disadvantages or dangers. Where the patient's health and future are at stake, the patient must make the final decision.'

[55] Thus the right to make the final decision and the duty of the doctor to inform the patient if the treatment may have special disadvantages or dangers go hand in hand. In this case there is no dispute that Mr Afshar owed a duty to Miss Chester to inform her of the risks that were inherent in the proposed surgery, including the risk of paralysis. The duty was owed to her so that she could make her own decision as to whether or not she should undergo the particular course of surgery which he was proposing to carry out. That was the scope of the duty, the existence of which gave effect to her right to be informed before she consented to it. It was unaffected in its scope by the response which Miss Chester would have given had she been told of these risks.

[56] There were three possibilities. She might have agreed to go ahead with the operation despite the risks. Or she might have decided then and there not to have the operation then or at any time in the future. Or she might have decided not to have the operation then but to think the matter over and take further advice, leaving the possibility of having the operation open for the time being. The choice between these alternatives was for her to take, and for her alone. The function of the law is to protect the patient's right to choose. If it is to fulfil that function it must ensure that the duty to inform is respected by the doctor. It will fail to do this if an appropriate remedy cannot be given if the duty is breached and the very risk that the patient should have been told about occurs and she suffers injury.

[57] In his article 'Informed Consent and Other Fairy Stories' (1999) 7 Med LRev 103 Professor Michael A Jones drew attention to the problems which had been focussed in the debate about informed consent that followed the decision of this House in *Sidaway*'s case to prefer what he described (at 104) as the reasonable doctor standard (the *Bolam* test) in contrast to the prudent patient standard adopted in the American cases, which has been accepted also in Canada. Liability for the non-disclosure of risks is judged by reference to the tort of negligence which looks to the nature of the doctor's duty and applies the *Bolam* test to it, rather than the validity of the consent of the patient to what would otherwise be a trespass. There are then two problems that face a patient who brings a claim for non-disclosure of risk: that of proving breach of duty and that of proving causation. The greater the difficulties that stand in the way of the patient on these issues, the more difficult it is to say that the law of informed consent works as a means of protecting patient autonomy.

[58] Commenting on a perceived imbalance of power in the doctor-patient relationship, Professor Jones said (at 129):

> 'Part of the imbalance between doctor and patient is due to the patient's lack of information, and, on one view, it is the function of the law to redress

the imbalance by providing patients with the "right" to be given that information, or perhaps more accurately imposing a duty on doctors to provide it. There are some within the medical profession who appear to resent the notion that informed consent is part and parcel of "patient rights"—a patient with rights is a lawsuit waiting to happen. On the other hand, a patient with no rights is a citizen who is stripped of his or her individuality and autonomy, as well as her clothes, as soon as she walks into the surgery or the hospital.'

He observed (at 133) that the law cannot play a direct role in setting out detailed rules by way of guidance to doctors, but that it can have a powerful symbolic and galvanising role and that this is its major strength. The message that he was seeking to convey was that, while the case law provided little guidance to doctors and even less comfort to patients, litigation on informed consent could provide a stimulus to the broader debate about the nature of the doctor-patient relationship. The 'happy ending' of his title would be found if the iterative process between case law and professional guidance were to lead to the creation of a more substantive 'right' to truly informed consent for patients.

[59] That is the background to the problem of causation that has been posed in this case. The scope of the duty brings within its ambit all the consequences of the risks that the patient ought to be informed about. It is unaffected by the response which the patient may give on being told of these risks.

CAUSATION

[60] It is not in doubt that a patient who claims that she has suffered injury as the result of a doctor's failure to inform her of the risk of injury must show that the damage was caused by the doctor's breach of duty. In this respect the present action is no different from any action that is brought in negligence. But how can causation be established when, as in this case, the patient would not have refused absolutely there and then and for ever to undergo the operation if told of the risks but would have postponed her decision until later?

[61] The problem is rendered all the more acute in this case by the fact that the failure to warn cannot be said in any way to have increased the risk of injury. The risk was inherent in the operation itself. It was described by Miss Chester's expert witness, Mr Firth, as 'the terror of neurosurgery'. The evidence indicated that it was also liable to occur at random, irrespective of the degree of care and skill with which the operation was conducted by the surgeon. This means that the risk would have been the same whenever and at whoever's hands she had the operation. It can be said that Miss Chester would not have suffered her injury 'but for' Mr Afshar's failure to warn her of the risks, as she would have declined to be operated on by him on 21 November 1994. But it is difficult to say that his failure was the effective cause of the injury.

[62] On the other hand, there is no doubt that the injury which Miss Chester sustained when she was operated on by Mr Afshar was within the scope of his duty to warn. It was his duty to warn her of the risks of the operation that he was proposing to perform, and it was in the course of that same operation that she sustained the very kind of injury that he ought to have warned her about. If she had been given the warning she would have avoided that risk, and the chances of her being injured in that way if she had had the operation later would have been very small—between 1% and 2% on Mr Findlay's evidence.

[63] None of the four cases in which claims for a failure to warn have come before the courts in this country, all of which were decided at first instance, raised

the issue of causation in this form. In *Smith v Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285 Hutchison J found on the balance of probabilities that the claimant would have consented to the operation even if she had been properly advised about the risk of tetraplegia. The consequence of this decision was that the lack of a warning could not have caused the injury, as she would have gone ahead with the operation anyway. In *Smith v Salford Health Authority* (1994) 23 BMLR 137 Potter J decided the case against the doctor on other grounds. But he would not have found him liable for a failure to warn, because he was not satisfied that the claimant would not have had the operation if he had been properly advised. In *McAllister v Lewisham and North Southwark Health Authority* [1994] 5 Med LR 343, on the other hand, Rougier J was confident that the claimant would not have had the operation if she had been properly warned and that on balance of probabilities she would have continued to decline it. So he held that the necessary causal connection was established in her case. And in *Smith v Tunbridge Wells Health Authority* [1994] 5 Med LR 334 the claim succeeded because Morland J was satisfied that the claimant would have declined the operation if he had been properly advised of the risk of impotence and bladder malfunction from rectal surgery.

[64] But the issue of causation in the form that has arisen in this case was present in *Chappel v Hart* [1999] 2 LRC 341, (1998) 72 ALJR 1344 a decision of the High Court of Australia. In that case Gaudron, Gummow and Kirby JJ held, on facts which were similar to those of this case, that there was a causal connection between the failure to warn and the claimant's injury. The minority, McHugh and Hayne JJ, held that causation had not been established, as the defendant did not increase the risk to which the claimant was exposed when she underwent the operation.

[65] The Court of Appeal in this case, having examined that decision, came to the conclusion that the majority in *Chappel v Hart* were right and that for the same reasons the decision of the trial judge in this case was right also. Sir Denis Henry, delivering the judgment of the court, explained the reasoning which had guided its decision in this way ([2002] 3 All ER 552 at [47], [2003] QB 356 at [47]):

> 'The purpose of the rule requiring doctors to give appropriate information to their patients is to enable the patient to exercise her right to choose whether or not to have the particular operation to which she is asked to give her consent ... The law is designed to require doctors properly to inform their patients of the risks attendant on their treatment and to answer questions put to them as to that treatment and its dangers, such answers to be judged in the context of good professional practice, which has tended to a greater degree of frankness over the years, with more respect being given to patient autonomy. The object is to enable the patient to decide whether or not to run the risks of having that operation at that time. If the doctor's failure to take that care results in her consenting to an operation to which she would not otherwise have given her consent, the purpose of that rule would be thwarted if he were not to be held responsible when the very risk about which he failed to warn her materialises and causes her an injury which she would not have suffered then and there.'

[66] In view of the importance which the Court of Appeal attached to the opinions of the majority in *Chappel v Hart* it is necessary to look more closely at the guidance which is offered by the views that were expressed in that case on both sides of the argument.

CHAPPEL v HART

[67] Mrs Hart underwent surgery for the removal of a pharyngeal pouch in her oesophagus at the hands of Dr Chappel who was an ear, nose and throat specialist. During this surgery the oesophagus was perforated and an infection set in which damaged a laryngeal nerve. This resulted in damage to Mrs Hart's vocal chords and loss of vocal strength which affected her employment as a teacher librarian. She was assessed as medically unfit and had to retire from her employment. A claim that the operation had been performed negligently was not pursued. Mrs Hart's case was that she had not been warned of the risk, however slight, that perforation of the oesophagus might occur and of the laryngeal damage that might result from this. The trial judge found that no such warning had been given and that, if she had been warned of the risk of vocal damage, Mrs Hart would have postponed the operation and made further inquiries to minimise the risk.

[68] The case is complicated by the fact that Mrs Hart maintained that if she had been warned of the risk she would have deferred the operation and had it performed instead by the most experienced surgeon in the field then available. That additional factor is not present in this case. There was no suggestion here that Miss Chester was more at risk at the hands of Mr Afshar due to any lack of experience on his part than she would have been at the hands of anyone else. It is necessary to bear in mind too that the law of Australia favours the objective rather than the subjective, or *Bolam*, approach to the duty to warn (see *Rogers v Whitaker* (1992) 175 CLR 479 at 490). Nevertheless there is obviously much common ground between the two cases.

[69] In *Chappel v Hart* McHugh J, who was in the minority, took as his starting point the proposition that in principle, if the act or omission by the defendant has done no more than expose the plaintiff to a class of risk to which he or she would have been exposed irrespective of the defendant's act or omission, the law of torts should not require the defendant to pay damages (see [1999] 2 LRC 341 at 353, (1998) 72 ALJR 1344 at 1350 (para 28)). He developed this theme, drawing upon examples from the negligent acts in *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] 1 All ER 1, [1949] AC 196 and *The Carslogie, Carslogie Steamship Co Ltd v Royal Norwegian Govt Represented by the Norwegian Shipping and Trade Mission* [1952] 1 All ER 20, [1952] AC 292, by considering how a causal connection might be established in the case of omissions such as the defendant's failure to warn the plaintiff that a particular route was liable to landslides. He restated his proposition that a defendant is not causally liable, and therefore legally responsible, for wrongful acts or omissions if those acts or omissions would not have caused the plaintiff to alter his or her course of action, adding these sentences:

> 'The inquiry as to what the plaintiff would have done if warned is necessarily hypothetical. But if the evidence suggests that the acts or omissions of the defendant would have made no difference to the plaintiff's course of action, the defendant has not caused the harm which the plaintiff has suffered.' (See [1999] 2 LRC 341 at 354, (1998) 72 ALJR 1344 at 1351 (para 32).)

[70] McHugh J set out his conclusions as to whether a causal connection existed between a defendant's failure to warn of a risk of injury and the subsequent suffering of injury by the plaintiff as a result of the risk eventuating

(see [1999] 2 LRC 341 at 355, (1998) 72 ALJR 1344 at 1351 (para 34)). Among these were the following:

> '(1) A causal connection will exist between the failure and the injury if it is probable that the plaintiff would have acted on the warning and desisted from pursuing the type of activity or course of conduct involved ...
>
> (2) No causal connection will exist if the plaintiff would have persisted with the same course of action in comparable circumstances even if a warning had been given ...
>
> (3) No causal connection will exist if every alternative means of achieving the plaintiff's goal gave rise to an equal or greater probability of the same risk of injury and the plaintiff would probably have attempted to achieve that goal notwithstanding the warning.'

[71] McHugh J said ([1999] 2 LRC 341 at 356, (1998) 72 ALJR 1344 at 1352 (para 35)) that in his opinion the defendant would escape liability only if the plaintiff did not prove that his failure to warn resulted in her consenting to a procedure that involved a higher risk of injury than would have been the case if the procedure had been carried out by another surgeon. He then reviewed the evidence. He said that it was all one way, that perforation of the oesophagus was an inherent risk of the procedure which could occur even when reasonable skill and care were exercised (see [1999] 2 LRC 341 at 358, (1998) 72 ALJR 1344 at 1353 (para 41)). He drew the conclusion that, on this approach, was inevitable (see [1999] 2 LRC 341 at 358, (1998) 72 ALJR 1344 at 1353 (para 42)). The plaintiff's claim must fail. The defendant's failure to warn did not increase the risk of injury involved in the procedure, and her claim that a causal connection existed between that failure and the injury had to be rejected.

[72] Hayne J, the other justice who was in the minority, pointed out that the 'but for' test was neither a comprehensive nor exclusive test of causation (see [1999] 2 LRC 341 at 385, (1998) 72 ALJR 1344 at 1373 (para 116)). In his view the only connection between the failure to warn and the harm to the plaintiff was that but for the failure to warn she would not have been in harm's way (see [1999] 2 LRC 341 at 387, (1998) 72 ALJR 1344 at 1374 (para 121)). It was not enough to show that the subject matter of the failure to warn was the very subject matter of the damage (see [1999] 2 LRC 341 at 388, (1998) 72 ALJR 1344 at 1374 (para 124)). Important as this was, it was not determinative (see [1999] 2 LRC 341 at 388, (1998) 72 ALJR 1344 at 1375 (para 125)). Nor was the ambit of the liability to be decided only according to whether enlarging that ambit would promote careful conduct, as the question of causation had still to be answered (see [1999] 2 LRC 341 at 388, (1998) 72 ALJR 1344 at 1375 (para 126)). He rejected the plaintiff's case that she had lost the chance of better treatment, and he agreed with McHugh J that there was insufficient evidence to say that the defendant's failure to warn exposed the plaintiff to a greater risk of injury (see [1999] 2 LRC 341 at 392, (1998) 72 ALJR 1344 at 1377 (para 146)).

[73] The approach of the minority is strong on logic and, so far as it goes, may be said to be impeccable in its reasoning. It is plain that the 'but for' test is not in itself a sufficient test of causation. It is also plain that the requirements of causation would have been satisfied if Mrs Hart had been able to show that the failure to warn had exposed her to an increased risk of injury or that she would not have had the operation at all if she had been warned of the risk. But if the application of logic is to provide the answer, the consequences for a case where those elements are absent, as they are here, are stark. A duty was owed, the duty

was breached and an injury was suffered that lay within the scope of the duty. Yet the patient to whom the duty was owed is left without a remedy.

[74] Gaudron J, who was one of the three justices in the majority, observed that causation was to be approached as a question of fact to be answered by applying common sense to the facts of the particular case ([1999] 2 LRC 341 at 347, (1998) 72 ALJR 1344 at 1346 (para 6)). She pointed out that questions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise and for present purposes that framework was the law of negligence (see [1999] 2 LRC 341 at 348, (1998) 72 ALJR 1344 at 1346 (para 7)). It was not disputed that the defendant was under a duty to inform his patient of the risk. The duty was called into existence because of the foreseeability of that risk, it was not performed and the risk eventuated. That was often the beginning and the end of the inquiry whether breach of duty materially caused or contributed to the harm suffered (see [1999] 2 LRC 341 at 348, (1998) 72 ALJR 1344 at 1346 (para 8)). She accepted that where there is a duty to inform it is necessary for the plaintiff to give evidence as to what would or would not have happened if the information had been provided. But it was to apply sophistry rather than common sense to say that, although the risk of physical injury which came about called the duty of care into question, breach of that duty did not cause or contribute to that injury but simply resulted in the loss of an opportunity to pursue a different course of action (see [1999] 2 LRC 341 at 348, (1998) 72 ALJR 1344 at 1347 (para 9)). The physical injury having occurred, breach of the duty was treated as materially causing or contributing to that injury unless there was sufficient reason to the contrary (see [1999] 2 LRC 341 at 348–349, (1998) 72 ALJR 1344 at 1347 (para 10)).

[75] Gummow J began his discussion by quoting the following passage from Mason CJ's highly influential judgment in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 509:

> 'In philosophy and science, the concept of causation has been developed in the context of explaining phenomena by reference to the relationship between conditions and occurrences. In law, on the other hand, problems of causation arise in the context of ascertaining or apportioning legal responsibility for a given occurrence.'

He referred also to Mason CJ's observation in that case (at 514) that, generally speaking, a sufficient causal connection is established if it appears that the plaintiff would not have sustained the injuries complained of had the defendant not been negligent. He then introduced his approach to the case with these words:

> 'Here, the injury to Mrs Hart occurred within an area of foreseeable risk. In the absence of evidence that the breach had no effect or that the injury would have occurred even if Dr Chappel had warned her of the risk of injury to the laryngeal nerve and of the consequent risk of partial or total voice loss, the breach of duty will be taken to have caused the injury ...' (See [1999] 2 LRC 341 at 364, (1998) 72 ALJR 1344 at 1358 (para 68).)

In his opinion it was for Dr Chappel to demonstrate some good reason for denying to Mrs Hart recovery in respect of injury which she would not have suffered at his hands but for his failure to advise her, and he had failed to do so (see [1999] 2 LRC 341 at 364, (1998) 72 ALJR 1344 at 1358 (para 69)). To make good her case and obtain damages, Mrs Hart was not required to negative the proposition that any later treatment would have been attended with the same or

a a greater degree of risk (see [1999] 2 LRC 341 at 366, (1998) 72 ALJR 1344 at 1359 (para 76)).

[76] Kirby J, the third justice in the majority, said ([1999] 2 LRC 341 at 380, (1998) 72 ALJR 1344 at 1369 (para 95)) that for a time he was attracted by Dr Chappel's arguments, which had laid emphasis upon a logical examination of the consequences which would have flowed had he not breached his duty to b warn his patient, but that ultimately he had concluded against them:

> 'The "common sense" which guides courts in this area of discourse supports Mrs Hart's recovery. So does the setting of standards which uphold the importance of the legal duty that was breached here ... This is the duty which all health care professionals in the position of Dr Chappel must c observe: the duty of informing patients about risks, answering their questions candidly and respecting their rights, including (where they so choose) to postpone medical procedures and to go elsewhere for treatment.'

He said ([1999] 2 LRC 341 at 380–381, (1998) 72 ALJR 1344 at 1369 (para 96)) that the standards which the court had set in *Rogers v Whitaker* (1992) 175 CLR 479 at d 490 as to the doctor's duty to warn the patient of a material risk inherent in the proposed treatment had fairly been described as onerous, but that they were the law and they had been established for good reason: 'When not complied with (as was held to be so in this case) it should occasion no surprise that legal consequences follow.'

e [77] Academic comment on *Chappel v Hart* favours the view that was taken of the case by the majority. Peter Cane 'A Warning about Causation' (1999) 115 LQR 21 at 23 said that the effect of adopting the central sense of 'cause', which was that favoured by the minority, as appropriate to determining liability and compensation for breach of the duty to inform and warn would be very much to weaken the force and importance of that duty. He said (at 25) that, so far as f Dr Chappel's role in the causal chain was concerned, it seemed to him that the majority view was correct. The desirable rule was that a doctor might be held liable for injury about the risk of which he had a duty to inform the patient, but not for injury the risk of which fell outside the duty to warn. Marc Stauch 'Taking the Consequences for Failure to Warn of Medical Risks' (2000) 63 MLR 261 at g 267, suggests that the High Court reached the correct conclusion in favour of liability, but not necessarily for the right reasons. The rationale which he favours is based on the special nature of the doctor's duty to advise his patient of risks of treatment. The principal reason for imposing this duty is to promote the patient's decision-making autonomy. The law should deem the doctor to have assumed the risk of injury as though, in failing to mention it, he had warranted that it h would not materialise. Or one could say that the doctor is estopped from pointing to the existence and unavoidable nature of the risk.

[78] Professor Andrew Grubb 'Clinical Negligence: Informed Consent and Causation' (2002) 10 Med LRev 322, in his commentary on the decision of the Court of Appeal in this case (see also his *Principles of Medical Law* (2nd edn, 2004) j p 200 (paras 3.161, 3.162), where the same comments are repeated), referred (at 324) to the fact that it had approved and applied the majority view in *Chappel v Hart*. After quoting part of the passage from the Court of Appeal's judgment ([2002] 3 All ER 552 at [47]) which I have set out at [65], above, he said:

> 'It is difficult to argue with this reasoning. It would undermine the rule and be unjust for a doctor to require a patient to show that she would never have

a particular procedure in the future (see also *Chappel v. Hart* ... *per* Kirby J. especially [1999] 2 LRC 341 at 380–381, (1998) 72 ALJR 1344 at 1369 (paras 95–96)). It is also counterintuitive to think that because the patient may run the risk in the future—by agreeing to and having the procedure—the negligence is not connected to her injury. At worst, she will be exposed to a small risk of injury which is unlikely *then* to eventuate—exceptional circumstances aside ... She had in a real and immediate sense suffered injury that she would not otherwise have suffered. That should be sufficient to establish a causal link.'

[79] In 'Medical non-disclosure, causation and risk: *Chappel v Hart*' (1999) 7 Torts Law Journal 1 at 7, Professor Tony Honoré said that at first sight the argument which commended itself to the minority in *Chappel v Hart* was cogent. Dr Chappel's advice related to a risk which Mrs Hart was bound, sooner or later, to run. On the assumption that the risk to her would have been the same whenever she had the operation (for reasons given earlier in this case note, he was proceeding on the assumption that the risk would have been exactly the same if she had been operated on by a surgeon more experienced in that type of operation than Dr Chappel), Dr Chappel neither exposed her to a risk that she need never run nor increased the risk she was bound to run in any case. So his failure to warn was not, on that assumption, a cause of the injury that she suffered.

[80] But he was not content to leave the matter there. He asked himself these questions (at 8):

'... does it follow that Mrs Hart should not recover? Or is this a case where courts are entitled to see to it that justice is done despite the absence of causal connection?'

His answer was that the latter proposition was the right one, for the following reason:

'The duty of a surgeon to warn of the dangers inherent in an operation is intended to help minimise the risk to the patient. But it is also intended to enable the patient to make an informed choice whether to undergo the treatment recommended and, if so, at whose hands and when. Dr Chappel violated Mrs Hart's right to choose for herself, even if he did not increase the risk to her ... All the High Court has therefore done is to give legal sanction to an underlying moral responsibility for causing injury of the very sort against the risk of which the defendant should have warned her.'

In his concluding remarks on the case he explained that, while he believed that the courts have power in certain cases to override causal considerations in order to vindicate a plaintiff's rights, this right must be exercised with great caution. He saw *Chappel v Hart* as an illustration of one of the types of case that he had in mind, where a plaintiff is entitled to recover from a defendant who has without negligence caused the sort of injury the risk of which the defendant should have warned the plaintiff. These, he said, were very unusual types of case in which causal principles have to be overridden so that a defendant bears the risk of harm that the defendant did not cause.

THE ANSWER TO THE PROBLEM OF CAUSATION IN THIS CASE

[81] I would accept that a solution to this problem which is in Miss Chester's favour cannot be based on conventional causation principles. The 'but for' test is

easily satisfied, as the trial judge held that she would not have had the operation on 21 November 1994 if the warning had been given. But the risk of which she should have been warned was not created by the failure to warn. It was already there, as an inevitable risk of the operative procedure itself however skilfully and carefully it was carried out. The risk was not increased, nor were the chances of avoiding it lessened, by what Mr Afshar failed to say about it. As Professor Honoré in his note 'Medical non-disclosure, causation and risk: *Chappel v Hart*" (1999) 7 Torts Law Journal 1 at 4 has pointed out, to expose someone to a risk to which that person is exposed anyhow is not to cause anything.

[82] Nor does it seem to me that an appeal to common sense alone will provide a satisfactory answer to the problem. In *Stapley v Gypsum Mines Ltd* [1953] 2 All ER 478 at 485, [1953] AC 663 at 681 Lord Reid said that the question as to what caused an accident must be determined as a properly instructed and reasonable jury would decide it, by applying common sense to the facts of each particular case. The problem that had to be resolved in that case was whether the fault of the deceased's fellow workman, they both having disobeyed their foreman's instructions, was to be regarded as having contributed to the accident. Lord Reid's dictum was referred to by Mason CJ in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 515 in a passage which laid the basis for the approach to the issue of causation in Australia and was much referred to in *Chappel v Hart*.

[83] An appeal to common sense when determining issues of causation is valuable in the right context. But out of its proper context, and without more, it may pull in two or more directions. This can be seen in *Chappel v Hart* where, following the guidance of Mason CJ in *March*'s case, common sense was referred to and relied upon by justices on either side of the argument: Gaudron J ([1999] 2 LRC 341 at 347, (1998) 72 ALJR 1344 at 1346 (para 6)); McHugh J ([1999] 2 LRC 341 at 351, (1998) 72 ALJR 1344 at 1349 (paras 23–24)); Kirby J ([1999] 2 LRC 341 at 373, (1998) 72 ALJR 1344 at 1364 (para 93)); Hayne J ([1999] 2 LRC 341 at 392, (1998) 72 ALJR 1344 at 1377 (para 148)). On its own common sense, and without more guidance, is no more reliable as a guide to the right answer in this case than an appeal to the views of the traveller on the London Underground. As I survey my fellow passengers on my twice weekly journeys to and from Heathrow Airport on the Piccadilly Line—such a variety in age, race, nationality and languages—I find it increasingly hard to persuade myself that any one view on anything other than the most basic issues can be said to be typical of all of them.

[84] As Lord Hoffmann sought to emphasise in *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 All ER 481 at 487, [1999] 2 AC 22 at 29, common sense answers to questions of causation will differ according to the purpose for which the question is asked. He supported this proposition by examples. He then said ([1998] 1 All ER 481 at 489, [1999] 2 AC 22 at 31) that before answering questions about causation it was first necessary to identify the scope of the relevant rule and that this is a question of law, not of common sense fact. But even with this guidance, with which I agree, I find myself back at the same answer. The relevant rule is the duty which the law has imposed on the doctor—the duty to warn. Did the doctor's breach of that duty cause the patient's injury? It would appear that this question can only be answered in the negative. He did nothing which increased the risk to the patient, or even altered it. It was a risk to which she was exposed anyway. It was the same risk, irrespective of when or at whose hands she had the operation.

[85] But the issue of causation cannot be separated from issues about policy. As Hart and Honoré point out in the preface to *Causation in the Law* (2nd edn,

1985) pp xxxiv–xxxv, questions about causation which lie beyond the simple issue as to whether the harm could have occurred in the absence of the wrongful conduct tend to be issues of legal policy in disguise. They are better answered by asking whether, all things considered, the defendant should be held liable for the harm which ensued, or, on another view, whether the harm was foreseeable as within the risk, or was within the scope of the rule violated by the defendant. I would prefer to approach the issue which has arisen here as raising an issue of legal policy which a judge must decide. It is whether, in the unusual circumstances of this case, justice requires the normal approach to causation to be modified.

[86] I start with the proposition that the law which imposed the duty to warn on the doctor has at its heart the right of the patient to make an informed choice as to whether, and if so when and by whom, to be operated on. Patients may have, and are entitled to have, different views about these matters. All sorts of factors may be at work here—the patient's hopes and fears and personal circumstances, the nature of the condition that has to be treated and, above all, the patient's own views about whether the risk is worth running for the benefits that may come if the operation is carried out. For some the choice may be easy—simply to agree to or to decline the operation. But for many the choice will be a difficult one, requiring time to think, to take advice and to weigh up the alternatives. The duty is owed as much to the patient who, if warned, would find the decision difficult as to the patient who would find it simple and could give a clear answer to the doctor one way or the other immediately.

[87] To leave the patient who would find the decision difficult without a remedy, as the normal approach to causation would indicate, would render the duty useless in the cases where it may be needed most. This would discriminate against those who cannot honestly say that they would have declined the operation once and for all if they had been warned. I would find that result unacceptable. The function of the law is to enable rights to be vindicated and to provide remedies when duties have been breached. Unless this is done the duty is a hollow one, stripped of all practical force and devoid of all content. It will have lost its ability to protect the patient and thus to fulfil the only purpose which brought it into existence. On policy grounds therefore I would hold that the test of causation is satisfied in this case. The injury was intimately involved with the duty to warn. The duty was owed by the doctor who performed the surgery that Miss Chester consented to. It was the product of the very risk that she should have been warned about when she gave her consent. So I would hold that it can be regarded as having been caused, in the legal sense, by the breach of that duty.

[88] The reasoning of Kirby J in *Chappel v Hart* [1999] 2 LRC 341 at 380, (1998) 72 ALJR 1344 at 1369 (para 95), which I would respectfully endorse, supports this approach. I am encouraged too by the answer which Professor Honoré gave to the question which he posed for himself in his case note on that case (7 Torts Law Journal 1 at 8): '... is this a case where courts are entitled to see to it that justice is done despite the absence of causal connection?' I would hold that justice requires that Miss Chester be afforded the remedy which she seeks, as the injury which she suffered at the hands of Mr Afshar was within the scope of the very risk which he should have warned her about when he was obtaining her consent to the operation which resulted in that injury.

[89] For these reasons, and those which have been given by my noble and learned friends Lord Steyn and Lord Walker of Gestingthorpe, I would dismiss the appeal.

LORD WALKER OF GESTINGTHORPE.

[90] My Lords, I have had the great advantage of reading in draft the opinions of my noble and learned friends Lord Steyn and Lord Hope of Craighead. I agree with them, and for the reasons which they give I would dismiss this appeal. But because of the general interest and difficulty of the issue of causation that arises in the appeal, and in view of the differences of opinion between your Lordships on that issue, I add some brief comments of my own.

[91] In his opinion (at [51], above) Lord Hope rightly emphasises that the issue of causation cannot be properly addressed without a clear understanding of the scope of the defendant's duty: in this case, the surgeon's duty to warn his patient of the risk, small though it was, of nerve damage occurring during lumbar surgery. This is a point which your Lordships' House has noted in several recent decisions, including *South Australia Asset Management Corp v York Montague Ltd, United Bank of Kuwait plc v Prudential Property Services Ltd, Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* [1996] 3 All ER 365 at 370–371, [1997] AC 191 at 212–213; *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 All ER 481 at 486–489, [1999] 2 AC 22 at 29–32; *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] UKHL 19, [2002] 3 All ER 209 at [69]–[72], [127]–[128], [2002] 2 AC 883 at [69]–[72], [127]–[128].

[92] The surgeon's duty to advise his patient (and in particular, to warn of unavoidable risks of surgery) is a very important part of his professional duty. In *Sidaway v Bethlem Royal Hospital Governors* [1985] 1 All ER 643 at 649, [1985] AC 871 at 882, Lord Scarman described the patient's right to make his own decision as a basic human right. Lord Scarman was delivering a dissenting speech, but the whole House recognised this right (see Lord Diplock ([1985] 1 All ER 643 at 659, [1985] AC 871 at 895), Lord Bridge of Harwich ([1985] 1 All ER 643 at 660, 662–663, [1985] AC 871 at 897, 900) and Lord Templeman ([1985] 1 All ER 643 at 666, [1985] AC 871 at 904)); and during the 20 years which have elapsed since *Sidaway* the importance of personal autonomy has been more and more widely recognised.

[93] The surgeon's duty to advise and warn his patient is closely connected with the need for the patient's consent to submit, under anaesthesia, to invasive surgery which would (in the absence of consent) be an assault. The advice is the foundation of the consent. That is why it is so important. And for that reason I derive very little assistance from analogies based on quite different facts (such as a landowner's duty to warn of the remote risk of a hiker being injured by a landslide or a falling tree). In this case the surgeon failed to warn of the risk of the very calamity which occurred in the course of the operation which he performed three days later. As Kirby J said in *Chappel v Hart* [1999] 2 LRC 341 at 381, (1998) 72 ALJR 1344 at 1370 (para 96):

> 'It is true to say that the inherent risks of injury from rare and random causes arise in every surgical procedure. A patient, duly warned about such risks, must accept them and their consequences. Mrs Hart was ready to accept any general risks of the operation of which she was warned. However, she declined to bear the risks about which she questioned the surgeon and received no adequate response. When those risks so quickly eventuated, common sense suggests that something more than a mere coincidence or irrelevant cause has intervened. This impression is reinforced once it is accepted that Mrs Hart, if warned, would not have undergone the operation when she did.'

[94] If a patient in the position of Miss Chester or Mrs Hart had been injured by some wholly unforeseeable accident of anaesthesia (the scenario suggested by Gummow J in *Chappel v Hart* [1999] 2 LRC 341 at 364, (1998) 72 ALJR 1344 at 1357 (para 66)) or because the operating theatre was struck by lightning (Hayne J's more fanciful scenario: see [1999] 2 LRC 341 at 389, (1998) 72 ALJR 1344 at 1375 (para 129)) the injury could have been described as coincidental in the sense indicated by Mason CJ in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at 516:

> '... a factor which secures the presence of the plaintiff at the place where and at the time when he or she is injured is not causally connected with the injury, unless the risk of the accident occurring at that time was greater ...'

When a traveller was delayed through a railway company's fault and a lamp exploded in the hotel where she was compelled to spend the night (the well-known case of *Central of Georgia Railway Co v Price* (1898) 32 SE 77) that was simply an unfortunate coincidence. Similarly, if a taxi-driver drives too fast and the cab is hit by a falling tree, injuring the passenger, it is sheer coincidence. The driver might equally well have avoided the tree by driving too fast, and the passenger might have been injured if the driver was observing the speed limit. But to my mind the present case does not fall into that category. Bare 'but for' causation is powerfully reinforced by the fact that the misfortune which befell the claimant was the very misfortune which was the focus of the surgeon's duty to warn.

[95] Against this must be set the cogent argument, lucidly developed by McHugh J in his minority judgment in *Chappel v Hart* [1999] 2 LRC 341 at 353, (1998) 72 ALJR 1344 at 1350 (para 27), that the surgeon's failure to warn did not increase the patient's risk :

> 'Before the defendant will be held responsible for the plaintiff's injury, the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury ... In the absence of a statute or undertaking to the contrary, therefore, it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases the risk of injury to another person ... If a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff. That being so, whether the claim is in contract or tort, the fact that the risk eventuated at a particular time or place by reason of the conduct of the defendant does not itself materially contribute to the plaintiff's injury unless the fact of that particular time or place increased the risk of the injury occurring.'

That argument has even more force on the facts of this appeal, since in the Australian case Mrs Hart would have gone to another surgeon, the most experienced who could be found, whereas in this case no one has suggested that Mr Afshar was not a leading expert in this type of surgery.

[96] The judge carefully considered what would have happened if Mr Afshar had given his patient an adequate warning at the consultation held three days

before the operation. The judge made such findings of fact as he could (at [69]) and summarised his limited findings (at [70]):

> 'Accordingly—while it is impossible to say what the probable outcome would have been if the claimant had sought a further opinion or opinions—I think it improbable that any surgery she might eventually have agreed to undergo would have been *identical* in circumstances (including nature of surgery, procedure and surgeon) to the operation she actually underwent on 21 November 1994.'

[97] Was this enough to justify the judge in finding a sufficient causal link between the surgeon's omission to warn and the nerve damage which ensued? My noble and learned friend Lord Hoffmann would reject that view. He puts forward a vivid analogy from roulette. But the 1 in 37 chance of a particular number coming up (assuming the roulette wheel to be properly made and operated) is a matter of simple and precise mathematical calculation. By contrast the chance of nerve damage occurring (without negligence) during lumbar surgery can be calculated only with hindsight, as a more or less accurate approximation, by compiling and analysing statistics as to the outcome of that type of surgery. The risk no doubt varies with the skill and experience of the surgeon, the severity of the patient's condition, and the precise type of surgery undertaken (for instance whether there is an operation on only one disc level, a point on which the judge made a detailed review of the expert evidence). There may be other less easily identifiable factors which also affect the risk.

[98] I would not accept, on the strength of the roulette analogy, that these should be regarded as changing the scenario only in some irrelevant detail. Nor, I suspect, would anyone who was suffering the same pain and distress as Miss Chester was suffering, and who was faced with the same dilemma as she faced (a dilemma which would have been even more anxious if she had been told of the risk of nerve damage). In making a decision which may have a profound effect on her health and well-being a patient is entitled to information and advice about possible alternative or variant treatments.

[99] I accept that (as Kirby J said in *Chappel v Hart* [1999] 2 LRC 341 at 380, (1998) 72 ALJR 1344 at 1369 (para 94)) a surgeon should not be penalised for chance alone. It would be irrational superstition to suppose that Mr Afshar, who had performed hundreds of similar operations without mishap, was somehow fated to meet with cauda equina syndrome ('the terror of neurosurgery' as one of the experts put it) during the operation which he performed on Miss Chester on 21 November 1994; and that a postponement of the operation by a month (or even a day) would somehow have completely averted the risk. It was no more 'in the stars' that it would happen on that particular day than it was 'in the stars' that the delayed vessel in *Associated Portland Cement Manufacturers (1900) Ltd v Houlder Brothers & Co Ltd* (1917) 86 LJKB 1495 would be torpedoed on 26 May 1916, but would not have been torpedoed if making the same voyage two or three days earlier.

[100] That is to my mind a criticism of the reasoning of the Court of Appeal ([2002] EWCA Civ 724, [2002] 3 All ER 552, [2003] QB 356):

> '[40] ... The defendant does change the risk in a material way: he causes the patient to have an operation which she would not otherwise have had then and there and possibly not at all. Logically, the correct comparison of risk is between having that operation on that occasion and not having it.

[41] ... If it is more likely than not that the same damage would not have been suffered, then by causing her to have the operation that day he has caused her to sustain it.'

In this passage the words *'possibly* not at all' (my emphasis) are difficult to reconcile, on normal principles of causation, with the requirement that it is for the claimant to prove her case, including loss caused by the defendant's negligence; and the last sentence quoted seems to stack the odds against the surgeon, since it compares a random misfortune which has actually and unexpectedly occurred with the statistical improbability of its occurring on one particular occasion in the future.

[101] Nevertheless there are real difficulties (especially, perhaps, for a conscientious claimant aware of the fallibility of hindsight) in a claimant asserting that (if warned of the risks) she would never in any circumstances have submitted to surgery. There would be a danger, as Lord Hope points out, of an honest claimant finding herself without a remedy in circumstances where the surgeon has failed in his professional duty, and the claimant has suffered injury directly within the scope and focus of that duty. I agree with Lord Steyn and Lord Hope that such a claimant ought not to be without a remedy, even if it involves some extension of existing principle, as in *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32 (see especially the speech of my noble and learned friend Lord Bingham of Cornhill at [8]–[13]). Otherwise the surgeon's important duty would in many cases be drained of its content.

Appeal dismissed.

Celia Fox Barrister.

Cream Holdings Limited and others v Banerjee and another

[2004] UKHL 44

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD WOOLF, LORD HOFFMANN, LORD SCOTT OF FOSCOTE AND BARONESS HALE OF RICHMOND

14, 15 JUNE, 14 OCTOBER 2004

Injunction – Interlocutory – Principle governing grant – Right to freedom of expression – Application for interim injunction which might affect convention right to freedom of expression – Approach to be adopted – Human Rights Act 1998, s 12(3), Sch 1, Pt I, art 10.

The first defendant, B, was dismissed from her post as financial controller of a company in the claimant group of companies. When she left, B took with her copies of documents which she claimed showed illegal and improper activity by the group. She passed those documents and additional information to the second defendant, a newspaper publisher, which subsequently published two articles about the alleged corruption. The group sought injunctive relief to restrain publication by the publisher of any further confidential information given to it by B. In cases where the grant of relief might affect the exercise of the right to freedom of expression under art 10[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), s 12(3)[b] of the 1998 Act provided that no such relief was to be granted so as to restrain publication before trial unless the court was satisfied that the applicant was 'likely' to establish that publication should not be allowed. The defendants admitted that the information was confidential, but contended that disclosure was in the public interest. At the hearing, the judge held that there were seriously arguable issues both ways as to whether that defence would succeed; that the group had established the necessary likelihood of a permanent injunction for the purposes of s 12(3) because there was 'a real prospect of success'; and that the balance of convenience test favoured the grant of an interim injunction. He accordingly granted an injunction prohibiting the defendants until trial from publishing, disclosing or using specified confidential information. The defendants appealed, contending, inter alia, that the correct test was not 'a real prospect of success' but 'more likely than not'. The Court of Appeal unanimously held that the judge had applied the correct test. The court then declined, by a majority, to interfere with the judge's conclusions on the facts and the exercise of his discretion. Accordingly, the appeal was dismissed. On the defendants' appeal to the House of Lords, their Lordships were required to determine the correct approach to the application of s 12(3).

a Article 10, so far as material, provides: '1. Everyone has the right to freedom of expression. This right shall include freedom ... to receive and impart information ... without interference by public authority ...

2. The exercise of these freedoms ... may be subject to such ... restrictions ... as are prescribed by law and are necessary in a democratic society ... for preventing the disclosure of information received in confidence ...'

b Section 12(3) is set out at [1], below

Held – On the true construction of s 12(3) of the 1998 Act, the court could not make an interim restraint order unless it was satisfied that the applicant's prospects of success at the trial were sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood made the prospects of success 'sufficiently favourable', the general approach should be that courts would be exceedingly slow to make interim restraint orders where the applicant had not satisfied the court that he would probably ('more likely than not') succeed at trial. In general, that should be the threshold an applicant had to cross before the court embarked on exercising its discretion, duly taking into account the relevant jurisprudence on art 10 of the convention and any countervailing convention rights. Nevertheless, there would be cases where it was necessary for a court to depart from that general approach, and a lesser degree of likelihood would suffice as a prerequisite. Circumstances where that might be so included those where the potential adverse consequences of disclosure were particularly grave (eg a grave risk of personal injury to a particular person), or where a short-lived injunction was needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal. Such an approach gave effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression, and at the same time was sufficiently flexible in its application to give effect to countervailing convention rights. In the instant case, the principal happenings that the publisher wished to publish were clearly matters of serious public interest. Since the judge had misdirected himself in a material respect when exercising his discretion and the Court of Appeal had not exercised that discretion afresh, it fell to the House of Lords to do so. Given the public interest mentioned above, the group's prospects of success at trial were not sufficiently likely to justify making an interim restraint order. On the evidence, the group was more likely to fail than succeed at the trial, and it had shown no sufficient reason for departing from the general approach applicable in that circumstance. The judge's injunction would therefore be discharged so far as it related to information already supplied by B to the newspaper, but the defendants were content that it should otherwise remain in force. Accordingly, the appeal would be allowed (see [19], [22]–[25], [27]–[30], below).

Decision of the Court of Appeal [2003] 2 All ER 318 reversed.

Notes

For the grant of relief which might affect the convention right to freedom of expression, see 8(1) *Halsbury's Laws* (4th edn) (2003 reissue) para 418.

For the Human Rights Act 1998, s 12, Sch 1, Pt I, art 10, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 542, 555.

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H (minors) (sexual abuse: standard of proof), Re [1996] 1 All ER 1, [1996] AC 563, [1996] 2 WLR 8, HL.

Harris Simons Construction Ltd, Re [1989] BCLC 202, [1989] 1 WLR 368.

Primlaks (UK) Ltd, Re [1989] BCLC 734.

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A v B (a company) [2002] EWCA Civ 337, [2002] 2 All ER 545, [2003] QB 195, [2002] 3 WLR 542.

A-G v Barker [1990] 3 All ER 257, CA.

A-G v BBC [1980] 3 All ER 161, [1981] AC 303, [1980] 3 WLR 109, HL.

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.

A-G v Newspaper Publishing plc [1987] 3 All ER 276, [1988] Ch 333, [1987] 3 WLR 942, CA.

A-G v Times Newspapers Ltd [1991] 2 All ER 398, [1992] 1 AC 191, [1991] 2 WLR 994, HL.

Ashdown v Telegraph Group Ltd [2001] EWCA Civ 1142, [2001] 4 All ER 666, [2002] Ch 149, [2001] 3 WLR 1368.

Autronic AG v Switzerland (1990) 12 EHRR 485, [1990] ECHR 12726/87, ECt HR.

Black v Sumitomo Corp [2001] EWCA Civ 1819, [2003] 3 All ER 643, [2002] 1 WLR 1562.

Bladet Tromsø v Norway (1999) 6 BHRC 599, ECt HR.

Blyth v Blyth [1966] 1 All ER 524, [1966] AC 643, [1966] 2 WLR 634, HL.

Bonnard v Perryman [1891] 2 Ch 269, [1891–4] All ER Rep 965, CA.

Brabourne (Lord) v Hough [1981] FSR 79.

Broadmoor Special Hospital Authority v Robinson [2000] 2 All ER 727, [2000] QB 775, [2000] 1 WLR 1590, CA.

Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523, CA.

Campbell v Frisbee [2002] EWCA Civ 1374, [2003] IP & T 86, [2003] ICR 141; *rvsg* [2002] EWHC 328 (Ch), [2002] EMLR 656.

Campbell v MGN Ltd [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 WLR 1232; *rvsg* [2002] EWCA Civ 1373, [2003] 1 All ER 224, [2003] QB 633, [2003] 2 WLR 80; *rvsg* [2002] EWHC 499 (QB), [2002] IP & T 612.

Castells v Spain (1992) 14 EHRR 445, [1992] ECHR 11798/85, ECt HR.

Chandler v Buffham [2002] EWHC 1426 (QB).

Douglas v Hello! Ltd [2001] 2 All ER 289, [2001] QB 967, [2001] 2 WLR 992, CA.

Fraser v Evans [1969] 1 All ER 8, [1969] 1 QB 349, [1968] 3 WLR 1172, CA.

Fressoz v France (1999) 5 BHRC 654, ECt HR.

G v G [1985] 2 All ER 225, [1985] 1 WLR 647, HL.

Grobbelaar v News Group Newspapers Ltd [2001] EWCA Civ 33, [2001] 2 All ER 437; *rvsd* [2002] UKHL 40, [2002] 4 All ER 732, [2002] 1 WLR 3024.

Harakas v Baltic Mercantile and Shipping Exchange Ltd [1982] 2 All ER 701, [1982] 1 WLR 958, CA.

Herbage v Pressdram Ltd [1984] 2 All ER 769, [1984] 1 WLR 1160, CA.

Holley v Smyth [1998] 1 All ER 853, [1998] QB 726, [1998] 2 WLR 742, CA.

Hyde Park Residence Ltd v Yelland [2000] IP & T 412, [2001] Ch 143, [2000] 3 WLR 215, CA.

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Kelly v BBC [2001] 1 All ER 323, [2001] Fam 59, [2001] 2 WLR 253.

Khashoggi v IPC Magazines Ltd [1986] 3 All ER 577, [1986] 1 WLR 1412, CA.

Lion Laboratories Ltd v Evans [1984] 2 All ER 417, [1985] QB 526, [1984] 3 WLR 539, CA.

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Malone v Comr of Police of the Metropolis (No 2) [1979] 2 All ER 620, [1979] Ch 344, [1979] 2 WLR 700, DC.

Mills v News Group Newspapers Ltd [2001] EMLR 957.

Minister of Home Affairs v Fisher [1979] 3 All ER 21, [1980] AC 319, [1979] 2 WLR 889, PC.

Niemietz v Germany (1993) 16 EHRR 97, [1992] ECHR 13710/88, ECt HR.

NWL Ltd v Woods, NWL Ltd v Nelson [1979] 3 All ER 614, [1979] ICR 867, [1979] 1 WLR 1294, HL.

Observer v UK (1992) 14 EHRR 153, [1991] ECHR 13585/88, ECt HR.

Peck v UK (2003) 13 BHRC 669, ECt HR.

R v Advertising Standards Authority Ltd, ex p Vernons Organisation Ltd [1993] 2 All ER 202, [1992] 1 WLR 1289.

R v Broadcasting Standards Commission, ex p BBC (Liberty intervening) [2000] 3 All ER 989, [2001] QB 885, [2000] 3 WLR 1327, CA.

R v Central Independent Television plc [1994] 3 All ER 641, [1994] Fam 192, [1994] 3 WLR 20, CA.

R v DPP, ex p Kebeline, R v DPP, ex p Rechachi [1999] 4 All ER 801, [2000] 2 AC 326, [1999] 3 WLR 972, HL.

R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.

S (a child) (identification: restriction on publication), Re [2003] EWCA Civ 963, [2003] 2 FCR 577, [2004] Fam 43, [2003] 3 WLR 1425.

Spencer (Earl) v UK (1998) 25 EHRR CD 105, E Com HR.

Sunday Times v UK (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.

Swain v Hillman [2001] 1 All ER 91, CA.

Theakston v MGN Ltd [2002] EWHC 137 (QB), [2002] EMLR 398.

Three Rivers DC v Bank of England (No 3) [2000] 3 All ER 1, [2003] 2 AC 1, [2000] 2 WLR 1220, HL.

Venables v News Group Newspapers Ltd [2001] 1 All ER 908, [2001] Fam 430, [2001] 2 WLR 1038.

Wainwright v Home Office [2003] UKHL 53, [2003] 4 All ER 969, [2003] 3 WLR 1137.

Woodward v Hutchins [1977] 2 All ER 751, [1977] 1 WLR 760, CA.

Appeal

The defendants, Chumki Banerjee and the Liverpool Daily Post and Echo Ltd, appealed with permission of the Appeal Committee of the House of Lords given on 20 May 2003 from the order of the Court of Appeal (Simon Brown and Arden LJJ, Sedley LJ dissenting) on 13 February 2003 ([2003] EWCA Civ 103, [2003] 2 All ER 318, [2003] Ch 650) dismissing their appeal from the order of Lloyd J on 5 July 2002 prohibiting them until trial from publishing, disclosing or using certain confidential information relating to the claimants, Cream Holdings Ltd, Chadmead Ltd, Cream Liverpool Ltd, CI Events Ltd, Cream Events Ltd, Gridzone Ltd and Harvey Recordings Ltd (the Cream group). The facts are set out in the opinion of Lord Nicholls of Birkenhead.

Richard Spearman QC and *Catrin Evans* (instructed by *Brabners Chaffe Street*, Liverpool) for the defendants.

Edward Bartley Jones QC and *Kelly Pennifer* (instructed by *Wacks Caller*, Manchester) for the Cream group.

Their Lordships took time for consideration.

14 October 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, the Human Rights Act 1998 introduced into the law of this country the concept of convention rights (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act)). Section 12 made special provision regarding one of these rights: the right to freedom of expression. When considering whether to grant relief which, if granted, might affect the exercise of the convention right to freedom of expression the court must have particular regard to the importance of this right: see s 12(4). Additionally, s 12(2) set out a prerequisite to the grant of relief against a person who is neither present nor represented. The court must be satisfied the applicant has taken all practicable steps to notify the respondent or that there are compelling reasons why the respondent should not be notified. Further, s 12(3) imposed a threshold test which has to be satisfied before a court may grant interlocutory injunctive relief:

> 'No such relief [which might affect the exercise of the convention right to freedom of expression] is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.'

[2] On this appeal your Lordships' House is concerned with the meaning and application of the word 'likely' in this provision.

THE FACTUAL CONTEXT

[3] The context in which this question arises on this appeal is as follows. The plaintiffs in this action are the Cream group of companies. These companies began as the Cream nightclub in Liverpool in 1992 and then expanded and diversified their business. They opened other clubs elsewhere and began to stage large events such as dance festivals. Now they also carry on a substantial business franchising their brand name and logo and merchandising clothes and other items. They are an important business in Liverpool featuring both on general news pages and financial pages of newspapers.

[4] The first defendant, Chumki Banerjee, is a chartered accountant. She was the financial controller of one of the companies in the Cream group for three years from February 1998 to January 2001. Before then Ms Banerjee worked for a firm of accountants and was responsible for dealing with the Cream group's financial affairs between 1996 and 1998. The second defendant, which I shall refer to simply as the Echo, is the publisher of Merseyside's two long-established and leading daily newspapers, the Daily Post and the Liverpool Echo.

[5] In January 2001 Cream dismissed Ms Banerjee. When she left she took with her copies of documents she claims show illegal and improper activity by the Cream group. She passed these to the Echo with additional information. She received no payments for this. On 13 and 14 June 2002 the Echo published

articles about alleged corruption involving one director of the Cream group and a local council official. On 18 June 2002 the Cream group sought injunctive relief to restrain publication by the newspaper of any further confidential information given it by Ms Banerjee.

THE PROCEEDINGS

[6] The defendants admitted the information was confidential. Their defence was that disclosure was in the public interest. Lloyd J held there were seriously arguable issues both ways on whether this defence would succeed. Cream had established the 'necessary likelihood' of a permanent injunction for the purposes of s 12(3): 'I do not say it is more likely than not, but there is certainly a real prospect of success.' The balance of convenience test favoured the grant of an interim injunction. Cream were likely to suffer irreparable loss of an unquantifiable nature if the story were published. Restraint of publication would delay the Echo's story but not necessarily preclude its publication altogether. Given the undoubted obligation of confidentiality inherent in Ms Banerjee's employment contract, the disputes of fact on some matters, and the possibility that Ms Banerjee's complaints of defaults by the Cream group might be met adequately by disclosure to certain regulatory authorities as distinct from publication at large by the press, the right course was to freeze the position and direct a speedy trial if desired. On 5 July 2002 Lloyd J granted an interlocutory injunction prohibiting the defendants until trial from publishing, disclosing or using information defined as confidential information in a confidential schedule. In order to prevent the immediate loss of confidentiality Lloyd J set out part of his judgment in a private appendix.

[7] The defendants appealed. The judge, they said, had applied the wrong test under s 12(3), that of a 'real prospect of success' rather than 'more likely than not'. Further, on the basis of his factual conclusions the judge erred in deciding Cream were likely to succeed at the trial.

[8] The Court of Appeal, comprising Simon Brown, Sedley and Arden LJJ, dismissed the appeal: [2003] EWCA Civ 103, [2003] 2 All ER 318, [2003] Ch 650. Sedley LJ dissented. Again, in order to maintain privacy for the information separate confidential judgments were delivered by two members of the court.

[9] All three Lords Justices agreed the judge was correct in his interpretation of 'likely' in s 12(3), although they differed in their reasoning. As to the facts, Simon Brown LJ held the judge was entitled to conclude Cream has a real prospect of success at the trial. The judge was also entitled to decide that in all the circumstances he should exercise his discretion in favour of making an order involving prior restraint. Simon Brown LJ, however, expressed reservations about the latter point. Not every judge would necessarily have reached the same conclusion as Lloyd J, and he himself might well not have done so. Arden LJ was also lukewarm in her view of the judge's decision, noting that in all the circumstances it could not be said to be perverse.

[10] On this point Sedley LJ dissented. Lloyd J erred in his conclusion that there is likely to be no public interest justification for the disclosure of the story which Ms Banerjee gave the Echo and the Echo wishes to publish. The principal matter the Echo wishes to publish is 'incontestably' a matter of serious public interest. The essential story was one which, whatever its source, no court could properly suppress.

[11] Ms Banerjee and the Echo appealed to your Lordships' House, raising arguments along the same lines as those they presented to the Court of Appeal.

SECTION 12(3) AND 'LIKELY'

[12] As with most ordinary English words 'likely' has several different shades of meaning. Its meaning depends upon the context in which it is being used. Even when read in context its meaning is not always precise. It is capable of encompassing different degrees of likelihood, varying from 'more likely than not' to 'may well'. In ordinary usage its meaning is often sought to be clarified by the addition of qualifying epithets as in phrases such as 'very likely' or 'quite likely'. In s 12(3) the context is that of a statutory threshold for the grant of interim relief by a court.

[13] The legal background against which this statutory provision has to be interpreted is familiar. In the 1960s the approach adopted by the courts to the grant of interlocutory injunctions was that the applicant had to establish a prima facie case. He had to establish this before questions of the so-called 'balance of convenience' fell to be considered. A prima facie case was understood, at least in the Chancery Division, as meaning the applicant must establish that as the evidence currently stood on the balance of probability he would succeed at the trial.

[14] The courts were freed from this fetter by the decision of your Lordships' House in *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396. Lord Diplock said ([1975] 1 All ER 504 at 510–511, [1975] AC 396 at 407–408) that the court must be satisfied the claim 'is not frivolous or vexatious; in other words, that there is a serious question to be tried'. But it is no part of the court's function at this stage of litigation to try to resolve conflicts of evidence on affidavit nor to decide difficult questions of law calling for detailed argument and mature consideration. Unless the applicant fails to show he has 'any real prospect of succeeding in his claim for a permanent injunction at the trial', the court should proceed to consider where the balance of convenience lies. As to that, where other factors appear to be evenly balanced 'it is a counsel of prudence' for the court to take 'such measures as are calculated to preserve the status quo'.

[15] When the Human Rights Bill was under consideration by Parliament concern was expressed at the adverse impact the Bill might have on the freedom of the press. Article 8 of the convention, guaranteeing the right to respect for private life, was among the convention rights to which the legislation would give effect. The concern was that, applying the conventional *American Cyanamid* approach, orders imposing prior restraint on newspapers might readily be granted by the courts to preserve the status quo until trial whenever applicants claimed that a threatened publication would infringe their rights under art 8. Section 12(3) was enacted to allay these fears. Its principal purpose was to buttress the protection afforded to freedom of speech at the interlocutory stage. It sought to do so by setting a higher threshold for the grant of interlocutory injunctions against the media than the *American Cyanamid* guideline of a 'serious question to be tried' or a 'real prospect' of success at the trial.

[16] Against this background I turn to consider whether, as the Echo submits, 'likely' in s 12(3) bears the meaning of 'more likely than not' or 'probably'. This would be a higher threshold than that prescribed by the *American Cyanamid* case. That would be consistent with the underlying parliamentary intention of emphasising the importance of freedom of expression. But in common with the views expressed in the Court of Appeal in the present case, I do not think 'likely' can bear this meaning in s 12(3). Section 12(3) applies the 'likely' criterion to all cases of interim prior restraint. It is of general application. So Parliament was painting with a broad brush and setting a general standard. A threshold of 'more

likely than not' in every case would not be workable in practice. It would not be workable in practice because in certain common form situations it would produce results Parliament cannot have intended. It would preclude the court from granting an interim injunction in some circumstances where it is plain injunctive relief should be granted as a temporary measure.

[17] Take a case such as the present: an application is made to the court for an interlocutory injunction to restrain publication of allegedly confidential or private information until trial. The judge needs an opportunity to read and consider the evidence and submissions of both parties. Until then the judge will often not be in a position to decide whether on balance of probability the applicant will succeed in obtaining a permanent injunction at the trial. In the nature of things this will take time, however speedily the proceedings are arranged and conducted. The courts are remarkably adept at hearing urgent applications very speedily, but inevitably there will often be a lapse of some time in resolving such an application, whether measured in hours or longer in a complex case.

[18] What is to happen meanwhile? Confidentiality, once breached, is lost for ever. Parliament cannot have intended that, whatever the circumstances, s 12(3) would preclude a judge from making a restraining order for the period needed for him to form a view on whether on balance of probability the claim would succeed at trial. That would be absurd. In the present case the Echo agreed not to publish any further article pending the hearing of Cream's application for interim relief. But it would be absurd if, had the Echo not done so, the court would have been powerless to preserve the confidentiality of the information until Cream's application had been heard. Similarly, if a judge refuses to grant an interlocutory injunction preserving confidentiality until trial the court ought not to be powerless to grant interim relief pending the hearing of an interlocutory appeal against the judge's order.

[19] The matter goes further than these procedural difficulties. Cases may arise where the adverse consequences of disclosure of information would be extremely serious, such as a grave risk of personal injury to a particular person. Threats may have been made against a person accused or convicted of a crime or a person who gave evidence at a trial. Disclosure of his current whereabouts might have extremely serious consequences. Despite the potential seriousness of the adverse consequences of disclosure, the applicant's claim to confidentiality may be weak. The applicant's case may depend, for instance, on a disputed question of fact on which the applicant has an arguable but distinctly poor case. It would be extraordinary if in such a case the court were compelled to apply a 'probability of success' test and therefore, regardless of the seriousness of the possible adverse consequences, refuse to restrain publication until the disputed issue of fact can be resolved at the trial.

[20] These considerations indicate that 'likely' in s 12(3) cannot have been intended to mean 'more likely than not' in all situations. That, as a test of universal application, would set the degree of likelihood too high. In some cases application of that test would achieve the antithesis of a fair trial. Some flexibility is essential. The intention of Parliament must be taken to be that 'likely' should have an extended meaning which sets as a normal prerequisite to the grant of an injunction before trial a likelihood of success at the trial higher than the commonplace *American Cyanamid* standard of 'real prospect' but permits the court to dispense with this higher standard where particular circumstances make this necessary.

[21] Similar problems have arisen with other statutory provisions imposing a statutory threshold on the grant of relief by a court. Two instances may be mentioned. A prerequisite to making a care order under s 31 of the Children Act 1989 is that the child in question is suffering or 'is likely to suffer' significant harm. Your Lordships' House has held that in this context 'likely' is used in the sense of a real possibility, a possibility that cannot sensibly be ignored having regard to the nature and gravity of the feared harm in the particular case: see *Re H (minors) (sexual abuse: standard of proof)* [1996] 1 All ER 1 at 14–15, [1996] AC 563 at 585. So the degree of likelihood differed according to the circumstances of the case. Again, a prerequisite to making an administration order under s 8(1) of the Insolvency Act 1986 is that the court considers making such an order 'would be likely to achieve' one of the statutory purposes. Following the lead given by Hoffmann J in *Re Harris Simons Construction Ltd* [1989] BCLC 202, [1989] 1 WLR 368, in *Re Primlaks (UK) Ltd* [1989] BCLC 734 at 742 Vinelott J held this required the court to be satisfied there is a 'prospect sufficiently likely in the light of all the other circumstances of the case to justify making the order'.

[22] In my view s 12(3) calls for a similar approach. Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy s 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of s 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on art 10 and any countervailing convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal.

[23] This interpretation achieves the purpose underlying s 12(3). Despite its apparent circularity, this interpretation emphasises the importance of the applicant's prospects of success as a factor to be taken into account when the court is deciding whether to make an interim restraint order. It provides, as is only sensible, that the weight to be given to this factor will depend on the circumstances. By this means the general approach outlined above does not accord inappropriate weight to the convention right of freedom of expression as compared with the right to respect for private life or other convention rights. This approach gives effect to the parliamentary intention that courts should have particular regard to the importance of the right to freedom of expression and at the same time it is sufficiently flexible in its application to give effect to countervailing convention rights. In other words, this interpretation of s 12(3) is convention-compliant.

THE INSTANT APPEAL

[24] In the instant case it is not necessary or helpful to analyse the judge's careful judgment line by line to see whether in substance his interpretation of s 12(3) differed from that set out above. This is so because I am satisfied that in one particular respect the judge fell into error in any event. The error was identified by Sedley LJ and sufficiently explained by him ([2003] 2 All ER 318 at [88], and para [1] of his 'private' judgment. I agree with him that the principal happenings the Echo wishes to publish are clearly matters of serious public interest. The graduated protection afforded to 'whistle blowers' by s 43A–L of the Employment Rights Act 1996, inserted by s 1 of the Public Interest Disclosure Act 1998, does not militate against this appraisal. Authorities such as the Inland Revenue owe duties of confidentiality regarding the affairs of those with whom they are dealing. The 'whistle blower' provisions were intended to give additional protection to employees, not to cut down the circumstances where the public interest may justify private information being published at large.

[25] Since Lloyd J misdirected himself in a material respect when exercising his discretion and the Court of Appeal did not exercise this discretion afresh, it falls to your Lordships' House to do so. I would allow this appeal. Given the public interest mentioned above I am firmly of the view that the Cream group's prospects of success at trial are not sufficiently likely to justify making an interim restraint order in this case. On the evidence the Cream group are more likely to fail than succeed at the trial, and the Cream group have shown no sufficient reason for departing from the general approach applicable in that circumstance. I would discharge the judge's injunction so far as it relates to information already supplied by Ms Banerjee to the Echo. The defendants were content that the injunction should otherwise remain in force.

[26] I recognise that without reference to the content of the confidential information this conclusion is necessarily enigmatic to those who have not read the private judgments of the courts below. But if I were to elaborate I would at once destroy the confidentiality the Cream group are seeking to preserve. Even if the House discharges the restraint order made by the judge, it would not be right for your Lordships to make public the information in question. The contents of your Lordships' speeches should not pre-empt Echo's publication, if that is what the newspaper decides now to do. Nor should these speeches, by themselves placing this information in the public domain, undermine any remedy in damages the Cream group may ultimately be found to have against the Echo or Ms Banerjee in respect of matters the Echo may decide to publish.

LORD WOOLF.

[27] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

LORD HOFFMANN.

[28] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

LORD SCOTT OF FOSCOTE.

[29] My Lords, the issue raised by this appeal, namely, the proper judicial approach to s 12(3) of the Human Rights Act 1998, is one of great importance.

This is particularly so for cases like this in which the disclosure which is sought to be prevented is, if the information in question is true, disclosure of iniquity by any standards. I have, however, had the advantage of reading in advance the opinion of my noble and learned friend Lord Nicholls of Birkenhead and am in complete agreement with the guidance he has given in [22], above, and with the reasons he has given for concluding that this appeal should be allowed. I, too, would make the order he has suggested.

BARONESS HALE OF RICHMOND.

[30] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Nicholls of Birkenhead. For the reasons he gives, with which I agree, I would allow this appeal.

Appeal allowed.

Dilys Tausz Barrister.

A v Head Teacher and Governors of Lord Grey School

[2004] EWCA Civ 382

COURT OF APPEAL, CIVIL DIVISION

DAME ELIZABETH BUTLER-SLOSS P, CLARKE AND SEDLEY LJJ

19 FEBRUARY, 29 MARCH 2004

Education – Pupil – Exclusion – Permanent exclusion of child of compulsory school age from school – Whether breach of right to education – Human Rights Act 1998, Sch 1, Pt II, art 2.

The claimant, a child of compulsory school age, was one of the pupils suspected of being responsible for a fire deliberately started at his school on 8 March 2001. The head teacher decided that the children should stay away from school until it was known what the police were going to do. However she did not notify the claimant's parents in writing that the claimant was being excluded until the end of term, which was 5 April, until 21 March (the end of the first phase of exclusion). On 29 March the claimant was charged with arson. On 25 April the school wrote again to the claimant's parents, further excluding him until the day after his SATS examinations ended on 14 May (the end of the second phase). During the whole of this time the claimant was provided with self-assessed revision work and he was permitted to sit his SATS examinations at the school. The claimant was excluded for a further period until 15 June, and the school's letter stated that work would continue to be set for him, although his parents did not make contact with the school to arrange it. None of the school's letters had given the legally requisite information about the right to make representations to the school's governing body. The maximum period of 45 days for a fixed term exclusion expired on 6 June (the end of the third phase of exclusion). The school referred the claimant to the local education authority which, under the Education Act 1996, had a general responsibility for the education of children of compulsory school age and a duty to make arrangements for the provision of suitable education for such children who by reason of exclusion from school would not receive such education. On 19 June the proceedings before the magistrates were discontinued for want of sufficient evidence. The claimant went to the school to ask for his reinstatement, which the head teacher said would be arranged as soon as she had confirmation of the court's decision. After receiving that in late June she wrote to the claimant's parents setting up a 'reintegration' meeting on 13 July (the end of the fourth phase). The claimant and his family did not attend that meeting. The head teacher wrote to them stating that the claimant was being removed from the school roll. His name was actually removed, unlawfully, in mid-October (the end of the fifth phase of exclusion). Although the head teacher had duly notified the governing body of the exclusion, the governors did not consider reinstating the claimant, as they were required to do by the Schools Standards and Framework Act 1998. The local education authority set about trying to get the claimant back into formal education. The claimant's parents requested his reinstatement at the school. The school refused. On 21 January 2002 he was enrolled at another school (the end of the sixth phase). The claimant

brought proceedings against the school seeking damages for the breach of his right to education under art 2[a] of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). The judge held that the claimant's exclusion for the first four phases had been unlawful, but sensible and reasonable, and not therefore in breach of art 2; that his exclusion thereafter and his removal from the roll had been unlawful and unreasonable; but that the local education authority had taken up its responsibility for his education, and he was not entitled to damages from the school. The claimant appealed, submitting, inter alia, that the right to education was not fixed but took the form of the provision made by each member state, and that his unlawful exclusion had brought about a direct denial of access to the education provided for in the law of England and Wales. The school contended, inter alia, that from the moment of exclusion the 1996 Act had transferred responsibility for the claimant's education from the school to the local education authority.

Held – (1) The head teacher and the governing body bore the primary duty to educate a child who had been accepted in their school, and as, a corollary, not to exclude him except as authorised by law. The school was not relieved of its obligations or of the legal consequences of failing to discharge them by the existence of the local education authority's fallback duty, together with the claimant's right to seek to enforce it (see [68], below).

(2) The principle that, subject to the convention's own limits, the right to education took the form prescribed in each member state carried the necessary corollary that any question whether there had been a violation of the right had to be answered initially in terms of the applicable domestic law. If a breach of domestic law were found it remained to be decided whether it had resulted in a denial of the convention right and, broadly, there would be such a denial where the breach of domestic law had resulted in a pupil being unable to avail him or herself of the means of education which presently existed in England and Wales by being shut out for a significant or an indefinite period from access to such education as the law provided for him or her. In the instant case the first phase of unlawful exclusion was of such a character as to amount on the face of it to a denial of the right to education because it purported to be indefinite. In the second phase, the illegality attending the exclusion of the claimant, once the head teacher had formally excluded him for a finite period, was the failure to involve the governing body. Excluding a pupil at a time when, and in circumstances in which, temporary exclusion was both lawful and factually permissible, but going about it otherwise than in accordance with the law was a denial of the pupil's right to education only if no worthwhile substitute was meanwhile put in place. By being given self-assessing work in preparation for the SATS examinations during those two phases the claimant was afforded sufficient access to education to answer his convention claim. On the same basis, the third phase, when the school offered to provide the claimant with work, but that offer was not taken up, did not involve a breach of his convention right. However, once the permitted period of temporary exclusion had expired the claimant's continued exclusion had been incontestably unlawful, not in the sense that it had been imposed in proper circumstances though in improper form, but in the sense that it had been done in defiance of a clear statutory prohibition and was a legal nullity. In those

a Article 2 is set out at [35], below

circumstances, the same approach taken as to the first three phases, that the quality of a breach of the law could not be divorced from its sequel, so that the provision or offer of homework was material, did not produce the same answer. It offended good sense and justice to hold that to exclude a pupil otherwise than permanently from the school at which he was enrolled, when to do so was prohibited by law, and when it had become apparent that there was no factual basis for doing so, was not a denial of his right to education so long as substitute homework was offered to him. Accordingly, in the fourth phase of exclusion, the claimant's right to education had been denied, notwithstanding that the school was still offering to provide him with substitute work to do at home. The final two phases had been a further denial of his convention right and had not been terminated by the deletion of the claimant's name from the school roll because there had been no lawful ground for deletion. The appeal would accordingly be allowed in relation to the three phases of exclusion from 7 June 2001 to 20 January 2002 (see [45], [47], [48], [50]–[52], [55]–[58], [60], [61], [64], [69]–[71], below).

Decision of Stanley Burnton J [2003] 4 All ER 1317 affirmed in part, on different grounds.

Notes

For the right to education, see 8(2) *Halsbury's Laws* (4th edn reissue) para 166.

For the Human Rights Act 1998, Sch 1, Pt II, art 2, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 536.

Cases referred to in judgments

Anufrijeva v Southwark London BC, R (on the application of N) v Secretary of State for the Home Dept, R (on the application of M) v Secretary of State for the Home Dept [2003] EWCA Civ 1406, [2004] 1 All ER 833, [2004] 2 WLR 603.

Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank [2003] UKHL 37, [2003] 3 All ER 1213, [2003] 3 WLR 283.

Belgian Linguistic Case (No 2) (1968) 1 EHRR 252, [1968] ECHR 1474/62, ECt HR.

Campbell v UK (1982) 4 EHRR 293, [1982] ECHR 7511/76, ECt HR.

R (on the application of L) v Governors of J School [2003] UKHL 9, [2003] 1 All ER 1012, [2003] 2 AC 633, [2003] 2 WLR 518.

Sulak v Turkey (1996) 84–A DR 98, E Com HR.

Whitman v UK App No 13477/87 (4 October 1989, unreported), E Com HR.

Yanasik v Turkey (1993) 74 DR 14, E Com HR.

Appeal

The claimant, A, a child of compulsory school age, appealed with permission of Sedley LJ, from the decision of Stanley Burnton J on 27 June 2002 ([2003] EWHC 1533 (QB), [2003] 4 All ER 1317) dismissing his claim for damages for breach of his right to education under art 2 of Pt II of Sch 1 to the Human Rights Act 1988, against the respondents, the head teacher and governors of the Lord Grey School, Milton Keynes, arising from his exclusion from the school following a fire on 8 March 2001. The facts are set out in the judgment of Sedley LJ.

Cherie Booth QC and *Carolyn Hamilton* (instructed by the *Children's Legal Centre*, Colchester) for the claimant.

Jonathan Moffett (instructed by *Alexander Jack*, Bracknell) for the respondents.

Cur adv vult

29 March 2004. The following judgments were delivered.

SEDLEY LJ (giving the first judgment at the invitation of Dame Elizabeth Butler-Sloss P).

THE ISSUE

[1] If a state school unlawfully excludes a pupil who is on its roll, or excludes a pupil who has been unlawfully removed from its roll, has it violated his right to education under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998); and if it has, are the head teacher and governing body liable under the 1998 Act to pay him damages?

[2] School exclusions are a serious matter. A disturbingly high proportion of the prison population has begun by being excluded from school. But a refractory pupil can disrupt the education of others and make teachers' work impossible. Legislation, guidance and case law have sought in recent years to keep a workable balance between justice to pupils in trouble and justice to the school as a functioning unit. That is one aspect of the present case.

THE STRUCTURE OF STATE EDUCATION

[3] The other aspect is that, while it is the state which both domestically and internationally bears the obligation to provide universal education, the law of England and Wales does not know the state as a legal entity. Centrally, the core functions of the state are performed by individuals in the name of the Crown, which since the Crown Proceedings Act 1947 has been able to be sued (as it always could be in Scotland) as if it were a legal person. Locally, the functions of the state have for centuries been discharged by a variety of corporations or boards, local authorities prominent among them. Other layers (agencies, quangos, trusts) now complicate the pattern but do not matter to the present case.

[4] It is the central state which by longstanding policy and more recently by international obligation has undertaken the provision of education. Today, s 10 of the Education Act 1996 places on the Secretary of State the general duty of promoting the education of the people of England and Wales. For largely historical reasons the obligation has, since the Education Act 1944, been discharged through local authorities; but in more recent years many of the educational powers and duties of local authorities have been transferred to schools in the interests of greater local autonomy.

[5] The state school, however, is neither an emanation of the Crown nor ordinarily a corporate entity. It is described in the 1996 Act as an educational institution (see s 4(1)) but as an institution it has no legal personality. In the case of a community school, a voluntary controlled school or a community special school, its teachers, including the head teacher, are employed and dismissable by the local education authority, which (being by s 12 a designated local authority) does have corporate status.

THE LOCAL EDUCATION AUTHORITY'S DUTIES

[6] Sections 13–18 spell out the functions of local education authorities in providing nursery, primary and secondary education for their areas, including a

duty to ensure that the areas contain sufficient schools of appropriate kinds (see s 14). Relevantly to the present case, s 19(1) as amended provides:

> 'Each local education authority shall make arrangements for the provision of suitable ... education at school or otherwise than at school for those children of compulsory school age who, by reason of illness, exclusion from school or otherwise, may not for any period receive suitable education unless such arrangements are made for them.'

In other words, it is the local education authority's obligation to ensure that no child falls out of the education system, even if excluded from school. The content of this duty is amplified by the provision of sub-s (5) that any such child continues to be a pupil for all statutory purposes; by the provision of sub-s (6) that 'suitable education' means efficient education suitable to the pupil's age, ability and aptitude; by Department for Education and Employment (DfEE) Circular 11/99 ('Social Inclusion: The LEA Role in Pupil Support') which requires local education authorities to ensure that temporarily excluded pupils are reintegrated where possible and educated meanwhile; and by DfEE Circular 10/99 ('Social Inclusion: Pupil Support'), which reminds the local education authority that the obligation to provide for the education of permanently excluded pupils reverts to them.

THE SCHOOL'S DUTIES

[7] The school of which the present respondents are respectively the head teacher and the governing body is a foundation school, one of the five types of maintained school now contained within the state system (see s 20 of the School Standards and Framework Act 1998). The duty to maintain the school rests on the local education authority (see s 22). By s 36 every maintained school is to have a governing body, to which the section accords corporate status and which is made responsible for the conduct of the school (see s 38) and its budget (see ss 49, 50).

[8] The legislation does not create the office of head teacher: it assumes its existence. Thus s 61(1) requires the governing body to ensure that policies designed to promote good behaviour and discipline are pursued at the school, and sub-ss (4) and (6) allocate to the head teacher the making and implementation of rules to implement the governors' policies. This division of responsibility is elaborated in paras 4 and 5 of the Education (School Government) (Terms of Reference) (England) Regulations 2000, SI 2000/2122 which give the governing body 'a largely strategic role' and make the head teacher responsible for 'the internal organisation, management and control of the school'. By s 579(1) of the 1996 Act 'head teacher' includes an acting head teacher.

[9] By s 68 of the School Standards and Framework Act 1998 (repealed as from 20 January 2003), both the head teacher and the governing body of a maintained school were required, in discharging their functions in relation to the exclusion of pupils, to have regard to any guidance given by the Secretary of State. In the present case this includes the two circulars referred to at [6], above. The detail of the school's disciplinary powers and related functions is spelt out in the provisions set out later in this judgment.

EVENTS

a **[10]** The careful judgment of Stanley Burnton J ([2003] EWHC 1533 (QB), [2003] 4 All ER 1317) makes it possible to set out the material facts shortly for present purposes.

[11] Lord Grey School is a larger-than-average comprehensive school specialising in modern languages. Its head teacher is Ms Despina Pavlou. The b local education authority is Milton Keynes council.

[12] A was born on 21 April 1987 and so was 14 on 8 March 2001 when a fire was deliberately started in a room during the lunch hour. A, who admitted being present, was among the three pupils suspected of being responsible for it and excluded without any term being set. On 29 March they were all charged with arson. On 19 June the proceedings before the magistrates were discontinued for c want of sufficient evidence.

[13] The head teacher, who had been away on the date of the fire, had next day indorsed the deputy head's decision that the boys should stay away from school until it was known what the police were going to do. It was, however, not until 21 March that she wrote to A's parents to notify them that she was excluding d A until the end of term, 5 April. Then on 25 April the deputy head wrote to A's parents, further excluding him until 15 May (the day after his standard assessment tasks (SATs) examinations). The letters did not give the legally requisite information about the right of access to the governing body.

[14] During the whole of this time self-assessed revision work in English, mathematics and science was provided for A to do at home, and he was permitted e to return to school between 8 and 14 May to sit the examinations (which he passed), but for no other purpose.

[15] On 4 May the school completed a form referring A to the local education authority, giving the date of referral as 25 May. The entry on the form explained that a court appearance was pending, and continued:

f > 'Referral to Access Panel is requested as the Headteacher is not willing to negotiate transfer to another school at this stage given the circumstances and severity of the incident. If A is deemed to be innocent then the Headteacher will be willing to negotiate reintegration at that stage.'

g **[16]** On 25 May the school wrote to A's parents to say that he was excluded for a further 20 days as from 14 May—that is, counting only school days, until 15 June. The letter went on: 'We will continue to set work as appropriate and would ask that you make contact with the school to arrange to collect it.' This, evidently, did not happen. Again, proper information about access to the governing body was not given.

h **[17]** The legal maximum period of 45 days for a fixed-term exclusion expired on 6 June. On that date the school sent the referral form to the local education authority. An accompanying letter said that the head teacher would prefer the boys to be referred to the access panel rather than to other schools, and that the school would be happy to discuss reintegration once the court case was over.

j **[18]** On 19 June, when the proceedings were discontinued, A and his brother went from the magistrates' court to the school to ask for his reinstatement. The head teacher said that she would arrange it as soon as she had written confirmation of the court's decision. When at the end of June she received official notification that the proceedings had been discontinued, she wrote to A's parents convening a 'reintegration' meeting for 13 July. Neither A nor his family attended. The judge, deciding a heavily contested evidential issue in favour of the

defendants, concluded that it was because A and his family had chosen to stay away from the meeting.

[19] Later on 13 July the head teacher wrote a letter which began: 'Following your failure to appear at the meeting organised this morning ... I am removing A from our school roll ...' The judge was understandably sceptical of the explanation that the letter was designed to precipitate A's return to the school. It was copied to the governors, but they took no action on it. A, however, was not removed from the school roll until an uncertain date after 7 September (counsel for the respondents tells us that it can be located in mid-October but that no precise date can be found).

[20] It was not until 6 November that A's father wrote asking for him to be reinstated. The school refused. In January 2002 he was enrolled at another secondary school, where at the time of the Queen's Bench hearing he was due to sit 10 or 11 GCSE subjects. It followed, as the judge found, that A was without schooling from 8 March 2001 to 21 January 2002.

[21] The local education authority's access panel had met on 19 June 2001, not knowing that the proceedings were being discontinued, and had recommended recourse to a pupil referral unit pending a resolution. At the end of September, when A was evidently still on the roll of the Lord Grey School, the local education authority's education welfare service completed a notification of absence, giving A's school as 'None / Ex-Lord Grey'. A week later the local education authority wrote to the head teacher: 'We understand that A is still in Bangladesh so a place is not required for him at present.' This was simply wrong. From the third week of October the local education authority set seriously about trying to get A back into formal education. The family made it clear that they wanted A to return to the Lord Grey School, but an internal memorandum written by the head teacher on 6 November says: 'No! ... there is no way he is coming back.'

[22] Although the head teacher had duly notified the governing body of the exclusion, at no stage did the governors consider reinstating A as they were required by law to do. It was not until 21 January 2002 that A was able to start in a new school. There, we understand, he is doing well and will be sitting A levels.

[23] It will be convenient to consider the legal consequences of this sequence of events in the following phases:

Phase 1: 9 March (informal exclusion) to 21 March 2001 (formal exclusion).
Phase 2: 22 March to 14 May (end of SATs).
Phase 3: 15 May to 6 June (end of the 45-day period).
Phase 4: 7 June to 13 July (meeting at school).
Phase 5: 14 July to mid-October (removal from school roll).
Phase 6: mid-October 2001 to 21 January 2002 (enrolment at new school).

THE PROCEEDINGS

[24] The action was brought on A's behalf by the Children's Legal Centre, to which the Citizens' Advice Bureau had wisely referred the family. It was brought in the county court, claiming damages for the unlawful exclusion of A and his unlawful removal from the school roll, resulting in the denial of his right to education under the 1998 Act and convention. The defendants were the present respondents. The local education authority was not joined by either party.

[25] Following transfer to the High Court, the action came on before Stanley Burnton J on liability alone. He held: (a) that the initial exclusion was unlawful, having been neither permanent nor for a fixed period: 'An indefinite temporary exclusion is not known to the law' (see [2003] 4 All ER 1317 at [93]); (b) that while

the fixed periods of exclusion which followed from 21 March to 13 July had been reasonable in the prevailing circumstances, there had been a failure to notify A or his parents of the right to make representations about his exclusion to the governing body and the way to do it; (c) that the governors, who had been duly notified of the exclusion, had failed in their independent duty to consider the exclusion at (if requested) an oral hearing and in any event to consider reinstating A; (d) that the exclusion had become unlawful at the expiry of 45 days on 6 June in the absence of any lawful decision from that point either to exclude A for good or to permit him to return; (e) that the continuing exclusion of A after 13 July was neither lawful nor reasonable; (f) that his eventual removal from the school roll was unlawful because of the failure to make reasonable inquiry to locate A before deciding to remove him.

[26] The judge said (at [106]):

> 'These failures of the school and the local education authority to observe the requirements of the relevant statutes and regulations disclose a regrettable ignorance of those requirements. They could and should have been challenged at the time.'

[27] The judge's ultimate decision, however, was that in respect of both main periods of exclusion the claim for damages failed. Early in his judgment he ruled out arts 6 and 14 of the convention, leaving art 2 of the First Protocol as the sole convention right in play.

[28] In relation to A's exclusion up to and including 13 July he found that—

> 'apart from the failure to comply with its statutory obligations, the school's decision to exclude the claimant until the termination of the prosecution and then until a reintegration meeting could be held was sensible and reasonable, and in my judgment does not give rise to liability for breach of art 2 of the First Protocol.'

[29] In relation to the second period, from 13 July, he held:

> '[107] ... In the circumstances, the only defence to the claim for damages for breach of art 2 of the First Protocol is that appropriate educational facilities were none the less available to the claimant but that either he chose not to avail himself of them or that the responsibility for the missed period of education was that of the local education authority.
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> [108] The local education authority had undertaken responsibility for the claimant's education as a result of his exclusion. That responsibility arose under s 19(1) of the 1996 Act. It may be that the words "by reason of ... exclusion from school" should be read as referring to a lawful exclusion (although this would be contrary to the general rule that an unlawful administrative action is valid and effective unless and until it is quashed), but if so an unlawful exclusion is in my judgment within the expression "or otherwise". The local education authority did not provide tuition for the claimant because, as I have found, the family declined the offer of tuition. It follows that the school was not the cause of the claimant's lack of suitable education between 13 July and the end of the summer term.
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> [109] The cause of the claimant's lack of schooling or education during the autumn of 2001 is more complex to ascertain. There is no explanation for the family's failure to contact Mr Read or Ms Gurney [of the local education authority], who were referred to in Ms Pavlou's letter of 13 July, until

October 2001. In addition, I find that until early November 2001 he and his family were uncertain whether they wanted him to return to the Lord Grey School (see eg Mr Read's letter of 22 October). If that uncertainty was the result of the school's unreasonable or unlawful actions, it might be responsible for it. However, I have no evidence from the family as to whether it was caused by, for example, Ms Pavlou's letter of 13 July, or resulted from the fact that the claimant had been accused of involvement in arson. B's [A's brother's] evidence, that at the meeting with Mr Read the family expressed their wish that A should return to the Lord Grey School, is inconsistent with Mr Read's letter and his evidence, and I reject it.

[110] Furthermore, nothing had occurred to bring to an end the local education authority's responsibility for the claimant's education under s 19(1). Although Mr Read said that he was unaware, during the autumn of 2001, that the claimant was out of school, he and Ms Gurney and Ms Barby had all been copied into the letter of 13 July, from which it was apparent that he had not returned to The Lord Grey School, so that the section applied. It was the local education authority's responsibility to provide suitable education for him.

[111] It follows that there were educational facilities available to the claimant. The evidence, which consists only of the cross-examination of Mr Read, does not justify a finding that if the claimant had sought access to the tuition services of the Manor Road pupil referral unit, they would have been inadequate. Moreover, it must be the case that if the family had made contact with Mr Read (or, presumably, Ms Gurney) soon after receipt of Ms Pavlou's letter of 13 July, the claimant would have been admitted to another school much earlier, and possibly in time for the beginning of the autumn term.

[112] In these circumstances, the claimant has not proved that his lack of schooling in the autumn, prior to his father's letter of 6 November 2001, was caused by the school.

[113] After the school had refused to permit the claimant to return, on the ground that its roll was full, it continued to be the responsibility of the local education authority (who were notified of the refusal by copy of the letter of 14 November 2001) to provide tuition pending the claimant's admission to an alternative school.

[114] It follows that, although the decisions to exclude the claimant and to remove him from the roll were unlawful, and could have been challenged by judicial review, they did not give rise to a liability in damages for breach of his rights under art 2 of the First Protocol.'

THIS APPEAL

[30] The judge refused permission to appeal, taking the view that while significant issues of law were raised by the case, the factual complications were such that it was this court which should decide whether it was apt for appeal. On a reading of the papers when application was made to this court, it appeared to me that even if the contested factual issues and their immediate legal consequences were kept where the judge had left them there remained triable and important questions of law. These, however, needed to be specifically addressed, and I asked for a fresh skeleton argument from the claimant and a response from the defendants showing cause why permission to appeal on these questions should not be granted. Having considered the helpful submissions

which came in response, I granted permission to appeal on the issue whether the failure to readmit A to the school when he was still on its roll and no longer excluded was a violation of a convention right in the precise form afforded by domestic law, and if so, whether it sounded in damages.

[31] No notice was given of intention to renew any other aspect of the permission application. No cross-appeal was intimated on the judge's conclusions of law in so far as they were against the respondents. But on reconsideration it was evident from what is set out earlier in this judgment that the issues of law arising from the decision below could not properly be limited to the issue set out in my grant of permission. The parties were accordingly told three days before this hearing that the court wished to hear argument on the human rights issues arising out of each of the situations considered by the judge from 8 March 2001 to 21 January 2002. All of these had in fact been addressed in the skeleton arguments which preceded my grant of permission to appeal.

[32] In granting permission to appeal I directed that the local education authority be given notice of the appeal. This has been done, and they have elected to take no part. The defendants, however, have served a respondent's notice asserting, in short, that any obligation of which the state may have been in breach rested not on the school but (in particular by virtue of s 19 of the 1996 Act) on the local education authority.

[33] The questions on which the parties have been asked to address the court are these. (A) Is A entitled to damages under s 8 of the Human Rights Act 1998 for: (i) having been reasonably but unlawfully excluded from the school between 8 March and 13 July 2001; (ii) having been unreasonably and unlawfully excluded from the school from 14 July 2001 to 20 January 2002; or (iii) having been excluded from the school until mid-October 2001 when he was removed, albeit unlawfully, from the school roll? (B) If the answer to any of the above is positive, against whom does the claim lie? In particular, is the allocation of liability affected by A's removal from the school roll and, if so, what is the effect of its having been done unlawfully?

ABSENCE AND EXCLUSION FROM SCHOOL

[34] The law and guidance governing school exclusions at the material time, within the statutory framework set out above, can be taken directly from Stanley Burnton J's survey of it ([2003] 4 All ER 1317).

> '[57] Parents of children of compulsory school age are under a duty to secure their suitable and efficient full-time education either by regular attendance at school or otherwise (see s 7 [of the 1996 Act]). If he is a registered pupil at a school, it is their duty to cause him to attend regularly (see s 444(1)). However, by s 444(3), a child shall not be taken to have failed to attend regularly by reason of his absence from the school "(a) with leave, (b) at any time when he was prevented from attending by reasons of sickness or any unavoidable cause ..."
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> [58] Leave of absence is the subject of the Education (Pupil Registration) Regulations 1995, SI 1995/2089. Regulation 7 relates to the keeping of an attendance register, in which must be recorded the presence or absence of every pupil, and in the case of an absence, whether or not it is authorised. In the case of a pupil who is not a boarder, reg 7(3) provides that an absence is to be treated as authorised for the purposes of that regulation if "(a) he has

been granted leave of absence in accordance with regulation 8; (b) he is unable to attend—(i) by reason of sickness or any unavoidable cause ..." a

[59] Regulation 8 provides that leave of absence may only be granted by a person authorised on their behalf by the proprietor of the school. In the present case, the proprietors were the school governors; the person who was authorised to give leave of absence was the head teacher. There are restrictions on the granting of leave of absence for the purposes of enabling b a pupil to undertake employment, or to go away on holiday, but otherwise the purpose of leave of absence is unspecified.

[60] Removal from the school roll (ie deletion from the admission register of the school) is the subject of reg 9. It prescribes the grounds on which the name of a pupil of compulsory school age must be deleted from the c admission register. The only relevant sub-paragraph of reg 9(1) is (g): "that [the pupil] has been continuously absent from school for a period of not less than four weeks and both the proprietor of the school and the local education authority have failed, after reasonable enquiry, to locate the pupil ..." In addition, sub-para (k) requires the deletion of a pupil from the admission register "where the pupil is registered at a maintained school, that d he has been permanently excluded from the school ..." However, sub-para (k) is subject to reg 9(4)(d): "the permanent exclusion of a pupil does not take effect until the governing body have discharged their duties under section 66 of the (School Standards and Framework Act 1998), and—(i) the relevant person has stated in writing that he or she does not e intend to bring an appeal under section 67 of the 1998 Act; (ii) the time for bringing an appeal has expired and no appeal has been brought within that time; or (iii) an appeal brought within that time has been determined or abandoned."

[61] Regulation 13 requires the proprietor of every school maintained by a local education authority to make a return to the local education authority f of pupil absences other than absences due to sickness or leave of absence granted by the school in accordance with reg 8. Lastly, reg 14 requires entries on an admission register or attendance register to be written in ink and so that any corrections are apparent.

[62] The division of responsibility between the governors of a school and g the head teacher is the subject of the Education (School Government) (Terms of Reference) (England) Regulations 2000, SI 2000/2122. As might be expected, they prescribe: "**4.**—(1) The governing body shall exercise their functions with the view to fulfilling a largely strategic role in the running of the school." On the other hand: "**5.**—(1) The head teacher shall h be responsible for the internal organisation, management and control of the school, and the implementation of the strategic framework established by the governing body."

[63] The exclusion of pupils is the subject of ss 64–68 of the School Standards and Framework Act 1998:

"**64.** *Power of head teacher to exclude pupils.*—(1) The head teacher of a j maintained school may exclude a pupil from the school for a fixed period or permanently.

(2) The head teacher may not exercise the power to exclude a pupil from the school for one or more fixed periods such that the pupil is so excluded for more than 45 school days in any one school year.

(3) A pupil may not be excluded from a maintained school (whether by suspension, expulsion or otherwise) except by the head teacher in accordance with this section.

(4) In this Act 'exclude', in relation to the exclusion of a child from a school, means exclude on disciplinary grounds (and 'exclusion' shall be construed accordingly).

65. *Exclusion of pupils: duty to inform parents, etc.*—(1) Where the head teacher of a maintained school excludes any pupil, the head teacher shall (without delay) take reasonable steps to inform the relevant person of the following matters—(a) the period of the exclusion (or, if the pupil is being permanently excluded, that he is being so excluded); (b) the reasons for the exclusion; (c) that he may make representations about the exclusion to the governing body, and (d) the means by which such representations may be made.

(2) Where the head teacher decides that any exclusion of a pupil for a fixed period should be made permanent, he shall (without delay) take reasonable steps to inform the relevant person of—(a) his decision, and (b) the matters specified in paragraphs (b) to (d) of subsection (1).

(3) Subsection (4) applies where the head teacher—(a) excludes any pupil in circumstances where the pupil would, as a result of the exclusion—(i) be excluded from the school for a total of more than five school days in any one term, or (ii) lose an opportunity to take any public examination, (b) excludes a pupil permanently, or (c) decides that any exclusion of a pupil should be made permanent.

(4) Where this subsection applies, the head teacher shall (without delay) inform the local education authority and the governing body of the following matters—(a) the period of the exclusion (or, if the pupil is being permanently excluded, that he is being so excluded), or (b) his decision that any exclusion of a pupil for a fixed period should be made permanent, and (in either case) of the reasons for it.

(5) In this section and in sections 66 and 67 'the relevant person' means—(a) in relation to a pupil under the age of 18, a parent of his; (b) in relation to a pupil who has attained that age, the pupil himself.

(6) Where regulations under paragraph 4 of Schedule 11 require the governing body of a maintained school to establish a discipline committee, references in this section and sections 66 to 68 to the governing body of such a school shall be construed as references to their discipline committee.

66. *Functions of governing body in relation to excluded pupils.*—(1) Subsections (2) to (6) apply where the governing body of a maintained school are informed under section 65(4) of any exclusion or decision to which that provision applies.

(2) The governing body shall in any such case—(a) consider the circumstances in which the pupil was excluded; (b) consider any representations about the exclusion made to the governing body—(i) by the relevant person in pursuance of section 65(1)(c) or (2)(b), or (ii) by the local education authority; (c) allow each of the following, namely—(i) the relevant person, and (ii) an officer of the local education authority nominated by the authority, to attend a meeting of the governing body and to make oral representations about the exclusion; and (d) consider any oral representations so made.

(3) In a case where it would be practical for the governing body to give a direction to the head teacher requiring the reinstatement of a pupil, they shall in addition consider whether he should be reinstated immediately, reinstated by a particular date or not reinstated.

(4) If the governing body decide that the pupil should be reinstated, they shall forthwith—(a) give the appropriate direction to the head teacher, and (b) inform the relevant person and the local education authority of their decision.

(5) The head teacher shall comply with any direction of the governing body for the reinstatement of a pupil who has been excluded from the school.

(6) If the governing body decide that the pupil should not be reinstated, they shall forthwith—(a) inform the relevant person, the head teacher and the local education authority of their decision, and (b) in addition in the case of a pupil who is permanently excluded, give the relevant person notice in writing referring to that decision and stating the following matters—(i) the reasons for the decision, (ii) his right to appeal against the decision, (iii) the person to whom he should give any notice of appeal, (iv) that any notice of appeal must contain the grounds of appeal, and (v) the last date on which an appeal may be made.

(7) Where—(a) the head teacher of a maintained school excludes a pupil otherwise than as mentioned in section 65(3), and (b) the governing body receive any representations made in pursuance of section 65(1)(c) or (2)(b) by the relevant person about the exclusion, they shall consider those representations.

(8) Regulations may provide that, where a governing body of a maintained school are required under this section to take any step, the duty must, subject to such exceptions as may be prescribed, be performed within the prescribed period; but such a provision shall not relieve the governing body of the duty to take any step which has not been taken within that period.

67. *Appeals against exclusion of pupils.*—(1) A local education authority shall make arrangements for enabling the relevant person to appeal against any decision of the governing body under section 66 not to reinstate a pupil who has been permanently excluded from a school maintained by the authority.

(2) Schedule 18 has effect in relation to the making and hearing of appeals pursuant to arrangements made under subsection (1); and in subsections (3) and (4) 'appeal panel' means an appeal panel constituted in accordance with paragraph 2 of that Schedule.

(3) The decision of an appeal panel on an appeal pursuant to arrangements made under subsection (1) shall be binding on the relevant person, the governing body, the head teacher and the local education authority.

(4) Where on such an appeal the appeal panel determines that the pupil in question should be reinstated, the panel shall either—(a) direct that he is to be reinstated immediately, or (b) direct that he is to be reinstated by a date specified in the direction.

68. *Exclusion of pupils: guidance.*—(1) This section applies to any functions of—(a) the head teacher or the governing body of a maintained school, (b) a local education authority, or (c) an appeal panel constituted in accordance

with paragraph 2 of Schedule 18, conferred by or under any of sections 64 to 67 and Schedule 18.

(2) In discharging any such function, such a person or body shall have regard to any guidance given from time to time by the Secretary of State."

[64] The Secretary of State gave guidance in Department for Education and Employment Circular 10/99 ("Social Inclusion: Pupil Support") (the circular). It has been amended since the times material to these proceedings. Paragraph 6.3 of the circular stated:

"Before reaching a decision, the head teacher should:

• consider all the relevant facts and firm evidence to support the allegations made, and take into account the school's policy on equal opportunities. If there is doubt that the pupil actually did what is alleged, the head teacher should not exclude the pupil;

• allow the pupil to give their version of events;

• check whether an incident appeared to be provoked by racial or sexual harassment;

• if necessary consult others, being careful not to involve anyone who may later take part in the statutory review of their decision, e g a member of the Discipline Committee."

[65] Paragraph 6.4 stated that exclusion should not be used for, among other matters, "punishing pupils for the behaviour of the parents, for example by extending a fixed period of exclusion until the parents agree to attend a meeting".

[66] Paragraph 6.5 was as follows: "The law allows head teachers to exclude a pupil for up to **45 days in a school year**. However, individual exclusions should be for the shortest time necessary, bearing in mind that exclusions of more than a day or two make it more difficult for the pupil to re-integrate into the school. In all cases of more than a day's exclusion, work should be set and marked."

[67] It is also necessary to refer to paras 6.6 and 6.7:

"6.6 **A decision to exclude a child permanently is a serious one. It is a final step in the process for dealing with disciplinary offences when a wide range of other strategies have been tried and have failed, including the use of a Pastoral Support Programme. It is also an acknowledgement by the school that it can no longer cope with the child. The Secretary of State does not expect a head teacher normally to exclude permanently a pupil for a 'one-off' or first offence.**

6.7 A head teacher considering excluding a pupil for a single block of more than **15 school days in a term** must plan:

• to enable the pupil to continue their education;

• how to use the time to address the pupil's problems; and

• with the LEA, what educational arrangements will best help the pupil to re-integrate into the school at the end of the exclusion. The school will usually be expected to meet some of the costs for this but the exact arrangements will need to be agreed with the LEA."

[68] Annexe D to the circular dealt with procedures for excluding a pupil. Under the heading "Responsibilities of the head teacher" and "Informing parents about the exclusion", it stated:

"1. A head teacher who excludes a pupil should make sure the parent is notified immediately, ideally by telephone, and that the telephone call is

followed by a letter within one school day. An exclusion should normally begin on the next school day.

2. Letters about fixed period and permanent exclusions should explain:

• why the head teacher decided to exclude the pupil and the steps taken to try and avoid exclusion;

• the arrangements for enabling the pupil to continue their education, including setting and marking the pupil's work;

• the parent's right to state their case to the Governing Body's Discipline Committee;

• who the parents should contact if they wish to state their case (usually the Clerk to the Committee);

• the latest date the parent can put a written statement to the Discipline Committee;

• the parent's right to see their child's school record;

• if the exclusion is for a **fixed period**, the length of the exclusion and the date and time the pupil should return to school;

• if the exclusion is for lunchtimes only, the length of the exclusion (normally no more than five school days) and the arrangements for providing a meal for any pupil entitled to free school meals;

• if the exclusion is **permanent**, the date the permanent exclusion takes effect, and details of any relevant previous warnings, fixed period exclusions or other disciplinary measures taken before the present incident;

• the name and telephone number of a contact at the LEA who can provide advice on the exclusions process and the telephone number for the Advisory Centre for Education (ACE) helpline ...

All correspondence should be in plain English and avoid unnecessary jargon. Exclusion cases should be treated in the strictest confidence.

3. A head teacher who extends a fixed period exclusion or, exceptionally, converts a fixed period exclusion into a permanent exclusion, should again write to the parent explaining the reasons and making the other points above. Where an exclusion is extended there is a new right for the parent to state their case to the Discipline Committee."

[69] Paragraphs 4 and 5 of Annexe D were as follows:

"4. The head teacher should inform the Governing Body's Discipline Committee and the LEA immediately of:

• all permanent exclusions;

• all exclusions which result, separately or in total, in the pupil missing more than five school days in any one term, or which deny pupils the chance to take a public examination.

Short fixed period exclusions of one to five school days should be reported termly, unless the LEA asks for more frequent reports.

5. For each exclusion reported the school should give:

• the name of the pupil;

• the length of the exclusion;

• the reason(s) for the exclusion;

• the pupil's age, gender, ethnicity, and whether they are on the SEN Code of Practice or have a statement of special educational needs;

• whether the pupil is looked after by the Local Authority."

[70] Paragraph 6 of Annexe D stated that the governing body should set up a discipline committee to review the use of exclusion. Paragraph 7 was as follows: "If the exclusion is fewer than five days, the Discipline Committee

cannot direct re-instatement, but should consider any statement from the parent. For exclusions of more than five days in a term, or where a pupil loses the opportunity to take a public examination, the Discipline Committee should consider the exclusion and decide whether the pupil should be reinstated ..."

[71] Annexe D required the clerk to the discipline committee, on receiving notice from the head teacher that a pupil has been excluded for more than five days, to set up a meeting of the discipline committee to consider the exclusion within specified time limits, and take other preliminary procedural steps.

[72] Chapter 6 and Annexe D of the circular were replaced with effect from January 2003, after, therefore, the events in question in these proceedings by Department for Education and Skills guidance, "Implementing behaviour and attendance: guidance on exclusion from schools and Pupil Referral Units". Paragraph 11.1 of Pt 1, dealing with decisions to exclude, is as follows: "A reintegration meeting with parents following the expiry of a fixed period exclusion is good practice. However, a fixed period exclusion should not be extended if such a meeting cannot be arranged in time or the parents do not attend." A new Pt 5 is entitled "police involvement and parallel criminal proceedings". It had no counterpart in the earlier circular. It included the following statement: "1.1 A school-related incident may sometimes also be the subject of a police investigation which may subsequently result in criminal proceedings. This can mean that the evidence available to head teachers, Discipline Committees and Independent Appeal Panels is very limited. They may not, for example, be able to hear relevant witnesses or to consider relevant material; it may not be known whether a criminal charge is to be brought; if a charge has been brought, the eventual outcome of any court proceedings may be uncertain." Under the heading "Head teacher's decision to exclude and consideration of the circumstances by the Discipline Committee" are the following statements: "2.1 A head teacher should not postpone his or her decision to permanently exclude a pupil simply because of the possibility that criminal proceedings might be brought in respect of the same incident. In these circumstances, a judgement must be made on the basis of the evidence available. Relevant considerations include the fact that: a) a serious allegation has been made against the pupil by another pupil or member of staff at the school which is the subject of a police investigation which may result in criminal proceedings being brought; b) pending the conclusion of any such criminal proceedings, the pupil's continued presence in the school may have an adverse effect on the complainant and other potential witnesses, and on the promotion of good order and discipline at the school generally."'

THE HUMAN RIGHTS ISSUES

[35] The material provisions of the Human Rights Act 1998 are:

'6.—(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right ...

(3) In this section "public authority" includes—(a) a court or tribunal, and (b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament ...

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) "An act" includes failure to act but does not include failure to—(a) introduce in, or lay before, Parliament a proposal for legislation; or (b) make any primary legislation or remedial order.

7.—(1) A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may—(a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the Convention right or rights concerned in any legal proceedings ...

(3) If the proceedings are brought on an application for judicial review, the applicant is to be taken to have sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act ...

(5) Proceedings under subsection (1)(a) must be brought before the end of—(a) the period of one year beginning with the date on which the act complained of took place; or (b) such longer period as the court or tribunal considers equitable having regard to all the circumstances, but that is subject to any rule imposing a stricter time limit in relation to the procedure in question ...

8.—(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate.

(2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings.

(3) No award of damages is to be made unless, taking account of all the circumstances of the case, including—(a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (of that or any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made.

(4) In determining—(a) whether to award damages, or (b) the amount of an award, the court must take into account the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention ...

(6) In this section—"court" includes a tribunal; "damages" means damages for an unlawful act of a public authority; and "unlawful" means unlawful under section 6(1) ...

The First Protocol ...

Article 2

Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions ...'

A PUBLIC AUTHORITY

[36] One thing which has been common ground is that each of the defendants, the head teacher and the governing body, is a public authority within the

meaning of s 6 of the Human Rights Act 1998. It is manifest that the local education authority is such a body, but we are bound to consider whether the concession about the two defendants is one which we ought to accept.

[37] The head teacher of a maintained school is the holder of a post recognised, albeit not created, by statute and made responsible for the discharge of duties owed by the state to the community (see s 13 of the 1996 Act). The governing body is incorporated by statute and has parallel obligations. There is no definition of a public authority in the 1998 Act and no comprehensive judicial exegesis of the expression. The House of Lords in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37, [2003] 3 All ER 1213, [2003] 3 WLR 283 held that a parochial church council (PCC) was not such a body, notwithstanding that its origin lay in a measure having the force of statute law, in essence because it was not discharging any function of government. 'It acts in the sectional, not the public interest' said Lord Hobhouse of Woodborough ([2003] 3 All ER 1213 at [86]). The PCC, said Lord Hope of Craighead (at [59]): '... is not accountable to the general public for what it does. It receives no public funding ...' These of course are only negative or exclusory tests. Some general affirmative tests are proposed by Lord Nicholls of Birkenhead (at [12]):

> 'Factors to be taken into account include the extent to which in carrying out the relevant function a body is publicly funded, or is exercising statutory powers, or is taking the place of central government or local authorities, or is providing a public service.'

[38] Although in contractual terms the head teacher is simply the first among equals, there is no institutional sense in which her functions are private or sectional. They are publicly funded; they are directed by statute to the purposes of an institution designed to serve the community and for which the larger responsibility rests on both central and local government. The contra-indications—that the head teacher holds no formal office and is a local government employee—do not seem to me sufficient to displace these factors. While I confess even so to a visceral unease at the conclusion that the head teacher of a maintained school is a public authority for the purposes of the Human Rights Act 1998, it seems to me on balance that the concession was rightly made. What may in the end matter more is that it is the governing body, about which I have no such reservations, which is also legally responsible and must in practice answer for the school's defaults.

THE ARGUMENTS

[39] The competing cases can be very simply stated. For A, Cherie Booth QC (appearing with Carolyn Hamilton) submits that the convention right to education is not fixed in content but takes the form of the provision made by each member state. Exclusion pursuant to law, provided the law itself does not breach the convention, therefore involves no denial of the convention right. It does not follow that every unlawful exclusion does amount to a breach: for example a temporary failure to provide transport when the law requires it will not amount to a denial of the right to education. Nor does it follow that no lawful act can amount to a breach: excluding a child for refusing to submit to corporal punishment which itself breaches the convention, or exercising a legal power (if there were one) to exclude a child permanently from all access to education, would create an incompatibility between domestic law and the convention and

attract one or other of the remedies afforded by the Human Rights Act 1998. But between these extremes, Ms Booth submits, lie cases like the present in which an unlawful exclusion has brought about a direct denial of access to the education provided for in the statute law of England and Wales, in the literal sense that A was for ten months not permitted to attend a school or given appropriate education by other means. All else goes, if to anything, to the quantum of damage.

[40] As to the first main period of A's exclusion, which the judge found to be reasonable though unlawful, Ms Booth submits that this represents a distinction without a difference. Damages under the Human Rights Act 1998 are awarded for unlawful acts, not for unreasonable ones.

[41] For the two respondents Jonathan Moffett argues that exclusion is a matter of fact, and that from the moment of its occurrence s 19 of the 1996 Act transfers responsibility from the school to the local education authority. If anyone is liable, even given the judge's findings, it is therefore neither of the respondents.

[42] Apart from this, it is Mr Moffett's submission that the convention right gives access to education, not to any particular educational institution or to education of any prescribed standard. Here A was initially given self-assessing work for his SATs, and not long afterwards he and his parents failed to attend a meeting designed to get him back into the Lord Grey School or else to find him another school. Moreover, s 19 makes convention-compliant provision for the continued education of every child in England and Wales who is not in a school.

[43] More generally, it is submitted by Mr Moffett that to offend against the convention an act has to be unreasonable as well as unlawful. This, however, cannot avail him in the light of the judge's finding that from mid-July A's exclusion was both.

DISCUSSION

The convention right

[44] It was established by the European Court of Human Rights (the European Court) in the *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252 at 280, 281 that the first sentence of art 2 of the First Protocol 'does enshrine a right'—not a right with any fixed content but a right for the citizens of member states 'in principle, to avail themselves of the means of instruction existing at a given time'. Correspondingly, any regulation of the exercise of the right 'may vary in time and place according to the needs and resources of the community and of individuals. It goes without saying' the European Court added (at 281–282), 'that such regulation must never injure the substance of the right to education ...'

[45] The realistic principle that, subject to the convention's own limits, the right to education takes the form prescribed in each member state carries in my judgment the necessary corollary that any question whether there has been a violation of the right has to be answered initially in terms of the applicable domestic law. For the reasons given by Ms Booth, which I accept, the answer yielded by the latter will not be determinative, but it is the indispensable starting point. Thus if no breach of domestic law is found, it is only if that law itself materially offends against the convention that the Human Rights Act 1998 moves one on to the question of a remedy. If a breach of domestic law is found, it remains to be decided whether it has resulted in a denial of the convention right.

Put broadly, there will be such a denial where the breach of domestic law has resulted in the pupil's being unable to avail himself of the means of education which presently exist in England and Wales—not, for example, by being temporarily unable to reach the school premises for want of transport, but by being shut out for a significant or an indefinite period from access to such education as the law provides for him or her.

[46] This does not necessarily mean access to every available aspect of education. We are bound in this regard by the decision of a majority of their Lordships' House in *R (on the application of L) v Governors of J School* [2003] UKHL 9, [2003] 1 All ER 1012, [2003] 2 AC 633 that 'reinstatement' in a school can accommodate the almost complete segregation of the pupil from the rest of the school community. But the question in the present case is whether the accepted unlawfulness of A's complete exclusion from the school which he would otherwise have been entitled to attend amounted, while it lasted, to a denial of his convention right to education in the form in which it was vouchsafed by domestic law—a different question from that decided by their Lordships' House.

Reasonableness and illegality

[47] In the first main period (phases 1 to 3) of de facto exclusion, the upshot of the judge's findings is that although A was unlawfully excluded, he could have been lawfully excluded and, had the school gone about it correctly, would have been. That, however, is not the same thing as holding the exclusion to have been unlawful but reasonable. In argument Mr Moffett accepted that had the exclusion been challenged during its currency by judicial review, reasonableness could have been no answer to the charge of illegality. It seems to me that the same must be true in a retrospective action for damages. Assuming that the other elements of liability are present (and I will come to these), what the argument may go to is the quantum of damage. Here one can see at least the initial attraction of the proposition that damage caused by an illegal act has to be measured by the difference between what happened and what would have happened had the defendant acted lawfully. But we have not reached that stage of the case and I express no firm view on it. For the rest, I do not accept that it can be an answer to a prima facie denial of the convention right to education that the denial, though unlawful, was reasonable. As will appear, however, I do consider that the answer may be affected by the nature of the illegality.

[48] In the second and third phases the exclusion itself was lawful in the sense that it was based on tenable grounds and was for a finite period not exceeding 45 school days in total. What was unlawful was the head teacher's failure to notify the parents about their right to make representations to the governing body, and the governing body's failure, having been notified of the exclusion, to meet and consider whether it should continue. In my view it is only where it is found that the governing body would more probably than not have ended the exclusion that it can be argued that an otherwise lawful exclusion amounts to a breach of the convention right to education. But here too, the answer to illegality is not reasonableness but immateriality.

[49] Just as reasonableness by itself is not a defence to illegality in public law, neither is it a defence in the convention jurisprudence on art 2 of the First Protocol. Mr Moffett sought to rely on the European Court's decision in *Campbell v UK* (1982) 4 EHRR 293 at 307 (para 41), and on the European Commission of Human Rights' (the Commission) decisions in *Whitman v UK* App No 13477/87 (4 October 1989, unreported), *Sulak v Turkey* (1996)

84–A DR 9, and *Yanasik v Turkey* (1993) 74 DR 14, in each case for the proposition that a reasonable denial of the right to education does not violate the convention. It is sufficient to say that in *Campbell v UK* the decision was that to exclude a child from school for as long as his parents refused to let him be beaten 'cannot be described as reasonable and in any event falls outside the State's power of regulation under Article 2'. This gives little if any support to Mr Moffett's affirmative proposition of law. The three Commission decisions confirm that reasonable restrictions may be placed by the state upon access to education without violating the right. That is a long way from saying that so long as the right is reasonably withheld the convention is satisfied. As the court was careful to say in *Campbell v UK*: '... such regulation must never injure the substance of the right ...'

Phase 1

[50] Was the first period of unlawful exclusion of such a character as to amount on the face of it to a denial of the right to education? I consider that it was—not so much because of its eventual duration (which, even so, was not insignificant) but because it purported to be indefinite. An indefinite exclusion from his school, absent some proper substitute provision (to which I turn next), seems to me to be a pretty unequivocal denial of a pupil's right to education.

Phase 2

[51] For the reasons I have given at [48], above I do not consider that the illegality attending the exclusion of A once the head teacher had formally excluded him for a finite period (viz the failure to involve the governing body) is of a nature which vitiates the exclusion itself. It might well have founded an application for judicial review, but the time for that is long past. There seems to me to be a difference (and I will need to return to this) between a lawful act vitiated by a failure to take further or associated steps required by law and an act done without any lawful authority at all.

Phases 1 and 2

[52] The next question therefore in relation to the first phase, when there was no lawful exclusion, and (were I to be wrong about the impact of the illegality associated with it) in relation to the second phase as well, is whether by being given self-assessing work in preparation for the SATs A was afforded sufficient access to education to answer his convention claim. If the initial exclusion had been lawful, I have no doubt that this would have answered the claim: it would have corresponded with the provision made by law to ensure that even when kept out of school a pupil is not shut off from learning. But what is the situation when the pupil has not been lawfully excluded in the first place?

[53] The respondents' answer is beguilingly simple: if A continued to be afforded education by the state system from the time when he was excluded to the time when he took the SATs, there can have been no denial during that time of his right to education. Although Ms Booth points out that the work was only in the three SATs subjects, that cannot rebut the respondents' answer. Her substantive rebuttal is that if, as the respondents rightly assert, the content of the convention right is as much or as little as the member state elects to provide, A was entitled admittedly to no more, but affirmatively to no less, than domestic law vouchsafed him. That included a right not to be excluded from the Lord

Grey School except in accordance with the principles and procedures set by law. If so, the substitution of homework for school education is nothing to the point.

[54] I do not find this easy. It can be said on the one hand that a reduction in a pupil's standard of education, albeit based on an illegal act on the part of the state, is no more a violation of the convention right to education than an unlawful failure by the state to provide transport. In neither case is the essence of the right invaded. On the other side it can be said that it does not lie in the mouth of the state to say that it is free to exclude a pupil from the very form of education which it has legislated to assure and to substitute something poorer in its place.

[55] On the latter view, the factual differential would fall to be reflected in damages, though these might well turn out to be modest or nominal. I accept, too, that the argument on which this view depends is the more principled argument. But my preference in the end is for the first and more pragmatic of the two approaches. Given the common ground that it cannot be every unlawful act or omission on the part of the state which, by blocking the pupil's access, amounts to a breach of the convention right to education, it follows that the quality of a breach of the law cannot be divorced from its consequences or sequel. In other words, an unlawful exclusion during which the pupil is offered no education at all by either the school or the local education authority is a different thing in convention terms from an unlawful exclusion during which adequate or appropriate substitute education is offered. This gives s 19 of the 1996 Act a proper role in gauging domestic compliance with the convention, for I have no doubt that, if the school itself does not send useful work home for an excluded pupil, s 19 triggers local education authority intervention. 'Illness, exclusion from school *or otherwise*' (my emphasis) seems to me to eliminate any question about the legality of the exclusion, though one would always expect the local education authority independently of s 19 to satisfy itself that an exclusion which came to its notice was lawful and appropriate.

[56] Accordingly I would hold that the first two phases of A's exclusion, while at least the first could have been attacked for straightforward illegality on judicial review, did not involve a breach of his rights under art 2 of the First Protocol. This is not, however, on the ground adopted by the judge that the exclusion, though unlawful, was reasonable. That is a distinction which I think the law would make at its peril. It is on the ground that, though he was denied access to his school, A was afforded appropriate education. It does depend in part, however, on the nature of the illegality, and I will return to this in relation to phase 4. For the present I stress that in phase 1 the legal vice was not the act of exclusion but the failure to set a term to it and that in phase 2 the legal vice was the failure of the governing body to become involved and of the head teacher to tell the parents of their right to involve the governors.

Phase 3

[57] From the completion of the SATs the school offered to provide A with work, but the offer was not taken up. In those circumstances, in the absence of an acceptable explanation, the third phase of exclusion has to stand on the same footing as the second.

Phase 4

[58] Once the permitted period of 45 days' temporary exclusion had expired, A's continued exclusion was incontestably unlawful. The school had a clear obligation either to re-admit him or (if it had grounds for doing so) to exclude him

permanently; but it did neither. The exclusion was now unlawful, moreover, not in the earlier sense that it had been imposed in proper circumstances though in improper form, but in the sense that it was done in defiance of a clear statutory prohibition and was a legal nullity. It was also in the course of this phase that it became clear that no grounds existed for permanent exclusion, leaving re-admission as the only option.

[59] In such a situation does the school's continuing offer to provide work at home still furnish an answer? Alternatively, should the local education authority carry the full blame for not having picked up A's needs under s 19? I will consider the second question separately.

[60] I suggested earlier in this judgment, in relation to the first three phases, that the quality of a breach of the law cannot be divorced from its consequences or sequel, so that the provision or offer of homework was material. If that is right, it must equally be true of the fourth phase. But it does not follow that the same approach to the fourth phase produces the same answer, and in my judgment it does not produce the same answer. It makes practical sense to hold that excluding a pupil at a time when, and in circumstances in which, temporary exclusion is both lawful and factually permissible, but going about it otherwise than in accordance with the law, is a denial of the pupil's right to education only if no worthwhile substitute is meanwhile put in place. It offends good sense and justice, by contrast, to hold that to exclude a pupil otherwise than permanently from the school at which he is enrolled when to do so is prohibited by law and, even more, when it becomes apparent that there is anyway no factual basis for doing so, is still not a denial of his right to education so long as substitute homework is offered to him. The denial of education—which is what it seems to me to have been—was compounded by the failure of the governors to consider whether the exclusion could lawfully continue. Had they considered it, they could have come to only one conclusion.

[61] I would hold accordingly that in phase 4 A's convention right to education was denied, notwithstanding that the school was still offering to provide him with substitute work to do at home. The availability of such work may go to the damages for this phase of exclusion, but it does not affect liability.

Phases 5 and 6

[62] The two final phases, though factually distinct, fall to be considered together in law because, as is now common ground, removal from the school roll is not an act with legal consequences. It is the administrative consequence of other acts, and if those acts are not lawfully done, neither is the removal from the school roll. This follows from the provisions of regs 6 and 9 of the 1995 regulations. The former requires an alphabetical register to be kept of 'all the pupils at the school'. The latter requires the deletion of a pupil's name if, among other things, 'he has been permanently excluded from the school'.

[63] The judge held that even the removal of A from the school roll was improper because reasonable attempts had not been made to locate A before deciding whether to delete his name. But no separate legal consequences flow from this. The question whether A had been permanently excluded de facto from the Lord Grey School does not arise in relation to mid-October, when his name was removed. It arises, if at all, in relation to the letter sent to his parents following the abortive meeting on 13 July. The effect of that letter, as the judge held, was to tell A and his parents that A was no longer a pupil at the school. There was accordingly no offer or expectation of further schoolwork to be done

at home. Once again, as the judge found, this purported exclusion was unlawful. He also found that it was unreasonable. There were by now, to the head teacher's knowledge, no grounds on which A could be lawfully excluded. Once again, the governors took no supervisory action.

[64] So characterised, the exclusion of A from 14 July until he was finally placed in a new school amounts in my judgment to a further denial of his convention right to education. It was complete and it was prolonged. It was not terminated by the deletion of A's name from the school roll because there was no lawful ground for deletion. To the extent that it may nevertheless have been acquiesced in, the damage may be mitigated. But this is not our present concern, and it will require (if the case goes that far) a factual inquiry into a number of things including the family's state of knowledge and understanding.

THE LOCAL EDUCATION AUTHORITY

[65] All of the foregoing, however, is subject to Mr Moffett's overriding argument that, notwithstanding these breaches of the law, neither the head teacher nor the school bears any liability because from the moment of exclusion, whether lawful or unlawful, the law places the responsibility for a child's education on the local education authority. Any breach of art 2 of the First Protocol, it follows in Mr Moffett's submission, has to be brought home to the local education authority. This, he submits, is both the purpose and the effect of s 19.

[66] I can readily accept that, where the local education authority does step in, any educational shortfall caused by an unlawful school exclusion may be partly or wholly mitigated. If my analysis of the classes of breach of duty on the part of the school is right, it will follow that in the first class there is no breach of the convention right where the local education authority intervenes, and in the second that the damages for the breach are reduced by the local education authority's intervention. Correspondingly, any failure to take advantage of local education authority intervention can negate a breach of the convention right in the first class of case and represent an unreasonable failure to mitigate damage in the second.

[67] In the present case it has not been argued that such offers as the local education authority made were sufficient to negate a breach of the convention right if one were otherwise made out against the school. It will be open to the respondents to submit that they mitigate the damage, which in turn will involve some inquiry as to what was or would have been offered.

[68] But I am unable to accept Mr Moffett's further and fundamental argument that the bare existence of the local education authority's fallback duty, together with A's right to seek to enforce it, relieves the school either of its obligations or of the legal consequences of failing to discharge them. On the contrary, it is on the two public authorities who are the present respondents (or put more realistically, the school) that the state has chosen to devolve the material elements of the obligation which it has undertaken to provide universal secondary education. It is the head teacher and the governing body who in law bear the primary duty to educate a child who has been accepted in their school and, as a corollary, not to exclude him except as authorised by law.

CONCLUSION

[69] I would therefore uphold, though on different grounds, the decision of Stanley Burnton J that the respondents are not liable to pay the appellant

damages under s 8 of the Human Rights Act 1998 for the period from 8 March to 6 June 2001. I would allow the appeal in relation to the period of exclusion from Lord Grey School from 7 June 2001 to 20 January 2002. In relation to that period the action must proceed to the assessment of damages unless (as is very much to be hoped) agreement can be reached between the parties. In this regard careful attention must be paid to the decision of this court in *Anufrijeva v Southwark London BC, R (on the application of N) v Secretary of State for the Home Dept, R (on the application of M) v Secretary of State for the Home Dept* [2003] EWCA Civ 1406, [2004] 1 All ER 833, [2004] 2 WLR 603.

CLARKE LJ.

[70] I agree.

DAME ELIZABETH BUTLER-SLOSS P.

[71] I also agree.

Appeal allowed in part.

Kate O'Hanlon Barrister.

Scribes West Ltd v Relsa Anstalt and another

[2004] EWCA Civ 965

COURT OF APPEAL, CIVIL DIVISION

BROOKE, MANCE, AND DYSON LJJ

29 JUNE, 20 JULY 2004

Court of Appeal – Practice – Civil Division – Determination of destination of appeals – Guidance – Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, arts 1(2), (3), 4.

In determining whether an appeal from an order of a county court judge on an action allocated to the multi-track lies to the High Court or the Court of Appeal, the judges of the Court of Appeal and the staff at the Civil Appeals Office have to interpret the order of the lower court as they find it. Under art 1(2)(a)[a] of the Access to Justice 1999 (Destination of Appeals) Order 2000, 'decision' includes any judgment, order or direction of the High Court or a county court, and under sub-para (c) 'final decision' means a decision of a court that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it. Article 1(3) of the 2000 Order provides that a decision of a court shall be treated as a final decision where it (a) is made at the conclusion of part of a hearing or trial which has been split into parts; and (b) would, if made at the conclusion of that hearing or trial, be a final decision under para (2)(c). Article 4[b] of the 2000 Order provides, inter alia, that an appeal shall lie to the Court of Appeal where the decision to be appealed is a final decision in a claim made under CPR Pt 7 and allocated to the multi-track. The relevant decision for the purposes of arts 1(2), (3), and 4 of the 2000 Order is the order of the lower court, and the 2000 Order determines where the appeal should lie from that order. If the parties, or one of them, believe that the order has not been drawn up correctly, then the correct procedure is to ascertain whether the lower court is willing to amend its order under the slip rule. If that party is disappointed by the lower court's response then that may be one of the complaints it may make on its appeal to the appeal court, but the appeal court has to be the one that is readily ascertainable from the face of the court's order, and not one which would or might have been ascertainable if the judge had made a different order. It would be intolerable if appeal courts had to be subjected to a complicated examination of the types of order which might have been made if the parties had dealt with things differently in the lower court, merely for the purpose of determining whether they possess jurisdiction. The destination of the appeal should be ascertainable from the language of the order (see [29], [35], [36], below).

Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801 applied.

a Article 1, so far as material, is set out at [18], below

b Article 4, so far as material, is set out at [18], below

Notes

For appeals from a decision of a county court, see 37 *Halsbury's Laws* (4th edn reissue) para 1518.

For the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071, see 5 *Halsbury's Statutory Instruments* (2002 issue) 597.

Cases referred to in judgments

Clark (Inspector of Taxes) v Perks [2000] 4 All ER 1, [2001] 1 WLR 17, CA.

Holmes v Bangladesh Biman Corp [1988] 2 Lloyd's Rep 120, CA; *rvsd* [1989] 1 All ER 852, [1989] AC 1112, [1989] 2 WLR 481, HL.

Lloyd Jones v T-Mobile (UK) Ltd [2003] EWCA Civ 1162, [2003] 3 EGLR 55.

Roerig v Valiant Trawlers Ltd [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304, CA.

Salter Rex & Co v Ghosh [1971] 2 All ER 865, [1971] 2 QB 597, [1971] 3 WLR 31, CA.

Tanfern Ltd v Cameron-MacDonald [2000] 2 All ER 801, [2000] 1 WLR 1311, CA.

White v Brunton [1984] 2 All ER 606, [1984] QB 570, [1984] 3 WLR 105, CA.

Appeal

The claimants, Scribes West Ltd appealed from the decision of Judge Mayer sitting in the Central London County Court on 17 September 2003 striking out their claim against the defendants, Relsa Anstalt, for relief against forfeiture in relation to a lease of business premises. The matter was listed before the Court of Appeal for a ruling on the jurisdictional issue of whether the appeal lay to the High Court or to the Court of Appeal. The second defendants Settle Up Ltd, were not represented. The facts are set out in the judgment of Brooke LJ.

Tom Weekes (instructed by *Mishcon de Reya*) for the claimants.

Andrew Bruce (instructed by *Richards Butler*) for the defendants.

Cur adv vult

20 July 2004. The following judgments were delivered.

BROOKE LJ.

[1] This matter was listed before us for a ruling on a jurisdictional issue.

[2] The claimants, Scribes West Ltd, were the lessees of business premises on the ground floor and basement of the Barkers Centre, Kensington, pursuant to the terms of a lease dated 25 January 1991 which was granted to them by House of Fraser plc. The first defendants Relsa Anstalt (whom I will call 'RA') were registered as the freehold proprietors of the premises on 10 November 1993.

[3] The claimants ceased trading on 1 May 1997, being the day on which they were granted a licence to assign the lease to London Sportsman's Club Ltd (whom I will call 'LSC'), and on which they also entered into a second charge over the leased premises to secure a loan they had made to LSC. In November 1999 the claimants entered into a voluntary arrangement with their creditors.

[4] On 28 February 2001 the defendants assigned their reversionary interest to Relsa Barkers Ltd (whom I will call 'RB'), pursuant to the terms of a transfer document which was described as 'TR1'. On the same day RB gave notice to LSC of the assignment and required them to pay the rent to them. On 16 July 2001 RB peaceably re-entered the premises on the grounds of arrears of rent. On

25 July 2001 RB granted a new lease of the premises to a company called Settle Up Ltd (whom I will call 'Settle Up').

[5] For the purposes of deciding the jurisdictional issue it is unnecessary to say any more about the facts. The present proceedings were commenced on 19 December 2001 and were constituted as an action by the claimants against RA claiming relief from forfeiture. The claimants' interest derived from their status as chargees of the valuable security constituted by the lease.

[6] On 23 February 2002 District Judge Madge allocated the action to the multi-track and joined Settle Up as second defendants.

[7] On 19 July 2002 the claimants made an application to amend their particulars of claim and to join a number of new parties to the proceedings. By the proposed amendment they also sought a declaration that RB's peaceable re-entry was ineffective to forfeit the lease, as an alternative to their claim for relief from forfeiture. Their application notice contained an application for a 'declaration that the proposed grant of a lease to the second defendant was ineffective or alternatively a declaration that the lease has not been forfeited, or that relief from forfeiture be granted'. It did not, however, comply with CPR PD 24, para 2(2), although an accompanying witness statement indicated that it was intended to be an application for summary judgment. At all events RA did not recognise it as such, and did not file any evidence in response to it.

[8] On 24 March 2003 RA applied for an order striking out the claim, alternatively for summary judgment, on the grounds that the claimants' claim—and their proposed amended claim—were misconceived. Their case was based on the contention that they had assigned the right to rent to RB who in turn were entitled to forfeit the lease pursuant to s 141(2) of the Law of Property Act 1925. They also contended that delay should prevent the claimants from obtaining relief from forfeiture. Alternatively they sought to strike out the claim on procedural grounds, but they did not pursue that part of their application before the judge.

[9] On 7 April 2003 District Judge Price directed that both sides' applications should be listed for hearing before a circuit judge, together with another application which need not concern us. Although he directed a timetable for the service of the claimants' evidence in response to RA's application, he made no such direction in relation to the claimants' application. It was by this route that the two applications came to be decided by Judge Mayer, sitting for the purpose in the Barnet County Court.

[10] The first day of the hearing, in which the claimants and RA were both represented by leading counsel, was on 28 May 2003. The skeleton argument filed by RA's leading counsel before the hearing betrayed no awareness that the claimants were seeking summary judgment on the prayer to their amended particulars of claim at the same time as they were seeking permission to amend. The claimants' wishes in this regard seem to have been clarified at the hearing on 28 May, and in the interval between 28 May and 2 July, when the hearing resumed, the claimants filed and served a second skeleton argument to which RA responded. This supplementary skeleton argument, which was said to be submitted on behalf of both RA and RB (even though RB was not a party to the action), contained in para 2 the following statement:

> 'The first defendant has been able to serve additional evidence. That evidence is also attached to this skeleton. Subject to that evidence being

admitted, the first defendant and [RB] will not object to the above question being finally determined as between all relevant parties.' a

[11] The hearing then resumed on 2 July 2003 with nobody apparently paying much attention to procedural niceties. In much the same way as the claimants' initial application had been ineptly drafted (I leave on one side the question whether a party can seek to amend its statement of case and seek summary judgment on the amended statement of case at one and the same time), nobody b seems to have addressed the question whether RA was now accepting that the hearing included an application for summary judgment, or was acquiescing in an unformulated proposal that the judge was instead being invited to try an issue on the amended pleading pursuant to CPR 3.1(2)(i)—or, possibly, CPR 3.1(2)(m). But the judge could not do this unless she granted permission to amend, with the c effect that the requested declaration would bind not only RB and RA but also the second defendants Settle Up, and also LSC and a Mr Lewis (who also had an interest as a chargee). We were told that LSC and Mr Lewis, who were among the parties whom the claimants sought to join to the proceedings, had written letters to the court (or to the parties?), but we were not shown those letters, and the court certainly had no power to make a declaration which could bind them d in respect of their interests without them first being formally joined to the proceedings and being given notice of the declaration it was sought to make. Settle Up were trading from the premises under the new lease which had been granted to them by RB in July 2001, and they had instructed a solicitor to look after their interests in court, although he did not play an active part in the e proceedings.

[12] On 26 August 2003 the judge delivered a reserved judgment. Its opening paragraph was in these terms:

'I am asked to decide essentially whether a lease could be forfeited by a landlord who does not hold the reversionary interest, the latter not having f been registered in the Land Registry at the relevant time. Subject to my decision on this point there are procedural issues I have to deal with.'

[13] In paras 3–19 she set out a chronology of events. In para 14 she described the claimants' application dated 19 July 2002 as including an application for summary judgment on a declaration that the lease was extant. The rest of this g narrative betrayed no understanding that she was deciding a preliminary issue in the action. Paragraphs 20–50 contained the judge's analysis of the interesting legal issues in the case (which had warranted the retention of leading counsel on both sides). She made it clear that she preferred the defendant's submissions. Her judgment ended in this way:

h

'51. I therefore, find: (1) RB were entitled to the rent from LSC pursuant to the TR1 and (2) RB were entitled to re-enter and forfeit the lease on 16 July 2001 and, having done so, the lease is no longer extant. The only remedy available to the claimants is an application for relief from forfeit pursuant to s 146 of the 1925 Act. This application is still outstanding.

52. I now turn to deal with the individual applications before me: (1) j I refuse the claimants' application for permission to amend the particulars of claim; similarly, I refuse joining any further defendants to this claim; (2) I strike out the claim against the first defendant, RA, and I substitute RB for RA as first defendant. As I have already said, the only outstanding application, therefore, remaining is the claimants' application for relief from

forfeit. That hearing I adjourn to another time and transfer it back to the Central London County Court.

53. I adjourn the hearing for hearing submissions about the final order and about costs; written submissions from both parties on the above by 9 September 2003.'

[14] On 17 September, after considering the parties' submissions, she decided to direct that the claim should be struck out after all. She gave her reasons for taking that course, and said that she had concluded that the correct course was to strike out the entirety of the present proceedings.

[15] In the meantime the claimants had filed a notice of appeal at the Civil Appeals Office, and on 24 November 2003 Chadwick LJ granted permission to appeal, saying that he was persuaded that the points raised in the appellant's skeleton argument were of sufficient general importance to require consideration by the Court of Appeal. The Civil Appeals Office then raised a query as to whether the Court of Appeal had jurisdiction to hear the appeal, in the light of what the judge had said at the end of her judgment.

[16] There was then a further short hearing before Judge Mayer, who declined to amend her order. She said that on the face of her order this was not a final decision because it arose out of applications for summary judgment and striking out. Although she had been invited to add a declaration by way of amendment to her order, she was persuaded that this was inappropriate since this would affect parties who were not present at the hearings. She made it clear that at all times she intended to decide the issue of whether the lease was validly forfeit by RB by virtue of their standing, and she hoped that this was clear from her judgment. The other matters, she said, were consequential on this point.

[17] In these circumstances the claimants contend, for reasons which I will explain, that the appeal properly lay to the Court of Appeal. Alternatively they wish to invite the High Court and/or the Court of Appeal to 'leap-frog' the High Court pursuant to the jurisdiction conferred by CPR 52.14. The first defendants for their part contend that appeal lies to the High Court, and that it should stay there on the grounds that the principal point raised by the appeal is a small (albeit interesting) point of construction on a statute passed some 79 years ago, and that this certainly does not justify a departure from the normal route of appeal.

[18] It is disappointing that difficulties are still arising in relation to the interpretation and/or implementation of the provisions of the Access to Justice Act 1999 (Destination of Appeals) Order 2000, SI 2000/1071 (the Destination Order). The relevant provisions of this order read as follows:

'1 ... (2) In this Order—(a) "decision" includes any judgment, order or direction of the High Court or a county court ... (c) "final decision" means a decision of a court that would finally determine (subject to any possible appeal or detailed assessment of costs) the entire proceedings whichever way the court decided the issues before it.

(3) A decision of a court shall be treated as a final decision where it—(a) is made at the conclusion of part of a hearing or trial which has been split into parts; and (b) would, if made at the conclusion of that hearing or trial, be a final decision under paragraph (2)(c).'

Article 4 provides, so far as is material:

'An appeal shall lie to the Court of Appeal where the decision to be appealed is a final decision—(a) in a claim made under Part 7 of the Civil

Procedure Rules 1998 and allocated to the multi-track under those Rules; or (b) made in proceedings under the Companies Act 1985 or the Companies Act 1989 or to which Sections I, II or III of Part 57 or any of Parts 58 to 63 of the Civil Procedure Rules 1998 apply.' a

[19] So far as the language of art 1(2)(c) is concerned, the draftsman of the order decided to adopt the language of RSC Ord 59, r 1A, which came into effect pursuant to the Rules of the Supreme Court (Amendment Rules) 1993, SI 1993/2133 in an attempt to bring to an end the uncertainty created by the former rules which simply referred to interlocutory and final orders and left it to the judges to determine how to categorise a particular order. RSC Ord 59, r 1A(3) and (4) provided that: b

'(3) A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it. c

(4) For the purposes of paragraph (3), where the final hearing or the trial of a cause or matter is divided into parts, a judgment or order made at the end of any part shall be treated as if made at the end of the complete hearing or trial.' d

[20] I explained the effect of the Destination Order in my judgment in *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801 at 806, [2000] 1 WLR 1311 at 1315 in these terms:

'16. The normal route of appeal will not be followed where ... a circuit judge in the county court ... gives the final decision in a multi-track claim allocated by a court to the multi-track ... e

17. For this purpose a final decision is one that would finally determine the entire proceedings, subject to any possible appeal or detailed assessment of costs, whichever way the court decided the issues before it (Destination Order, art 1(2)(c)). A final decision includes the assessment of damages or any other final decision where it is "made at the conclusion of part of a hearing or trial which has been split up into parts and would, if made at the conclusion of that hearing or trial, be a final decision" (Destination Order, art 1(3)); it does not include a decision only on costs. This means that if a judge makes a final decision on any aspect of a claim, such as limitation, or on part of a claim which has been directed to be heard separately, this is a final decision within the meaning of this provision ... f g

18. Orders striking out the proceedings or a statement of case, and orders giving summary judgment under CPR Pt 24 are not final decisions because they are not decisions that would finally determine the entire proceedings whichever way the court decided the issues before it.' h

[21] I returned to this topic in *Lloyd Jones v T-Mobile (UK) Ltd* [2003] EWCA Civ 1162, [2003] 3 EGLR 55, in a judgment which I hoped would receive wider publicity because difficulties were continuing to be experienced over the effect of this part of the Destination Order. This was a case involving the trial of a preliminary issue, in which experienced City solicitors wrongly believed that appeal lay to the High Court. After going over the ground I have just covered, I said: j

'[24] Practitioners who rely only on the White Book for their procedural law will not have obtained the full flavour of what I said in my judgment in

Tanfern. An abbreviated summary of this passage is given in the third main paragraph on p 1256 of Part 1 of the 2003 edition. This is why I am returning to this topic now. There is a rather fuller treatment of the topic in Vol 1 of the Civil Court Practice 2002 (the Green Book) at pp 907–908.

[25] For the purposes of Article 1(2)(c) and Article 1(3), the relevant proceedings are the proceedings that relate to the issue of whether notice of objection was served by the claimants within three months of completion of the installation of the apparatus. In the event, Judge Morgan decided that issue in favour of the claimants, and he determined it finally in the sense that the defendant could not have reopened it when the eventual trial on the merits took place. If he had decided it in favour of the defendant, that would be the end of the action. In either case, the dissatisfied party's only method of redress was by way of appeal.'

[22] Before applying the Destination Order to the facts of the present case I must give a strong warning that nothing will be gained under the CPR regime by a return to the old case law when this court was having to decide, without statutory guidelines, whether an order was an interlocutory order within the meaning of the former rule. In *Salter Rex & Co v Ghosh* [1971] 2 All ER 865 at 866, [1971] 2 QB 597 at 601, Lord Denning MR said:

> 'This question of "final" or "interlocutory" is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point.'

[23] In *White v Brunton* [1984] 2 All ER 606 at 607, [1984] QB 570 at 572 Sir John Donaldson MR observed, 'as is well known, this clarity conceals the obscurity of what is or is not an interlocutory order …'.

[24] In *Holmes v Bangladesh Biman Corp* [1988] 2 Lloyd's Rep 120, an appeal from a judge's order deciding a preliminary issue of law in a Fatal Accidents Act case (which would be readily categorised as a 'final decision' under the modern Destination Order), Bingham LJ was constrained to say (at 124), in the absence of any assistance contained in the pre-1993 rules:

> 'Order 33, r. 3 gives the Court a wide discretion to order the separate trial of different issues in appropriate cases and a decision is not to be regarded as interlocutory simply because it will not be finally determinative of the action whichever way it goes. Instead, *a broad commonsense test* should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial. Judged by that test this judgment was plainly final, even though it did not give the plaintiff a money judgment and would not, even if in the airline's favour, have ended the action.' (My emphasis.)

[25] I am mentioning the difference between the old judge-made case law and the code contained in the Destination Order because by what Waller LJ said in *Roerig v Valiant Trawlers Ltd* [2002] EWCA Civ 21, [2002] 1 All ER 961, [2002] 1 WLR 2304 he might have tempted practitioners to go back to the old case law. In that case he said (at [45]) that it seemed to him that what the present rules in fact reflected, in relation to treating a decision as final where it was made at the conclusion of the hearing of a preliminary issue, what Bingham LJ said in this passage in his judgment in *Holmes*'s case. It would be very much safer, in my judgment, for practitioners and judges to put *Holmes*'s case behind them and stick to the language of the Destination Order and the interpretation given to it in my

judgments in *Tanfern Ltd v Cameron-MacDonald* [2000] 2 All ER 801, [2000] 1 WLR 1311 and *Lloyd Jones v T-Mobile (UK) Ltd* [2003] 3 EGLR 55. See also *Clark (Inspector of Taxes) v Perks* [2000] 4 All ER 1 at 13, [2001] 1 WLR 17 at 30–31 (para 54).

[26] By the time all the relevant cases had been identified and were before the court it became obvious that the answer to the question about the destination of this appeal was readily obtainable once it was ascertained what decision the judge had in fact made. Mr Weekes, for the claimants, maintained that her decision should be interpreted as if she had granted the amendments his clients sought, had directed the trial of a preliminary issue as to whether RB had been entitled to forfeit the lease, and had then made a declaration to the effect that it was so entitled. In that case, appeal would have lain to this court from a final decision on a preliminary issue in the multi-track.

[27] Mr Bruce, for the defendants, maintained on the other hand that the judge had made a favourable decision on his clients' application that the claim should be struck out. In that case appeal lay to a High Court judge because a striking order is not a final decision. The judge's reasoning had included her finding that RA had successfully assigned to RB the right to re-enter in the event of the tenant's failure to pay the rent reserved by the lease, but her decision was that the present action should be struck out. Even if an order had been drawn up describing the fate of the claimants' application, it would have been drawn up to the effect that the court had dismissed their applications to amend and to join new parties, and had also dismissed their application for summary judgment (given that the amendments were refused and the judge was in any event not disposed to grant the declaration sought). In that event, too, appeal would have lain to a High Court judge.

[28] I can understand why the claimants are seeking to draw out of RA's supplementary skeleton argument (in which RB curiously joined: for this skeleton argument see [10], above) a willingness on their part to invite the judge to make a final determination of the legal issue at the heart of this dispute, and why they are seeking to interpret what happened when the hearing resumed on 2 July as if the matter had proceeded along those lines. But nobody seems to have articulated this clearly to the judge, and as she was to observe the following February, the other parties (RB, LSC and Mr Lewis) would have had to be formally joined in order for any declaratory order to be binding on them.

[29] The judges of this court (and the staff at the Civil Appeals Office) have to interpret the order of the lower court as we find it. The relevant decision (see [18], above) is the court's order, and the Destination Order determines where appeal should lie from that order. If the parties (or one of them) believe that the order has not been drawn up correctly, then the correct procedure is to ascertain whether the lower court is willing to amend its order under the slip rule (and on the present occasion Judge Mayer was not willing to make any such amendment). If that party is disappointed by the lower court's response then this may be one of the complaints it may make on its appeal to the appeal court, but the appeal court must be the one that is readily ascertainable from the face of the court's order, and not one which would or might have been ascertainable if the judge had made a different order. It would be intolerable if appeal courts had to be subjected to a complicated examination of the types of order that might have been made if the parties had dealt with things differently in the lower court, merely for the purpose of determining whether they possess jurisdiction. The destination of the appeal should be ascertainable from the language of the order.

[30] In case he failed on that point, Mr Bruce had another reason for submitting that any appeal from this order did not lie to the Court of Appeal. He argued that

a claim issued on form N5A under CPR Pt 55 (see CPR 55.3, CPR PD 55, para 1.5 and the table in CPR PD 4) is not 'a claim made under CPR Pt 7 within the meaning of art 4 of the Destination Order'.

[31] The present language of art 4 was introduced by the Civil Procedure (Modification of Enactments) Order 2003, SI 2003/490. Before this order came into effect, art 4 was in these terms:

b

> 'An appeal shall lie to the Court of Appeal where the decision to be appealed is a final decision—(a) in a claim allocated by a court to the multi-track under rules 12.7, 14.8 or 26.5 of the Civil Procedure Rules 1998; or (b) made in proceedings to which rule 49(2) of the Civil Procedure Rules 1998 refers or to which any of Parts 57 to 62 of those Rules applies.'

c

[32] Until the change made to art 4 of the Destination Order in 2003, a CPR Pt 55 claim allocated to the multi-track pursuant to CPR 55.9 was not covered by the language of that article, and the purpose of the amendment was evidently to introduce a much more straightforward regime. The guidelines are set out in the third section of CPR PD 7:

d

> **'THE CLAIM FORM**
>
> 3.1 A claimant must use practice form N1 or practice form N208 (the Part 8 claim form) to start a claim (but see paragraphs 3.2 and 3.4 below).
>
> 3.2 Rule 7.9 deals with fixed date claims and rule 7.10 deals with the Production Centre for the issue of claims ...

e

> 3.3 If a claimant wishes his claim to proceed under Part 8, or if the claimant is required to proceed under Part 8, the claim form should so state. Otherwise the claim will proceed under Part 7 ...
>
> 3.4 Other practice directions may require special practice forms to be used to commence particular types of proceedings ...'

f

[33] Claim form N5A, the form required to be used in claims for relief from forfeiture, does not state that the claim is proceeding under Pt 8. The claim therefore is a claim proceeding under CPR Pt 7 and falls within the language of the new art 4 of the Destination Order. I therefore reject Mr Bruce's alternative submission.

g

[34] For these reasons I consider that on the proper interpretation of the Destination Order, appeal from Judge Mayer's order lies to a High Court judge. Whether it is appropriate to transfer the appeal from the High Court to this court is a different issue, which I will determine as a High Court judge when I have had the opportunity of considering any further submissions which I invited the parties to send to the court once they had had the opportunity of considering this judgment in draft.

h

MANCE LJ.

[35] I agree.

j

DYSON LJ.

[36] I also agree.

Order accordingly.

Dilys Tausz Barrister.

Sargeant and another v Macepark (Whittlebury) Ltd

[2004] EWHC 1333 (Ch)

CHANCERY DIVISION

LEWISON J

25–27 MAY, 8 JUNE 2004

Landlord and tenant – Covenant – User of premises – Covenant against change of use without consent – Consent not to be unreasonably withheld – Whether conditions restricting user protecting landlord's trading interests reasonable.

The claimant landlords carried on the business of a championship golf course and golf and country club facilities. The defendant tenant was a market leader in the provision of facilities for management training. Under a lease between the landlords and the defendant tenant the tenant constructed a hotel on land adjacent to that on which the landlords' business was carried on. The permitted use of the leased premises was as a hotel, conference centre, management training centre, leisure fitness and health complex, and ancillary uses, and 'any other use approved by the Landlord from time to time, such approval not to be unreasonably withheld or delayed'. The landlords covenanted not to allow their business property to be used in any activity which would adversely affect the tenant's income or investment in the leased premises, with an exception for the provision of food and drink in relation to the golf and country club business, associated conferences and wedding receptions. The tenant applied for the landlords' consent to construct an extension to the hotel and negotiations over the conditions on which consent would be granted took place. Eventually, the tenant notified the landlord that it considered that consent had been unreasonably withheld or delayed and started building works. The landlords commenced proceedings. The parties subsequently agreed on the terms of a licence to allow the construction of the extension. The licence contained a clause which restricted the use of the public rooms in the extension to use for functions and activities directly related or connected to management training conferences held at the hotel which would be added to the lease 'in the event that the Court shall determine that it is reasonable for the Landlord to impose as a condition of granting consent' such a restriction. The tenant contended, inter alia, that it was not reasonable for a landlord to refuse consent to the making of alterations on the ground that the alterations would damage his trading interests, or to impose a condition aimed at protecting his trading interests.

Held – There was no rule of law which precluded a landlord from relying under any circumstances on perceived damage to his trading interests in adjoining or neighbouring property as a ground for refusing consent to an assignment or change of use. Whether the particular perception was reasonable, and whether, if reasonable, it justified a refusal of consent or the imposition of a condition, was a question of fact in each case. The same principle applied in cases concerning alterations. In an appropriate case a landlord was entitled to object to alterations on the ground that he had a reasonable objection to the use the tenant proposed to make of the altered property, whether that use was the same as or different

from the use carried on in the remainder of the property. In the instant case the landlords were entitled to protect themselves against perceived competition to their wedding and functions business but they were not entitled to protect the future possibility of their entering the conference business, which was already part of the tenant's business. Under the proposed clause the only types of conference permitted were management training conferences and all other types of conference were excluded. The clause, as it stood, therefore went further than was reasonable to protect the landlords' legitimate concerns, and, accordingly, the lease would not be varied to incorporate it (see [55], [56], [79]–[82], below).

Sportoffer Ltd v Erewash BC [1999] 3 EGLR 136 applied.

Notes

For alterations and improvements, see 27(1) *Halsbury's Laws* (4th edn reissue) paras 380–382.

Cases referred to in judgment

Ashworth Frazer Ltd v Gloucester City Council [2001] UKHL 59, [2002] 1 All ER 377, [2001] 1 WLR 2180.

Bates v Donaldson [1896] 2 QB 241, [1895–9] All ER Rep 170, CA.

Bickel v Duke of Westminster [1976] 3 All ER 801, [1977] QB 517, [1976] 3 WLR 805, CA.

Brawley v Marczynski [2002] EWCA Civ 756, [2002] 4 All ER 1060, [2003] 1 WLR 813.

Bromley Park Garden Estates Ltd v Moss [1982] 2 All ER 890, [1982] 1 WLR 1019, CA.

Gibbs and Houlder Bros & Co Ltd's Lease, Re, Houlder Bros & Co Ltd v Gibbs [1925] Ch 575, [1925] All ER Rep 128, CA.

Hooker's Settlement, Re, Heron v Public Trustee [1954] 3 All ER 321, [1955] Ch 55, [1954] 3 WLR 606.

International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd [1986] 1 All ER 321, [1986] Ch 513, [1986] 2 WLR 581, CA.

Iqbal v Thakrar [2004] EWCA Civ 592, [2004] All ER (D) 304 (Apr).

Lambert v FW Woolworth & Co Ltd (No 2) [1938] 2 All ER 664, [1938] Ch 883, CA.

Mount Eden Land Ltd v Straudley Investments Ltd (1996) 74 P & CR 306, CA.

Newton Abbott Co-Operative Society Ltd v Williamson and Treadgold Ltd [1952] 1 All ER 279, [1952] Ch 286.

Pimms Ltd v Tallow Chandlers in the City of London [1964] 2 All ER 145, [1964] 2 QB 547, [1964] 2 WLR 1129, CA.

Sportoffer Ltd v Erewash BC [1999] 3 EGLR 136.

Tredegar (Viscount) v Harwood [1929] AC 72, [1928] All ER Rep 11, HL.

West Layton Ltd v Ford [1979] 2 All ER 657, [1979] QB 593, [1979] 3 WLR 14, CA.

Whiteminster Estates Ltd v Hodges Menswear Ltd [1974] EGD 324.

Cases referred to in skeleton arguments

Balls Bros Ltd v Sinclair [1931] 2 Ch 325, [1931] All ER Rep 803.

Berenyi v Watford BC [1980] 2 EGLR 38, CA.

Premier Confectionery (London) Co Ltd v London Commercial Site Rooms Ltd [1933] Ch 904, [1933] All ER Rep 579.

Woolworth (FW) & Co Ltd v Lambert [1936] 2 All ER 1523, [1937] Ch 37, CA.

Claim

Jeffery Ian Sargeant and Carol Elizabeth Sargeant brought proceedings against Macepark (Whittlebury) Ltd for an injunction to prevent certain works being carried out at a property known as Whittlebury Hall, the subject of a lease made between themselves and Macepark on 20 October 1998 for a period of 122 years commencing on 1 April 1998. The parties agreed the terms of a licence under which the works could proceed save for a variation of the lease incorporating the terms set out at [4], below, and the Sargeants applied to the court for the variation of the lease. The facts are set out in the judgment.

John Male QC (instructed by *Beachcroft Wansbroughs*) for the Sargeants.
Nicholas Dowding QC (instructed by *Ashurst*) for Macepark.

Cur adv vult

8 June 2004. The following judgment was delivered.

LEWISON J.

INTRODUCTION

[1] Mr and Mrs Sargeant own a large area of land at Whittlebury in Northamptonshire, close to the Silverstone Motor Racing Circuit. In the first half of the 1990s the land was developed by the construction of a golf course, clubhouse, bars and restaurants. It was part of the Sargeants' long-term plans that the complex should also include a hotel.

[2] Following negotiations with Mr Mike Rockall, the managing director of Macepark (Whittlebury) Ltd (Macepark), the Sargeants entered into an agreement for lease, and subsequently a lease, with Macepark. Under the terms of the lease Macepark were to construct the hotel, which they did.

[3] The lease contains a covenant by Macepark not to make alterations without the landlords' consent, such consent not to be unreasonably withheld or delayed. Macepark applied for consent to construct an extension to the hotel in May 2003. At the end of July 2003 the Sargeants said that they would give consent, but only on certain conditions. Macepark took the view that the conditions were unreasonable, and began the works without consent. This prompted the Sargeants to seek an interim injunction which was initially granted on an application without notice on 20 August 2003 and subsequently continued by consent until trial of a preliminary issue. The preliminary issue directed to be tried was whether the Sargeants had unreasonably withheld or delayed the giving of consent to the extension. Statements of case were served on each side, but in the event the issue was all but compromised.

[4] On 24 October 2003 the Sargeants granted Macepark a licence to carry out the work subject to a number of conditions. Somewhat unusually, one of the conditions contained in the licence was not agreed. Clause 7.3 of the licence says:

> 'In the event that the Court shall determine that it is reasonable for the Landlord to impose as a condition of granting consent to the works a restriction on the use of public rooms in the Extension in the form set out below, the following sub-clause will be added to clause 3 of the Lease:
>
> "3.34 **Restrictions on use of public rooms in the Extension**
>
> Not to use any of the meeting or conference rooms or other facilities intended for use otherwise than as bedrooms in the extension constructed

pursuant to a Licence and Deed of Variation made the 24th day of October 2003 between the Landlord (1) and the Tenant (2) otherwise than for functions and activities which are directly related or connected to management training conferences held at the Premises" ...'

[5] I have been asked to decide whether the imposition of this condition is one which it is reasonable for the Sargeants to impose. I was initially sceptical about whether this was a proper issue for the court to resolve (compare *Re Hooker's Settlement, Heron v Public Trustee* [1954] 3 All ER 321, [1955] Ch 55). However, where a case is settled before trial, the court retains a discretion to decide unresolved issues, such as costs (compare *Brawley v Marczynski* [2002] EWCA Civ 756, [2002] 4 All ER 1060, [2003] 1 WLR 813); although it must exercise that discretion with caution. The issue I am asked to decide was a substantive issue in the case, raised on the pleadings. Accordingly, I consider that it is proper that I should determine the one outstanding issue between the parties.

[6] Mr Nicholas Dowding QC appeared for Macepark; and Mr John Male QC appeared for the Sargeants.

BACKGROUND FACTS

[7] At the date of the lease the Sargeants had been carrying on business for the best part of a decade. In a subsequent arbitration between the Sargeants and Macepark the arbitrator described their business at that time as follows:

'Between 1991 and 1994 Mr and Mrs Sargeant developed the business of a championship golf course and golf and country club facilities which trades under the name of Whittlebury Park. At all material times Whittlebury Park was engaged in the business of managing and operating a golf club, golf days, corporate hospitality, product launches, incentives and promotions, team building, multi-activity days, corporate family days, lunches and dinners, parties and dinner dances, weddings and receptions, "stag" and "hen" parties, buffets and barbecues, themed occasions and other golf and country club related activities. In addition during the week of the British Grand Prix and other major race meetings at the adjacent Silverstone Race track, Whittlebury Park engages in the business of letting space for camping and caravanning and car-parking.'

[8] The arbitrator found that Macepark knew this at the time. The Sargeants also live on the site in a house called West Park House. Macepark was a market leader in the provision of facilities for management training. Among its establishments was Scalford Hall, which Mr Rockall showed the Sargeants during the course of negotiations.

THE LEASE

[9] The lease was granted on 29 October 1998 for a term of 122 years from 1 April 1998. The rent payable under the lease consists of two components. (i) The minimum rent. This is £100,000 per annum subject to review on 1 April 2003 and every fifth anniversary thereafter. The review is in accordance with Sch 4, which provides for the rent to be increased in line with increases in the retail price index (RPI). (ii) The turnover rent. This is payable in accordance with Sch 5. It represents the turnover rent percentage of the tenant's gross annual receipts for any year of the term. The turnover percentage is 5% of the first £2m, 6% of the next £1m, and 7% of anything above £3m. No minimum rent is payable if the turnover rent exceeds the minimum rent.

[10] Clause 3.33 is a covenant by the tenant to—

> 'use its best endeavours to maximise all income receivable by it whether through its own operations or through those of any licensee concessionaire subtenant or any Associate (as defined in Schedule 5).'

In fact the turnover rent has exceeded the minimum rent by a substantial margin. In 2003 it was over £500,000 per annum.

[11] The lease required the tenant to construct the works shown on plans attached to the lease. The date on which those works were completed was to be called 'the Certificate Date'. Clause 3.6.1 provides that after the certificate date the tenant must not (among other things) make any alteration to the premises 'except as permitted by the provisions of this clause'. Clause 3.6.2 provides:

> 'After the Certificate Date the Tenant must not make alterations to the Premises unless he first—
>
> 3.6.2.1 obtains and complies with all necessary consents of any local or other competent authority and pays the authority's charges for them,
>
> 3.6.2.2 makes an application for consent supported by drawings and where appropriate a specification in duplicate prepared by an architect, or a member of some other appropriate profession,
>
> 3.6.2.3 pays the reasonable fees of the Landlord or any mortgagee for the preparation of such consent,
>
> 3.6.2.4 obtains the consent of the Landlord, whose consent may not be unreasonably withheld or delayed ...'

[12] This is the clause in issue in the present case.

[13] Under cl 3.13.2 the tenant must not make any application for planning permission (other than in respect of matters which do not require the landlord's consent under the lease) after the certificate date without the prior consent of the landlords such consent not to be unreasonably withheld or delayed. Under cl 3.13.5 the tenant may not carry out any development until the landlords have acknowledged that any planning permission is acceptable to them.

[14] Under cl 3.25 the tenant must not at any time on or after the certificate date use the leased premises other than for the permitted use. The permitted use is defined by the lease as follows:

> '"The Permitted Use" means Hotel, Conference Centre, Management Training Centre Leisure Fitness and Health complex and any ancillary and additional uses as are compatible or may from time to time be associated therewith or any other use approved by the Landlord from time to time, such approval not to be unreasonably withheld or delayed.'

[15] Paragraph 7 of Sch 7 contains the following covenant by the landlords:

> 'Not at any time to allow any part of West Park to be used for nor to do nor be involved in either alone or with others nor be interested (whether as a partner Director or otherwise) in any activity which would adversely affect the income of the Tenant or the value of the Tenant's investment in the Premises for the Permitted Use save that the provision of food and drink to members or temporary playing members social members and their guests of the Golf Club the holding of conferences in connection with the Golf Club activities or wedding receptions shall not be deemed to be in contravention of this covenant.'

[16] The expression 'Golf Club' is defined in cl 1.10 so as to include a golf and country club business.

RELATIONS BETWEEN THE PARTIES

[17] It is clear that the relationship between the parties has not been a happy one. Disputes arose right from the beginning. These disputes have led to a number of arbitrations, in which in excess of 50 issues have been referred to arbitration. Many of the issues have concerned the use to which Macepark has put the property.

[18] The hotel opened in June 2000. It is called Whittlebury Hall. As originally constructed, it included a large lounge; a series of meeting and training rooms; a dining room capable of serving 250 covers, and a leisure complex which included a swimming pool, gym and other facilities. By October the Sargeants were complaining that Macepark were holding wedding receptions in the hotel. This was one of the issues referred to arbitration. The Sargeants' argument before the arbitrator was that Macepark were in breach of covenant in using the premises 'for functions, weddings and private dining'. Macepark admitted the uses complained of, but denied that they were in breach of covenant. The arbitrator considered at length the rival arguments, and considered much of the background negotiations for the grant of the lease. The arbitrator held that the activities complained of all fell within the definition of the permitted use and that, accordingly, Macepark were not in breach of covenant. However, he found that there had been a collateral agreement made between Mr Rockall and Mr Sargeant the effect of which was to preclude Macepark from allowing wedding ceremonies (as opposed to wedding receptions) to take place on the premises. He expressed his conclusion as follows:

> 'I HOLD that the carrying out of wedding (ceremonies) is in breach [of] an agreement between the parties and ORDER that Macepark be restrained from further such activity, subject to the landlord's consent in accordance with the terms of the lease.'

[19] Running in parallel were a number of applications by Macepark for consent to make alterations. I need only refer to two. On 31 March 2001 Macepark's architect sent the Sargeants plans relating to a proposed lecture theatre and small office extension for their approval. The lecture theatre was to be constructed on the eastern side of the complex and as an 'in-fill' between the spa and the dining room. The lecture theatre was required primarily in connection with the conference business and also for the hotel function side of the business. It was intended to overcome the difficulties caused by the previous practice of using the hotel lounge or dining room or a marquee erected in the grounds.

[20] The Sargeants replied on 9 April 2001. They said:

> 'We are prepared to grant consent for the above extensions, subject to the lease being varied in accordance with the attached schedule ... If this is not acceptable you may wish to apply to add item (iii) [ie the request to build the lecture theatre] to the existing Arbitration or to commence new proceedings.'

[21] The schedule attached to the letter contained a large number of variations. I mention a few, just to give a flavour: (i) a doubling of the minimum rent to £200,000 per annum; (ii) an undertaking by Macepark to make

accommodation available to golf club visitors at discounted rates offered to other third parties; (iii) an undertaking by Macepark 'not to compete with the landlords' established Wedding, Banqueting and Functions businesses', and a written undertaking that the lecture theatre was to be used only for the purpose of management training lectures and conferences, unless prior written consent was obtained from the Sargeants for other specific events, the granting of such consent to be at the sole discretion of the claimants 'to ensure non-competition with the Landlords existing businesses'; (iv) an increase in the turnover percentage to 8% on all turnover over £5m.

[22] Macepark did not accept these conditions. The arbitrator published his award on 13 November 2001. Within a couple of days, Macepark applied for consent to use the premises for wedding ceremonies. The Sargeants replied on 6 December 2001. They did not reject the application out of hand, but indicated that they were minded to refuse consent, on the ground that they would lose business. However, they invited Macepark's proposals 'as to how you consider it may be possible for our two wedding businesses to co-exist'. Macepark did not put forward any such proposals.

[23] The application for consent to the construction of the lecture hall rumbled on. On 11 July 2002 the Sargeants asked for Macepark's—

> 'undertaking that this new facility would only be used for specific purposes to be agreed by the parties in advance, such that if approved by the Landlords this extension will not become a Trojan horse to try to prevent the Landlords from undertaking any more of their existing businesses, e.g. we shall require an undertaking that it will not be used for weddings.'

[24] The Sargeants made a request in similar terms on 31 July 2002.

[25] In August 2002 the Sargeants offered to settle the outstanding issues referred to arbitration on terms. By now Macepark were keen to proceed with the work of constructing the lecture hall, but the Sargeants' objections had not been overcome. Consequently in September 2002 Macepark agreed to enter into an undertaking in the following terms:

> 'You having given consent to Macepark (Whittlebury) Limited to continue with planning application no. S/2002/1096/P re. a lecture hall extension at Whittlebury Hall and to Macepark (Whittlebury) Limited building the extension. Macepark (Whittlebury) Limited undertakes not to use the extension for functions other than exclusively in connection with management training without the consent in writing of the Landlords (such consent to be entirely at the discretion of the Landlords) unless and until an arbitrator has adjudged that the condition (that the extension should not be used for functions other than exclusively in connection with management training) is unreasonable and/or such a condition constitutes an unreasonable refusal of consent.'

[26] I read the word 'functions' in this undertaking as a synonym for parties. Within a month or so the Sargeants were complaining that Macepark were advertising the lecture theatre for functions with 300 covers, in breach of the undertaking that had just been given. Macepark were also advertising their ability to hold wedding ceremonies, despite the arbitrator's order. Mr Rockall said in evidence that Macepark had taken the view that consent to do this had been unreasonably withheld; although no such allegation was made in contemporaneous correspondence.

THE CURRENT APPLICATION

[27] On 9 May 2003 Macepark applied to South Northamptonshire Council for planning permission for an extension to be built at the rear of Whittlebury Hall. Three days before that application was submitted Macepark asked the Sargeants for consent to the making of the application pursuant to cl 3.13.2 of the lease. The extension consists of the following: 78 bedrooms, ten syndicate rooms, two training rooms, a large conference hall capable of accommodating 700 people.

[28] It is clear that the extension is physically capable of being used for a wide variety of purposes, including the holding of wedding receptions, other social functions, balls, business and professional conferences, product launches and so on.

[29] Although Macepark had applied for planning permission without the Sargeants' consent, it was agreed that no separate issue would be made about this. Instead the parties concentrated on the need for Macepark to obtain the Sargeants' consent to the alterations under cl 3.6.2.4 of the lease.

[30] On 10 May 2003 the Sargeants asked for copies of all information given to the planning authority, and if no such information had been provided 'details and evidence to the Landlords of the need for the application'. Macepark responded on 14 May 2003 and the following day faxed to the Sargeants a copy of the letter from their planning consultant (Mr Cave) to the planning authority in which the need for the extensions was dealt with. On 23 May 2003 the Sargeants' solicitors, Beachcroft Wansbroughs (Beachcrofts) wrote asking for more information. This included:

> 'The precise use to which it is intended to put the proposed extension and any effect this would have on the use of other parts of Whittlebury Hall. You are aware of our clients' concerns about functions.'

On 5 June 2003 Macepark replied that the use to which the extension would be put was clear from the plans, supplemented by Mr Cave's letter. The main space shown on the plan was a large space designated 'conference room'. Mr Cave's letter said:

> 'The most recent extension to Whittlebury Hall as the conference room has proved to be extremely popular in commercial terms and particularly well used by the motor industry. In this respect there are intensive training courses using the facility bringing in for example motorcars which are the subject of particular sales and training programmes. The nature of the dedicated courses has also required that training delegates occupy the facilities for long periods and use the room also for their own catering for delegates. As a consequence, this particular niche market has begun to absorb the facility in a way that has not allowed the original conference or large group sessions to be accommodated therein. This has resulted in an urgent requirement for such dedicated space which it is intended will be provided at the rear of the health and leisure complex.'

[31] Beachcrofts responded on 13 June 2003 to the effect that the plans did not clearly show the use of each room, and went on to say:

> 'We made it clear that our client is concerned (as you well know) about functions which compete with their own business. There is an issue about the lecture theatre and weddings. With this in mind, please confirm whether the proposed use of the "public" (i.e. non bedroom) rooms will be limited to

functions and activities directly related to the management training and conference use of the building or if you propose to hold functions (for example wedding ceremonies and receptions or private parties) in the extension.'

[32] I read the first and third uses of the word 'functions' as again being a synonym for parties; but the second use of that word as part of the composite phrase 'functions and activities'. On 27 June 2003 Macepark's solicitors (then Prettys) replied:

'We are instructed to confirm that the public rooms as you describe them (i.e. non-bedrooms) will be limited to functions and activities directly related to or connected to management training and conference uses'

[33] On 4 July 2003 Macepark wrote asking whether, in view of the extremely tight time pressure they were under, the Sargeants would be prepared to agree to allow them to begin some preparatory work before the grant of planning permission. On the same day Beachcrofts wrote (i) making a number of new points regarding services, sewage, site access and the glazed entrance to the extension, and (ii) refusing to allow any works to start before planning permission and the completion of a formal licence. Following further correspondence, the Sargeants came to their decision on 29 July, which was communicated by Beachcrofts' letter of that date. The upshot was that they were prepared to give consent subject to a number of conditions. The conditions included:

'The use of the "public" rooms (i.e. non-bedrooms) in the extension and the recently built lecture theatre will be limited to functions and activities directly related to management training conferences held at Whittlebury Hall ...'

[34] The lecture theatre was not, of course, part of the application; and had already been dealt with by Macepark's undertaking, which was susceptible to review by arbitration. No draft licence was provided with the letter. Macepark was keen to get the work underway. It began preparatory enabling work in early August 2003. That prompted a letter from Beachcrofts on 4 August 2003 threatening an immediate application for an injunction if by 10.30 am on the following day they did not receive confirmation that the works had ceased and an undertaking not to recommence works until both planning permission and a formal licence had been granted. Macepark then offered various concessions on 5 August 2003 in return for being allowed to proceed with the work forthwith. They included: 'The "public" rooms (i.e. non-bedrooms) of the new extension will not be used for any functions not directly related to management training ...'

[35] I say in passing that I read the word 'functions' as being a synonym for parties. Thus this form of words would not have prevented the use of the extension for business conferences, product launches and so on. However, this form of words was not acceptable to the Sargeants. On 7 August 2003 the Beachcrofts sent a draft licence which included in cl 7.3 a restriction in the following terms:

'Not to use any of the meeting or conference rooms or other facilities intended for use otherwise than as bedrooms in the extension constructed pursuant to a Licence and Deed of Variation made the day of 2003 between the Landlord (1) and the Tenant (2) otherwise than for functions and

activities which are directly related or connected to management training conferences held at the Premises ...'

THE PROCEEDINGS

[36] On 15 August 2003 Beachcrofts informed Macepark's solicitors that unless Macepark undertook that no works would be commenced before 21 August 2003, an application would be made without notice for an injunction on 18 August 2003 to prevent the works being commenced. On 18 August 2003 Macepark wrote saying that (i) it regarded consent as having been unreasonably withheld or delayed, and (ii) in the circumstances it was not prepared to wait any longer because further delay would lead to substantial losses as a result of lost contracts.

[37] Despite warnings of an application for an injunction Macepark did not stop work; and on 19 and 20 August 2003 the Sargeants sought and obtained an injunction. On that occasion the judge (Etherton J) indicated that the issue of unreasonable withholding of consent was best dealt with separately and at an early stage. The injunction was continued on 2 September 2003 by Rimer J. On that occasion a preliminary issue was defined and directions given which led to a hearing being fixed for November 2003. Subsequently the parties met; in September and October 2003 they managed to agree the terms of a licence which left one issue for consideration, namely whether or not the Sargeants were entitled to impose the restriction on the use of the public rooms of the extension set out in cl 7.3 of that licence which provides as follows:

> 'In the event that the Court shall determine that it is reasonable for the Landlord to impose as a condition of granting consent to the works a restriction on the use of public rooms in the Extension in the form set out below, the following sub-clause will be added to clause 3 of the Lease:
>
> "3.34 **Restrictions on use of public rooms in the Extension**
>
> Not to use any of the meeting or conference rooms or other facilities intended for use otherwise than as bedrooms in the extension constructed pursuant to a Licence and Deed of Variation made the 24th day of October 2003 between the Landlord (1) and the Tenant (2) otherwise than for functions and activities which are directly related or connected to management training conferences held at the Premises" ...'

[38] That is the issue now before me.

LEGAL PRINCIPLES

[39] The question whether consent to alterations has been unreasonably withheld must be considered under two heads: the common law and s 19(2) of the Landlord and Tenant Act 1927.

[40] The law on reasonableness has been most extensively developed in relation to covenants against alienation. In *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 All ER 321, [1986] Ch 513 the Court of Appeal distilled a number of principles from the authorities. Of these principles, Lord Bingham of Cornhill selected three as worthy of special emphasis in *Ashworth Frazer Ltd v Gloucester City Council* [2001] UKHL 59, [2002] 1 All ER 377, [2001] 1 WLR 2180:

> '[3] When a difference is to be resolved between landlord and tenant following the imposition of a condition (an event which need not be

separately considered) or a withholding of consent, effect must be given to three overriding principles. The first, as expressed by Balcombe LJ in *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 All ER 321 at 325, [1986] Ch 513 at 520 is that—"a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject matter of the lease." The same principle was earlier expressed by Sargant LJ in *Re Gibbs and Houlder Bros & Co Ltd's Lease, Houlder Bros & Co Ltd v Gibbs* [1925] Ch 575 at 587, [1925] All ER Rep 128 at 134: "... in a case of this kind the reason must be something affecting the subject matter of the contract which forms the relationship between the landlord and the tenant, and ... it must not be something wholly extraneous and completely dissociated from the subject matter of the contract." While difficult borderline questions are bound to arise, the principle to be applied is clear.

[4] Secondly, in any case where the requirements of the first principle are met, the question whether the landlord's conduct was reasonable or unreasonable will be one of fact to be decided by the tribunal of fact. There are many reported cases. In some the landlord's withholding of consent has been held to be reasonable (as, for example, in *Pimms Ltd v Tallow Chandlers in the City of London* [1964] 2 All ER 145, [1964] 2 QB 547 and *Bickel v Duke of Westminster* [1976] 3 All ER 801, [1977] QB 517), in others unreasonable (as, for example, in *Bates v Donaldson* [1896] 2 QB 241, [1895–9] All ER Rep 170, *Re Gibbs & Houlder Bros & Co Ltd's Lease* and the *International Drilling* case). These cases are of illustrative value. But in each the decision rested on the facts of the particular case and care must be taken not to elevate a decision made on the facts of a particular case into a principle of law. The correct approach was very clearly laid down by Lord Denning MR in *Bickel's* case [1976] 3 All ER 801 at 804–805, [1977] QB 517 at 524.

[5] Thirdly, the landlord's obligation is to show that his conduct was reasonable, not that it was right or justifiable. As Danckwerts LJ held in the *Pimms* case [1964] 2 All ER 145 at 151, [1964] 2 QB 547 at 564: "... it is not necessary for the landlords to prove that the conclusions which led them to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances ..." Subject always to the first principle outlined above, I would respectfully endorse the observation of Viscount Dunedin in *Viscount Tredegar v Harwood* [1929] AC 72 at 78, [1928] All ER Rep 11 at 14 that one "should read reasonableness in the general sense". There are few expressions more routinely used by British lawyers than "reasonable", and the expression should be given a broad, commonsense meaning in this context as in others.'

[41] The principles that Balcombe LJ distilled in the *International Drilling* case were adapted by Peter Gibson LJ (with whom Longmore LJ agreed) for the purposes of a covenant against alterations in *Iqbal v Thakrar* [2004] EWCA Civ 592 at [26], [2004] All ER (D) 304 (Apr) at [26] as follows:

'(1) The purpose of the [covenant] is to protect the landlord from the tenant effecting alterations and additions which damage the property interests of the landlord. (2) A landlord is not entitled to refuse consent on grounds which have nothing to do with his property interests. (3) It is for the tenant to show that the landlord has unreasonably withheld his consent to the proposals which the tenant has put forward. Implicit in that is the

necessity for the tenant to make sufficiently clear what his proposals are, so that the landlord knows whether he should refuse or give consent to the alterations or additions. (4) It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable landlord in the particular circumstances. (5) It may be reasonable for the landlord to refuse consent to an alteration or addition to be made for the purpose of converting the premises for a proposed use even if not forbidden by the lease. But whether such refusal is reasonable or unreasonable depends on all the circumstances. For example, it may be unreasonable if the proposed use was a permitted use and the intention of the tenant in acquiring the premises to use them for that purpose was known to the freeholder when the freeholder acquired the freehold. (6) While a landlord need usually only consider his own interests, there may be cases where it would be disproportionate for a landlord to refuse consent having regard to the effects on himself and on the tenant respectively. (7) Consent cannot be refused on grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment. (8) In each case it is a question of fact depending on all the circumstances whether the landlord, having regard to the actual reasons which impelled him to refuse consent, acted unreasonably.'

[42] I have placed the word 'covenant' in square brackets, because the text of the transcript reads 'consent'; but that seems to me to be a misprint. Proposition (7) is a new one. It does not feature among the principles enunciated by Balcombe LJ in the *International Drilling* case. Although Peter Gibson LJ does not expressly say so, it echoes the effect of s 19(2) of the 1927 Act. The Court of Appeal considered the effect of that subsection in *Lambert v FW Woolworth & Co Ltd (No 2)* [1938] 2 All ER 664, [1938] Ch 883. Section 19(2) provides:

'In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against the making of improvements without licence or consent, such covenant condition or agreement shall be deemed, notwithstanding any express provision to the contrary, to be subject to a proviso that such licence or consent is not to be unreasonably withheld; but this proviso does not preclude the right to require as a condition of such licence or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require as a condition of such licence or consent, where such a requirement would be reasonable, an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed.'

[43] Slesser LJ said ([1938] 2 All ER 664 at 675, [1938] Ch 883 at 906):

'However this may be, in the present case, as I have said, the landlords have unconditionally withheld their consent, and made no condition as to payment of any compensation in respect of damage to, or diminution in the value of, the premises. Having so failed, they have abstained from claiming the benefit of subsect. (2), which expressly preserves this right to them, nor,

in my view, can they now be heard to say, as evidence of reasonableness, that the premises have suffered damage, or any diminution in value, and that the tenants have not offered to compensate them. *Prima facie*, the proviso says that they shall not unreasonably withhold their licence or consent, but gives to them expressly a right to claim the payment of a reasonable sum in respect of damage or diminution in value. This they have not claimed, and I think that therefore they must seek for some grounds of reasonableness for their refusal other than those of damage or diminution in value, to meet the case of the tenants against them.'

[44] MacKinnon LJ said ([1938] 2 All ER 664 at 678, [1938] Ch 883 at 910–911):

'Leaving aside the statute for the moment, if there is a covenant in a lease "not to make structural alterations without consent, such consent not to be unreasonably withheld," and if the tenant asks for consent to do certain works, the landlord might justify his refusal to consent on various grounds. (i) He might object on aesthetic, artistic, or sentimental grounds. (ii) He might object that the alterations would damage the demised premises, or diminish their value. (iii) He might, perhaps, object that the alteration would damage his neighbouring premises, or diminish their value. I say "perhaps," as to this, having in mind the possible effect of the principle of (*Gibbs and Houlder Bros & Co Ltd's Lease, Re, Houlder Bros & Co Ltd v Gibbs* [1925] Ch 575, [1925] All ER Rep 128). (iv) He might object that, as the alteration would not add to the letting value of the premises, he would have to undo it and reinstate the old conditions at the end of the term. Of these, the first ground, I believe and hope, remains unaffected by anything in the Act of 1927. No court, as I hope and believe, will ever hold that, under sect. 19(2) a landlord must consent to the hideous degradation of the front of his building by the fitting of a sheet of plate glass, and be satisfied by a money payment for the loss of graceful eighteenth-century windows. A glance at the photograph of these premises shows that no aesthetic considerations can be involved in this case, however. As regards the second, third, and fourth grounds, the section makes express provision. The landlord must not unreasonably withhold his consent: "but this proviso does not preclude the right to require as a condition of such licence, or consent the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to the landlord, and of any legal or other expenses properly incurred in connection with such licence or consent, nor, in the case of an improvement which does not add to the letting value of the holding, does it preclude the right to require ... an undertaking on the part of the tenant to reinstate the premises in the condition in which they were before the improvement was executed."'

[45] It is clear from these passages that in a case governed by s 19(2) a landlord cannot refuse consent on the ground of pecuniary damage to his interest in the leased property or neighbouring property which belongs to him. His only right is to ask for compensation as a condition of giving consent. In the light of Peter Gibson LJ's formulation of the common law principles, this seems to be part of the common law as well. In most cases it will not matter, because the covenant and the subsection will work in tandem.

[46] However, Mr Male submitted that s 19(2) only applies to a lease containing a covenant against making improvements without consent. It

operates by attaching to such a covenant a proviso that consent will not be unreasonably withheld. If the lease already contains such a proviso, then there is no need for the statutory proviso, so it does not apply. But in my judgment Mr Dowding was right to submit that if the statutory scheme, taken as a whole, is more favourable to the tenant than the contractual provisions of the lease, the lease must yield to the statute.

[47] In addition to the propositions I have quoted, the Court of Appeal formulated two further propositions in *Mount Eden Land Ltd v Straudley Investments Ltd* (1996) 74 P & CR 306 at 310. They are:

> '(1) It will normally be reasonable for a landlord to refuse consent or impose a condition if this is necessary to prevent his contractual rights under the [lease] from being prejudiced by the proposed assignment or sublease.
>
> (2) It will not normally be reasonable for a landlord to seek to impose a condition which is designed to increase or enhance the rights that he enjoys under the [lease].'

[48] When considering the reasonableness of conditions, it seems to me that if the landlord would have been entitled to refuse consent on some particular ground, a condition neutralising the landlord's concern will ordinarily be reasonable. The most common example would be a case in which the landlord would be entitled to refuse consent to an assignment to a financially weak assignee, but in fact grants consent on condition that the assignee's obligations are guaranteed or that the assignee puts up a rent deposit. In considering the reasonableness of a condition imposed to allay a particular concern of a landlord, Peter Gibson LJ's principle (6) in *Iqbal v Thakrar* [2004] All ER (D) 304 (Apr) is also relevant:

> 'While a landlord need usually only consider his own interests, there may be cases where it would be disproportionate for a landlord to refuse consent having regard to the effects on himself and on the tenant respectively.'

[49] One question of principle that arises in this case is whether a landlord is entitled to refuse consent to the making of alterations on the ground that the alterations would damage his trading interests; or to impose a condition aimed at protecting his trading interests. Peter Gibson LJ's formulation of the principles in *Iqbal*'s case, and in particular principles (1) and (2), would suggest that the answer to that question is No. It is only if damage to the landlord's *trading* interests would affect his *property* interests that his trading interests become a potentially relevant consideration. On the other hand, in *Lambert*'s case Slesser LJ said ([1938] 2 All ER 664 at 675, [1938] Ch 883 at 907):

> 'I agree with Mr. Radcliffe that many considerations,aesthetic, historic or even personal, may be relied upon as yielding reasonable grounds for refusing consent, which I do not think it necessary or possible here to catalogue. The wider the connotation given to the idea of improvement, the more necessary it may be that the landlord should have his protection.'

[50] Peter Gibson LJ said in *Iqbal*'s case that no case had been drawn to the court's attention dealing with the grant or refusal of consent to alterations. So it appears that the court did not have the benefit of the judgments in *Lambert*'s case or, perhaps, *Ashworth Frazer Ltd v Gloucester City Council* [2002] 1 All ER 377. In addition, a refusal of consent based on a fear of competition has been upheld as reasonable in relation to covenants against alienation and change of use. In

Whiteminster Estates Ltd v Hodges Menswear Ltd [1974] EGD 324 the landlords carried on business as men's outfitters. They also owned the shop next door which had been let as a café. The tenant applied for consent to assign the lease to another men's outfitter, and the landlords refused on the ground that the proposed assignee would be a direct competitor. In a shortly reported (but reserved) judgment Pennycuick V-C held that the landlords fear of an adverse effect on their trade was one that could reasonably be held. He continued (at 325–326):

> 'Once it was accepted, as now it must be, that a landlord was entitled to take into account his own interests as well as his interests as a landlord, that was really an end of the matter. It was sufficient that the landlord could reasonably anticipate that the opening of the new shop would prejudice his own trade.'

[51] Mr Dowding submitted that the proposition as expressed by Pennycuick V-C, namely that the landlord could take into account his own interests 'as well as' his interests as a landlord, was too widely stated. He referred to *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] 1 All ER 321 at 326, [1986] Ch 513 at 521 in which Balcombe LJ said:

> 'To the opposite effect are the dicta, obiter but nevertheless weighty, of Viscount Dunedin and Lord Phillimore in *Viscount Tredegar v Harwood* [1929] AC 72 at 78, 82, [1928] All ER Rep 11 at 14, 16. There are numerous other dicta to the effect that a landlord need consider only his own interests: see, for example, *West Layton Ltd v Ford* [1979] 2 All ER 657 at 663, [1979] QB 593 at 605 and *Bromley Park Garden Estates Ltd v Moss* [1982] 2 All ER 890 at 896, [1982] 1 WLR 1019 at 1027. Those dicta must be qualified, since a landlord's interests, collateral to the purposes of the lease, are in any event ineligible for consideration: see para (2) above.'

[52] Thus, he submitted that the landlord's interests at large are not necessarily eligible for consideration. In my judgment there is force in this submission. Balcombe LJ's proposition (2) was the first of the three principles that Lord Bingham selected for special emphasis in the *Ashworth Frazer* case. Lord Bingham also said that wide statements to the effect that the question of reasonableness was at large needed to be qualified in the light of that principle. However, that still leaves the question whether the landlord's interests as the occupier of adjoining property must be left out of account.

[53] In *Sportoffer Ltd v Erewash BC* [1999] 3 EGLR 136 the landlords were the local authority, and operated a municipal leisure centre. The tenants were the tenants of a squash club and applied for consent to a change of use to use as a leisure centre. The landlords objected on the ground that the proposed change would damage the viability of their municipal leisure centre; and their refusal was upheld as reasonable by Lloyd J. He was referred both to the *Whiteminster Estates* case and to the *International Drilling* case. He concluded (at 142):

> 'I would find it surprising if a landlord could not reasonably take into account the circumstances of other property of his own, whether let or in hand, when considering an application for a consent to change of use under a lease. A shopping centre is an obvious example, but not the only case, where estate management considerations may suggest that one type of use be allowed under a lease but others not, because of the circumstances of

a other adjoining property. I find nothing in Balcombe LJ's judgment, nor in the case cited by him in relation to the proposition which I have mentioned, which suggests that this is not legitimate or that Sir John Pennycuick's decision in (the *Whiteminster Estates* case) is wrong. I therefore hold that, following Sir John's decision, a landlord can legitimately take into account considerations relating to adjoining property of his own, whether let or not.'

b [54] On the facts he held that the landlords' concern for their own trading interests was a reasonable concern, and that consequently, the refusal of consent was justified. In the analogous field of restrictive covenants affecting freehold land, a covenant taken for the protection of a business carried on on land owned by the covenantee has been held to be a covenant taken for the benefit of land; in c other words a property interest: see *Newton Abbott Co-Operative Society Ltd v Williamson and Treadgold Ltd* [1952] 1 All ER 279, [1952] Ch 286.

[55] In my judgment there is no rule of law which precludes a landlord from relying under any circumstances on perceived damage to his trading interests in adjoining or neighbouring property as a ground for refusing consent to an assignment or change of use. Whether the particular perception is reasonable d and whether, if reasonable, it justifies a refusal of consent or the imposition of a condition, is a question of fact in each case.

[56] Mr Dowding submitted in the alternative that a different principle applies in cases concerning alterations. In such a case, he submitted, the landlord's objection must relate to the works alone, and not to the use to be made of them. e However, Peter Gibson LJ's proposition (5) in *Iqbal*'s case says in terms that the use of the property following alterations may be a reasonable ground of objection, depending on the particular facts. In addition, as Slesser LJ pointed out in *Lambert*'s case, a landlord may rely on 'personal' reasons as a ground for refusal. Suppose that the operator of a petrol filling station lets an adjoining piece of land to a supermarket. Suppose that the supermarket then applies for consent to erect f its own petrol filling station on the leased land. On the face of it, it seems to me to be reasonable for the landlord to object on the ground that he would be damaged by the erection of a competing filling station next door. I do not accept Mr Dowding's submission. Mr Dowding submits as a fall-back position that the circumstances in which a landlord is entitled to object to an alteration on the g grounds of its use are confined to a conversion of the premises to a proposed use, and not as here, an alteration to extend property for the same use as that currently carried on. He bases this submission on the way that Peter Gibson LJ formulated proposition (5) in *Iqbal*'s case. But in my judgment, as Mr Male submitted, Peter Gibson LJ's use of the phrase 'converting the premises to a proposed use' is explicable because that was the proposal he was considering. I conclude that, in h an appropriate case, a landlord is entitled to object to alterations on the ground that he has a reasonable objection to the use that the tenant proposes to make of the altered property, whether that use is the same as or different from the use carried on in the remainder of the property.

[57] To hold otherwise would be to fall into the trap identified by Lord j Denning MR in *Bickel v Duke of Westminster* [1976] 3 All ER 801, [1977] QB 517 (and approved in the *Ashworth Frazer* case [2002] 1 All ER 377 at [4], [67]):

> 'The words of the contract are perfectly clear English words: "such licence shall not be unreasonably withheld". When those words come to be applied in any particular case, I do not think the court can, or should, determine by strict rules the grounds on which a landlord may, or may not, reasonably

refuse his consent. He is not limited by the contract to any particular grounds. Nor should the courts limit him. Not even under the guise of construing the words.' (See [1976] 3 All ER 801 at 804, 805, [1977] QB 517 at 524.)

[58] In addition the lease in the present case refers expressly to the Sargeants' business. Paragraph 7 of Sch 7 prohibits them from competing with Macepark's business, but goes on to permit them, without breach of covenant, to provide food and drink to golfers, to hold conferences relating to the golf club, and to hold wedding receptions. That aspect of their business, at least, is part of the subject matter of the contract.

[59] It seems to me, therefore, that the approach I should adopt in the present case is to identify the Sargeants' real and legitimate concerns; and then to ask whether the proposed condition amounts to reasonable protection of those concerns. Mr Male reminds me, and I accept, that the Sargeants do not have to show that the conclusions which led them to seek to impose the condition are right or justifiable but simply that they are conclusions which might be reached by a reasonable person in the circumstances. On the contrary, the burden of proof lies on Macepark to demonstrate unreasonableness.

THE SARGEANTS' BUSINESS

[60] I have already quoted the arbitrator's finding about the range of the Sargeants' activities at the date of the lease. As Mr Dowding points out, that was simply a list, without any weighting being given to the various activities. In her witness statement Mrs Sargeant says that the 'wedding and function business' is a very large part of what she does on a day-to-day basis. The Sargeants have a number of venues capable of accommodating wedding receptions and functions. At the moment they can accommodate up to 750 covers with the use of marquees, and once the new building, currently under construction, is complete, they will have an additional venue capable of accommodating up to 800 covers. Mrs Sargeant says, and I accept, that between May 2003 and May 2004 they have held 180 functions, of which 140 were weddings, generating a turnover of £750,000. Mr Sargeant confirmed these statistics in his witness statement. Both Mr and Mrs Sargeant confirmed in cross-examination that they did not hold business or professional conferences of the sort that Macepark do. They have, however, from time to time held 'corporate days', which are primarily social or sporting events; although they may be preceded by a business meeting. Mr Sargeant also said that they had held an exhibition for an artist friend; and had hosted a farmers' discussion group.

[61] The Sargeants are, as I have mentioned, in the course of constructing a new building, called the Atrium. It is a two-storey building, with a bar and dining facilities on the ground floor; and a large function room on the first floor. The building is being erected pursuant to a planning permission containing a condition in the following terms:

> 'THE PREMISES SHALL ONLY BE USED FOR GOLF AND COUNTRY CLUB, WEDDING AND ASSOCIATED FUNCTIONS AND FOR NO OTHER PURPOSE WHATSOEVER INCLUDING ANY OTHER PURPOSE IN USE CLASS D2 OF THE SCHEDULE TO THE TOWN AND COUNTRY PLANNING (USE CLASSES) ORDER 1987.'

[62] This condition would in my judgment preclude the new building from being used to accommodate business or professional conferences. (I do not think

that this is affected by permission given for temporary use by general development order, since that only applies to land that is unbuilt on.)

MACEPARK'S BUSINESS

[63] Mr Rockall described Macepark's business in terms that were unchallenged. The largest component (50% of turnover) consists of management training. Groups of delegates, averaging 16 people attend a residential course. The course is typically 3 to 5 days. The usual format involves a combination of sessions involving all the delegates and exercises involving smaller groups. The full group session will take place in a training room, and the smaller sessions in syndicate (or 'break-out') rooms.

[64] Another large component of Macepark's business (40% of turnover) consists of providing conference facilities. These could involve a seminar, a lecture, an annual general meeting, a product launch or an exhibition. In 2003 there were approximately 90 conferences of this kind.

[65] The remaining 10% of turnover is generated from 'ordinary' hotel activities and the accommodation of functions, such as wedding receptions. Mr Rockall was unable to break down this component into its constituent parts in terms of turnover; but he said that a 'large proportion' of this 10% came from the members of the leisure club who use the swimming pool and other health facilities. It must follow that the turnover relating to weddings and other functions is of the order of 5% or less. Even so, on Macepark's turnover for 2003, that represents a turnover of the order of £400,000 per annum.

THE SARGEANTS' CONCERNS

[66] Mr Male put the Sargeants' concerns under two heads. First, he said, that since taking the lease Macepark has changed the direction of its business and is now trying to attract the sort of business which the Sargeants have carried out for some years and which they are continuing to carry out. Wedding ceremonies and receptions are one example of this trend. In these circumstances, the Sargeants are right to be concerned about the threat which such activities by Macepark may pose to their own businesses. The Sargeants reasonably apprehend that Macepark's use of the 'public' rooms will adversely affect their own interests. In these circumstances, it is hardly surprising that the Sargeants should impose the sort of condition which they did. A reasonable person in their position would have sought to impose that, or a similar, condition. It cannot be said that the imposition of a condition such as that, or in similar terms, is unreasonable.

[67] The supposed change in direction of Macepark's business is based on what the Sargeants say they were told by Mr Rockall about Macepark's business before the lease was granted. Mr Male rightly accepted that what they were told can have no bearing on the question of the interpretation of the lease, but he said that when reasonableness was concerned everything was 'up for grabs'. I do not agree. The starting point must be the terms of the lease as granted, absent any claim based on the existence of a collateral contract or estoppel. I do not consider that in the exercise of a right to withhold consent on reasonable grounds, the landlord can attempt to claw back parts of a bargain that, with hindsight, he regrets.

[68] Second, he said, the Sargeants are also concerned about the effect of para 7 of Sch 7 to the lease. The Sargeants can hold functions so long as the holding of those functions does not adversely affect the income of the tenant or

value of the tenant's investment in the premises. Wedding receptions and various activities related to the golf club are specifically exempted. If Macepark is now allowed to use the extension for particular activities which the Sargeants also carry out then, at a later stage, Macepark could seek to rely upon para 7 of Sch 7 to try to prevent the Sargeants from carrying out those activities. This might happen even though the Sargeants had been carrying on those activities for many years prior to the grant of the lease.

[69] If Macepark is now allowed to use the new non-bedroom or 'public' accommodation for activities which the Sargeants presently carry on then to do so could lead to the Sargeants later being prevented from carrying on those activities under para 7 of Sch 7. If a condition is imposed limiting the activities which can be carried out by Macepark in the 'public' rooms then Macepark cannot carry out the prohibited activities and there is no risk then of a claim against the Sargeants under para 7 of Sch 7.

[70] Mr Male accepted, however, that it would not be legitimate for the Sargeants to rely on activities which already are a breach of para 7 of Sch 7; since to do so would be attempting to rely on their own wrong. It follows from this, in my judgment, that the Sargeants are not entitled to rely on any competitive concerns that they might have as regards the provision of management training or conferences (using the latter expression in the broad sense in which Mr Rockall used it); since those are all part of Macepark's existing business, which is protected by para 7 of Sch 7, and are not within the specific exemptions from that protection. Moreover, the Sargeants did not carry on those businesses at the date of the lease.

[71] In addition the covenant in para 7 of Sch 7 refers to Macepark's investment in the premises 'for the Permitted Use'; in other words all of it, and not just what Mr Male called Macepark's 'core business' of providing management training. Paragraph 7 is specifically designed to protect Macepark; and I agree with Mr Dowding that it would turn para 7 on its head if it could be used by the Sargeants as a reason to restrict Macepark's activities within the 'Permitted Use' as defined. Some weight must also be given to Macepark's obligation to maximise turnover; and to the Sargeants' direct interest (through the turnover rent) in that maximisation. In addition the Sargeants themselves described Macepark's core business in further information given in the action as 'management training and conferences'.

[72] On the other hand, in my judgment the Sargeants are entitled to rely on competitive concerns as regards the businesses that are within the specific exemptions in para 7; namely—

> 'the provision of food and drink to members or temporary playing members social members and their guests of the Golf Club the holding of conferences in connection with the Golf Club activities or wedding receptions ...'

[73] I accept Mr Male's submission that, on the evidence, the Sargeants can justifiably take the view that, if allowed to, Macepark will attempt to compete with the Sargeants for wedding business (including the holding of wedding ceremonies). I accept also that these concerns are relevant concerns for the purposes of the covenant against alterations. I do not overlook the fact that there is already competition between Macepark and the Sargeants for wedding business, and that that competition will continue whatever the outcome of this case. But the Sargeants are, in my judgment, entitled to take the view that to

allow Macepark to use the new extension for weddings will enable Macepark to compete with the Sargeants for much larger weddings which, apart from the new extension, Macepark cannot physically accommodate (except by using a marquee).

DO THESE CONCERNS JUSTIFY THE CONDITION?

[74] Mr Dowding submitted that in effect the Sargeants' concerns were concerns about possible damage to the profitability of their business. As such, they were concerns based on the possibility of pecuniary loss. Thus either at common law (according to Peter Gibson LJ's proposition (7) in *Iqbal v Thakrar* [2004] All ER (D) 304 (Apr)) or under the proviso to s 19(2) of the 1927 Act, the proper course for the Sargeants to have taken would have been to have asked for a compensatory payment. He submitted that the policy of the 1927 Act was that if there was nothing intrinsically wrong with the alterations simply viewed as works, the tenant should be allowed to carry them out; and any other kind of loss to the landlord should be dealt with by way of a compensatory payment under the proviso. Thus, he submitted, the concerns on which the Sargeants are entitled to rely could justify neither a refusal of consent, nor a condition limiting the use to which the extension may be put.

[75] In answer to Mr Male's point that the complaint was not a complaint about the diminution in value of the Sargeants' retained land, but a complaint about potential damage to their business, and that a compensatory payment would be very hard to evaluate, Mr Dowding riposted that damage to the landlord's business interests (as opposed to his property interests) was not a legitimate consideration; and in any event valuers can value anything.

[76] There is, as always, considerable force in Mr Dowding's submission. However, as to the first part of it, I consider that he reads Peter Gibson LJ's reference to the landlord's 'property interests' in too narrow a sense. As the House of Lords emphasised in *Ashworth Frazer Ltd v Gloucester City Council* [2002] 1 All ER 377, reasonableness is a broad concept. As to the second part, it is not the alterations themselves that will damage the Sargeants' business interests, but the use that Macepark will (or might) make of the alterations. Moreover the submission that valuers can value anything proves too much. Apart from sentimental considerations, anything (even aesthetic considerations) can have a money value placed on them if need be. But I do not consider that Parliament can have intended to cut down the landlord's right to withhold consent to alterations on reasonable grounds to the extent that Mr Dowding's submission implies. In my judgment the Sargeants were not confined to asking for money.

[77] Mr Male submitted that if I came to the conclusion that the Sargeants could have refused consent to the alterations based on their fear of competition then I should look 'charitably' on the wording of the disputed condition, since the consent they were prepared to give to the alterations was itself a concession.

[78] However, I do not consider that the Sargeants' fear of competition would have justified an outright refusal of consent. First, looked at purely from the point of view of the Sargeants, a reasonable landlord in their position would have weighed up the potential competition to the wedding business on the debit side; and the potential increase in rent (through a potential increase in turnover of the hotel) on the credit side. Second, an outright refusal of consent, in circumstances in which the vast bulk of Macepark's business consisted of management training and conferences, would have been wholly disproportionate. Third, if the Sargeants had refused consent, they would no doubt have been asked for their

reasons; and if they had given as their reasons those reasons on which I have held they are entitled to rely, Macepark could have reapplied for consent on the basis that they would undertake not to use the extension for weddings, or functions unrelated to training or conferences. An application along those lines could not, in my judgment, have been reasonably refused.

[79] In summary, I consider that the Sargeants were entitled to protect themselves against perceived competition to their wedding and functions business. They were not entitled to protect the future possibility of their entering the conference business, which was already part of Macepark's existing business. The condition on which I am asked to rule limits use of the extension to 'functions and activities which are directly related or connected to management training conferences held at the Premises'. I should say in passing that it was common ground that the word 'functions' in the licence is to be read as a composite phrase 'functions and activities' and not as a freestanding synonym for parties. Under this form of words the only types of conference permitted are management training conferences. It excludes all other types of conference. Mr Male submitted that this phrase could be generously interpreted, but he accepted (or asserted) that even on a generous interpretation it would preclude Macepark from holding product launches, award ceremonies and exhibitions, all of which are part of Macepark's existing business and are not within the specific exemptions from para 7 of Sch 7.

[80] In addition, the proposed covenant is an absolute one. It is not qualified by any provision enabling the tenant to apply to the landlord for consent to widen the use, even if the landlord has no reasonable grounds for refusal.

[81] In my judgment the clause goes further than was reasonable to protect the Sargeants' legitimate concerns. I think that, in effect, Mr Sargeant accepted as much, since he agreed in cross-examination that the form of words proposed by Prettys ('functions and activities directly related to or connected to management training *and* conference uses') would have been satisfactory to him. Had that form of words been adopted, it seems unlikely that this litigation would have taken place (although I express no view on whether it would have been reasonable for the Sargeants to have imposed that condition in the absence of agreement). It is unfortunate that this litigation turns on the use of the word 'and'.

[82] However that may be, both counsel agreed that I could only rule on the clause as it stands. Either it is reasonable as it stands, or it is not. It is not open to me to impose a compromise form of words. In my judgment the clause is not reasonable as it stands; and the lease will not, therefore, be varied to incorporate it.

Claim dismissed.

Victoria Ellis Barrister.

Re S (a child) (identification: restriction on publication)

[2004] UKHL 47

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOFFMANN AND LORD CARSWELL

11, 28 OCTOBER 2004

Child – Protection – Freedom of publication – Balance between freedom of press and protection of children – Right to respect for private and family life – Right to freedom of expression – Child's mother defendant in criminal proceedings on charge of murder of her other child – Whether publication of identity of mother and deceased child should be prohibited – Human Rights Act 1998, Sch 1, Pt I, arts 8, 10.

The mother of S (the child) was charged with the murder of her other child. An order was made in the criminal proceedings against the mother under s 39[a] of the Children and Young Persons Act 1933, prohibiting the publication of information calculated to lead to the identification of the child. That order was discharged on the application of a newspaper, on the ground that s 39 of the 1933 Act was inapplicable to the case because the child was not 'a child concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings were taken, or as being a witness therein'. Care proceedings had been commenced in respect of the child, and his guardian applied for an injunction under the inherent jurisdiction of the High Court. An order was made prohibiting publication of certain information which might lead to the identification of the child and which was designed to prohibit publication of the name of the mother and the deceased child in any report of the impending criminal trial. On an ex parte application by the newspaper the order was modified to include the proviso that 'Nothing in this order shall of itself prevent any person publishing any particulars of or information relating to any part of the proceedings before any court other than a court sitting in private' but the modification was stayed pending an inter partes hearing, at which three national newspaper groups appeared on behalf of the press. The newspapers accepted that they should not refer to the child, but wished to be able to publish the names and photographs of both parents and of the deceased child. The judge considered the inherent jurisdiction of the court, the interplay between the right to respect for private and family life provided by art 8[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) and the right to freedom of expression under art 10[c] of the convention, and the balancing exercise required under the inherent jurisdiction and the convention. He decided that the stay should be lifted and that the modification should stand. The Court of Appeal dismissed the child's appeal. The court decided unanimously that the judge had not performed the correct balancing exercise between the child's right under art 8 and the newspapers'

a Section 39, so far as material, is set out at [21], below
b Article 8 is set out at [16], below
c Article 10 is set out at [16], below

rights under art 10, but the majority held that he had nevertheless come to the correct conclusion. The child appealed, contending that by virtue of his art 8 right he was entitled to expect the state to provide protection against harmful publicity concerning his family which could damage his health and well-being, and, recognising that the subject matter of the mother's trial was a matter of public interest, that a proportionate response would be to permit only newspaper reports which did not refer to the family name or incorporate photographs of family members.

Held – Given the number of statutory exceptions to the general principle of open justice the court had no power to create further exceptions by process of analogy, except in the most compelling circumstances. In s 39(1) of the 1933 Act, in regard to children not concerned in a criminal trial, there had been a legislative choice not to extend the right to restrain publicity to them. That was a factor which could not be ignored. The nature of the impact of the trial upon the child in the instant case was essentially indirect. While art 8(1) of the convention was engaged, and none of the factors in art 8(2) justified the interference, the nature of the relief sought, being the grant of an injunction beyond the scope of s 39, the remedy provided by Parliament to protect juveniles directly affected by criminal proceedings, was a step too far. The interference with art 8 rights, however distressing for the child, was not of the same order when compared with cases of juveniles who were directly involved in criminal trials. The rights under art 10 of the convention, by contemporaneous reporting of criminal trials in progress, promoted the values of the rule of law. The consequence of the grant of the proposed injunction would be that informed debate about criminal justice would suffer. The judge had been correct, given the weight traditionally given to the importance of open reporting in criminal proceedings, in carrying out the balance required by the convention, to begin by acknowledging the force of the argument under art 10 before considering whether the right of the child under art 8 was sufficient to outweigh it. The appeal would, accordingly, be dismissed (see [1], [2], [17], [20], [21], [25]–[27], [30], [32]–[40], below).

Campbell v Mirror Group Newspapers Ltd [2004] 2 All ER 995 applied.

Per curiam. Since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of the inherent jurisdiction need not be considered in the instant case or in similar cases. The foundation of the jurisdiction to restrain publicity in such a case is now derived from convention rights. The case law on the inherent jurisdiction is not wholly irrelevant; it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the provisions of the convention. But it will in future be necessary, if earlier case law is cited to bear in mind the new methodology required by the convention (see [1], [2], [17], [23], [39], [40], below).

Notes

For the right to respect for private and family life, for what constitutes respect, for the right to freedom of expression and for what constitutes freedom of expression, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 149, 150, 154, 158, 159.

For the Human Rights Act 1998, Sch 1, Pt I, arts 8, 10, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 707.

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A-G v Leveller Magazine Ltd [1979] 1 All ER 745, [1979] AC 440, [1979] 2 WLR 247, HL.

Axen v Germany (1984) 6 EHRR 195, [1983] ECHR 8273/78, ECt HR.

Bakova v Slovakia [2002] ECHR 47227/99, ECt HR.

C (a minor) (wardship: medical treatment) (No 2), Re [1989] 2 All ER 791, [1990] Fam 39, [1989] 3 WLR 252, CA.

Campbell v Mirror Group Newspapers Ltd [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 WLR 1232.

Diennet v France (1996) 21 EHRR 554, [1995] ECHR 18160/91, ECt HR.

H-S (minors) (protection of identity), Re [1994] 3 All ER 390, [1994] 1 WLR 1141.

M and anor (minors) (wardship: freedom of publication), Re [1990] 1 All ER 205, [1990] Fam 211, [1989] 3 WLR 1136, CA.

Malhous v The Czech Republic [2001] ECHR 33071/96, ECt HR.

Pretto v Italy (1984) 6 EHRR 182, [1983] ECHR 7984/77, ECt HR.

R (a minor) (wardship: restrictions on publication), Re [1994] 3 All ER 658, [1994] Fam 254, [1994] 3 WLR 36, CA.

R v Central Independent Television plc [1994] 3 All ER 641, [1994] Fam 192, [1994] 3 WLR 20, CA.

R v Legal Aid Board, ex p Kaim Todner (a firm) [1998] 3 All ER 541, [1999] QB 966, [1998] 3 WLR 925, CA.

Reynolds v Times Newspapers Ltd [1999] 4 All ER 609, [2001] 2 AC 127, [1999] 3 WLR 1010, HL.

Riepan v Austria [2000] ECHR 35115/97, ECt HR.

Scott v Scott [1913] AC 417, [1911–13] All ER Rep 1, HL.

W (a minor) (wardship: freedom of publication), Re [1992] 1 All ER 794, [1992] 1 WLR 100, CA.

Werner v Austria (1998) 26 EHRR 310, [1997] ECHR 21835/93, ECt HR.

X (a minor) (wardship: restriction on publication), Re [1975] 1 All ER 697, [1975] Fam 47, [1975] 2 WLR 335, Fam D and CA.

Z (a minor) (freedom of publication), Re [1995] 4 All ER 961, [1997] Fam 1, [1996] 2 WLR 88, CA.

Cases referred to in list of authorities

A (an infant), Re, Hanif v Secretary of State for Home Affairs, Re S (N) (an infant), Singh v Secretary of State for Home Affairs [1968] 2 All ER 145, sub nom *Re Mohamed Arif (an infant)* [1968] Ch 643, [1968] 2 WLR 1290, CA.

A v B (a company) [2002] EWCA Civ 337, [2002] 2 All ER 545, [2003] QB 195, [2002] 3 WLR 542.

A-G v Guardian Newspapers Ltd (No 2) [1988] 3 All ER 545, [1990] 1 AC 109, [1988] 3 WLR 776, HL.

B v UK [2001] 2 FCR 221, ECt HR.

Bensaid v UK (2001) 11 BHRC 297, ECt HR.

Bladet Tromso v Norway (1999) 6 BHRC 599, ECt HR.

Craig v Harney (1947) 331 US 367, US SC.

Crook, Ex p [1995] 1 All ER 537, [1995] 1 WLR 139, CA.

Doorson v Netherlands (1996) 22 EHRR 330, [1996] ECHR 20524/92, ECt HR.

Douglas v Hello! Ltd [2001] 2 All ER 289, [2001] QB 967, [2001] 2 WLR 992, CA.

Fressoz v France (1999) 5 BHRC 654, ECt HR.

H v Belgium (1987) 10 EHRR 339, ECt HR.

Hakansson v Sweden (1990) 13 EHRR 1, ECt HR.
Handyside v UK (1976) 1 EHRR 737, [1976] ECHR 5493/72, ECt HR.
Irish Times Ltd v Murphy [1998] 2 ILRM 161, Ir SC.
Jersild v Denmark (1994) 19 EHRR 1, [1994] ECHR 15890/89, ECt HR.
Kelly v BBC [2001] 1 All ER 323, [2001] Fam 59, [2001] 2 WLR 253.
Le Compte v Belgium (1981) 4 EHRR 1, [1981] ECHR 6878/75, ECt HR.
Local Authority v Health Authority (disclosure: restriction on publication) [2003] EWHC 2746 (Fam), [2004] 1 All ER 480, [2004] Fam 96, [2004] 2 WLR 926.
Melin v France (1993) 17 EHRR 1, [1993] ECHR 12914/87, ECt HR.
Millar v Dickson [2001] UKPC D4, [2002] 3 All ER 1041, [2002] 1 WLR 1615.
Prager v Austria (1995) 21 EHRR 1, [1995] ECHR 15974/90, ECt HR.
R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.
R (on the application of Razgar) v Secretary of State for the Home Dept [2004] UKHL 27, [2004] 3 All ER 821, [2004] 3 WLR 58.
R (Wagstaff) v Secretary of State for Health, R (Associated Newspapers Ltd) v Secretary of State for Health [2001] 1 WLR 292, DC.
R v Central Criminal Court, ex p Crook (1984) Times, 8 November, DC.
R v Felixstowe Justices, ex p Leigh [1987] 1 All ER 551, [1987] QB 582, [1987] 2 WLR 380, DC.
R v Jones [2002] UKHL 5, [2002] 2 All ER 113, [2002] 2 WLR 524.
Raybos Australia Pty Ltd v Jones (1985) 2 NSWLR 47, NSW CA.
Roddy (a child) (identification: restriction on publication), Re; Torbay Borough Council v News Group Newspapers [2003] EWHC 2927 (Fam), [2004] 1 FCR 481.
Sunday Times v UK (1979) 2 EHRR 245, [1979] ECHR 6538/74, ECt HR.
TB (care proceedings:criminal trial), Re [1996] 1 FCR 101, CA.
Thorgeirson v Iceland (1992) 14 EHRR 843, ECt HR.
Von Hannover v Germany (2004) 16 BHRC 545, ECt HR.
Wingrove v UK (1996) 1 BHRC 509, ECt HR.
X v Iceland [1976] 5 DR 86, E Com HR.
Z v Finland (1997) 45 BMLR 107, ECt HR.
Zumtobel v Austria (1993) 17 EHRR 116, ECt HR.

Appeal

Through his guardian, S, an eight-year old child, appealed, with permission of the Appeal Committee of the House of Lords given on 23 June 2004, from the decision of the Court of Appeal (Lord Phillips of Worth Matravers MR and Latham LJ, Hale LJ dissenting) on 10 July 2003 ([2003] EWCA Civ 963, [2003] 2 FCR 577) dismissing his appeal from the decision of Hedley J on 19 February 2003 ([2003] EWHC 254 (Fam)) allowing the application made by News Group Newspapers Ltd, Associated Newspapers Ltd and Trinity Mirror plc (the newspapers) that an order made by him on 17 October 2002 under the inherent jurisdiction of the High Court prohibiting the publication of certain information relating to the child and his family should be modified to allow publication of the identity of the child's mother, the defendant in criminal proceedings on a charge of murder of her other child, or photographs of the mother or her deceased child. The mother supported the child's appeal. The facts are set out in the opinion of Lord Steyn.

Cherie Booth QC and *Frank Feehan* (instructed by *Sharpe Pritchard*) for the child.
Alison Russell and *Siobhan Kelly* (instructed by *Kenneth Elliott & Rowe*, Romford) for the mother.
Gavin Millar QC and *Anthony Hudson* (instructed by *Farrer & Co*) for the newspapers.

Their Lordships took time for consideration.

28 October 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, I have had the benefit of reading in draft the opinion of my noble and learned friend Lord Steyn. I agree with it, and would make the order which he proposes.

LORD NICHOLLS OF BIRKENHEAD.

[2] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD STEYN.

[3] My Lords, on 19 February 2003 a judge in the Family Division of the High Court (Hedley J) dismissed an application for an injunction restraining the publication by newspapers of the identity of a defendant in a murder trial which had been intended to protect the privacy of her son who is not involved in the criminal proceedings: *Re S* [2003] EWHC 254 (Fam). By a majority (Lord Phillips of Worth Matravers MR and Latham LJ, with Hale LJ dissenting) the Court of Appeal dismissed an appeal against the order of Hedley J ([2003] EWCA Civ 963, [2003] 2 FCR 577, [2004] Fam 43).

I. THE DEATH OF A CHILD AND THE CRIMINAL PROCEEDINGS

[4] The child concerned is CS, who is now eight years old. On 20 August 2001, his older brother DS, then aged nine, died of acute salt poisoning in the renowned Great Ormond Street Hospital where he was a patient. Press reports about the death appeared soon afterwards, namely in *The Evening Standard* for 22 August, with headline '"Poison" theory over mystery death of boy, 9'; in *The Recorder* (a local paper) for 24 August, with headline 'Police Probe into Boy's Death'; in *The Evening Standard* for 28 August, with headline 'Boy's death from a mystery illness turns into murder inquiry'; in *The Independent* on 29 August, with headline 'Poisoning suspected after heart attack kills boy aged nine'; in the local paper for 31 August with headline '"Poisoned" boy: Now it's murder'; and finally in the local paper for 5 October with headline 'Boy's death: Man and woman arrested'. All these reports named the dead child and where he lived. The local paper also named his parents, his younger brother and his school in their earlier reports. *The Evening Standard* did not name the dead child's parents or refer to his having a younger brother. *The Independent* named his parents but did not refer to a brother. In their final report, the local paper did not name the man and woman arrested or refer to the dead boy's family, but they did name the school he had attended.

[5] Shortly after DS died, the London Borough of Havering brought care proceedings in relation to CS, to whom I will refer as the child. During the care proceedings the child was fostered. At a fact-finding hearing in July 2002, Hedley J found that the death was caused by salt poisoning administered by the mother. As a result of Hedley J's findings, the mother was charged with murder on 9 August 2002. She is due to be tried at the Central Criminal Court on 15 November 2004. Her trial is expected to last three months.

[6] The parents have separated. The father has remained in the family home and the mother has moved out to live with her parents. At the final hearing in the care proceedings on 13 November 2002, Hedley J made a care order and approved a care plan to place the child with his father. The child has therefore returned to live in his home and attend his old school. He has supervised contact with his mother and maternal grandparents. Contact is still in issue in the care proceedings and will probably remain so until after the criminal trial.

[7] On 29 August 2002, in the criminal proceedings, Judge Moss QC made an order under s 39 of the Children and Young Persons Act 1933, prohibiting publication of information calculated to lead to the identification of the child. The judge stated that publication of the family's surname would be considered an act calculated to lead to such identification. On 11 October 2002, on the application of the local paper, Judge Focke QC discharged the order of 29 August 2002. He took the view, with which Hedley J later agreed, that s 39 was inapplicable to the case because the child was not a 'child concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings were taken, or as being a witness therein'.

II. THE PROCEEDINGS IN THE FAMILY DIVISION

[8] The guardian of the child made an application to Hedley J for an injunction under the inherent jurisdiction of the High Court. On 17 October 2002, the judge made an order based upon the standard form commonly used in the Family Division. The order prohibited publication: (a) of the name or address of the child and his school; (b) of any picture of the child or either of his parents; and (c) of any other information which might lead to the child's identification. The order expressly prevented any person 'publishing any particulars of or information relating to any part of the proceedings before any court which may or is calculated to lead to the identification of the said child'. The order was clearly designed to prohibit publication of the name of the mother and the deceased child in any report of the impending criminal trial. It is common ground that the order also prevented publication of any photographs of the mother or deceased child.

[9] The parties and any person affected were at liberty under the order to apply to vary the order. On 13 November 2002 the local paper, *The Romford Recorder*, applied ex parte for a modification of the order. Hedley J changed the order to include in para 8 the proviso that 'Nothing in this order shall of itself prevent any person (a) publishing any particulars of or information relating to any part of the proceedings before any court other than a court sitting in private'. However, para 8 was stayed until 13 December 2002 so that the matter could be fully argued at an inter partes hearing.

[10] At the hearing before Hedley J in chambers on 12 and 13 December 2002 three national newspaper groups (the respondents) appeared on behalf of the press. The local newspaper withdrew to avoid the risk of being ordered to pay

costs. The argument before Hedley J centred on whether the exception in para 8(a) should remain in the order. The newspapers accepted that they should not refer to the child, but they wished to be able to publish the names and photographs of both parents and of the dead boy. At the hearing the court had before it a psychiatric report from a well-known child psychiatrist (Dr Dora Black) who had already made reports on the child for the purpose of the care proceedings. When she had seen him in May 2002 he was apparently a well-functioning six-year old who was attached to his parents. She said that he had coped well with the death of his brother and separation from his parents. She ascribed that to the good therapeutic programme put in place by the local authority. She understood that the child had now been told how his brother had died and that his mother was to stand trial for her alleged part in it. Dr Black stated that the child was confused and his therapist and father were trying to help him. She said:

> '2.1 CS attends school and once the news of the charges against his mother becomes public, he will have to cope with the curiosity of his peers, and possible bullying and teasing. If the reporting was confined to the time of the trial and CS's name and the name of the family was not mentioned, and photos not published, it would be possible to plan for the minimum of adverse effects by removing CS from the country for a holiday during the trial itself and for sensitive work to be done with his peers by the school in his absence.
>
> 2.2. However if there is a long period of adverse named publicity, the effect on this vulnerable boy, who has already lost a brother by death and has been deprived of his mother's care (and it has to be said that there is no evidence that she was anything other than a good and caring parent to CS) would, in my opinion be significantly harmful. It would not be possible to protect him in the way I mention above. The effect of bereavement on a child of this age is to enhance the risk of developing a depressive disorder five-fold. CS therefore, whilst at present well-functioning carries this enhanced risk which may not manifest itself immediately. The risk continues into adult life. The addition of the stress of coping with the curiosity and possible teasing and bullying of his peers would be to significantly increase the possibility of his developing a psychiatric disorder.'

The argument before Hedley J covered, among other things, the case law on the inherent jurisdiction of the High Court to restrain publication, the interplay between art 8 (right to respect for private and family life), art 10 (freedom of expression) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 as scheduled to the Human Rights Act 1998, and the balancing exercise required under the inherent jurisdiction and the convention.

[11] On 19 February 2003 Hedley J delivered a carefully reasoned reserved judgment. He summarised his conclusions as follows ([2003] EWHC 254 (Fam) at [19]):

> 'First I recognise the primacy in a democratic society of the open reporting of public proceedings on grave criminal charges and the inevitable price that that involves in incursions on the privacy of individuals. Secondly, I recognise that Parliament has in a number of statutes qualified that right to report and, in the context of this case, most notably in s 39 of the 1933 Act; where a set of circumstances arise not covered by those provisions the court

should in my judgment be slow to extend the incursion into the right of free speech by the use of the inherent jurisdiction. Thirdly, I have to recognise that not even the restrictions contended for here offer real hope to CS of proper isolation from the fallout of publicity at this trial; it is inevitable that those who know him will identify him and thus frustrate the purpose of the restriction. Lastly, I am simply not convinced that, when everything is drawn together and weighed, it can be said that grounds under art 10(2) of the convention have been made out in terms of the balance of the effective preservation of CS's art 8 rights against the right to publish under art 10. I should add, although it is not strictly necessary to do so, that I think I would have come to the same conclusion even had I been persuaded that this was a case where CS's welfare was indeed my paramount consideration under s 1(1) of the 1989 Act.'

The judge decided that the stay should be lifted and the exception in para 8(a) should remain in the order. In other words, on the basis of his decision the newspapers were not prevented in reports of the criminal trial from publishing the identity of the defendant or her deceased son or photographs of them.

III. THE PROCEEDINGS IN THE COURT OF APPEAL

[12] Through his guardian the child appealed to the Court of Appeal against the inclusion of para 8(a). The mother supported the appeal. Although she was the dissenting member of the court the judgment of Hale LJ (now Baroness Hale of Richmond) appears first in the law reports because the other members of the court adopted her detailed analysis of the law. Lord Phillips of Worth Matravers MR and Latham LJ took the view that, although Hedley J had not performed the right balancing exercise, he had come to the correct conclusion. The majority dismissed the appeal. Referring to arts 8 and 10 of the convention, Hale LJ concluded ([2003] 2 FCR 577 at [60]):

'... there is in my judgment no escape from the difficult balancing exercise which the convention requires. Because the judge did not consider each article independently, and thus did not conduct that exercise, I consider that this appeal should be allowed.'

Hale LJ concluded her judgment as follows:

'[62] In my view there is a good case for remitting the case to Hedley J, who has considerable experience of both criminal and family cases. However, at the end of his judgment, he stated that he would have reached the same conclusion even if the child's welfare had been the paramount consideration. With the greatest of respect to him, I cannot understand this. If the child's welfare is the paramount consideration, then when everything else has been taken into account and weighed, it rules on or determines the issue before the court. *It* is the trump card. It might therefore be preferable for the matter to be reconsidered by the judge who is to try the criminal case, provided that he is authorised to exercise the inherent jurisdiction and has the benefit of the relevant material from the family proceedings.

[63] However, it is not necessary for me to resolve that dilemma. I understand that Lord Phillips of Worth Matravers MR and Latham LJ, although agreeing with my analysis of the law, consider that Hedley J was entitled to reach the conclusion he did in this case and that his decision

should not be disturbed. I, for the reasons given, would have allowed this appeal.'

The Court of Appeal refused leave to appeal. The Appeal Committee of the House of Lords granted leave to appeal.

IV. THE APPEAL

[13] Through his guardian the child now challenges the decision of the majority of the Court of Appeal. Counsel for the child submitted that the majority misapplied the principle of proportionality in a case of competing rights under the convention and in so doing exposed a vulnerable child to interference with his private and family rights. In outline her submissions were as follows. The child had a right to respect for his private and family life in that he was entitled to expect the state to provide, by way of his access to the court, protection against harmful publicity concerning his family. The child has a right to protection from publicity which could damage his health and well-being and risk emotional and psychiatric harm. Recognising that the subject matter of the trial is a matter of public interest counsel for the child submitted that a proportionate response would be to permit only newspaper reports which do not refer to the family name or incorporate photographs of family members or the deceased.

[14] In order to assess the merits of these arguments it will be necessary to set out the legal framework in some detail.

V. THE RELEVANT CONVENTION PROVISIONS

[15] In the present case there is no suggestion of a possible breach of art 6, which provides that in the determination of any criminal charge against him 'everyone is entitled to a fair and public hearing'. Article 6 is, however, relevant so far as it provides that 'the press and public may be excluded from all or part of the trial' for a variety of reasons including 'where the interests of juveniles' so require. The purpose of a public hearing is to guard against an administration of justice in secret and with no public scrutiny and to maintain public confidence: *Axen v Germany* (1984) 6 EHRR 195 at 200 (para 25). Article 6 recognises a prima facie rule in favour of open justice in criminal trials. In the Court of Appeal Hale LJ drew attention to the decision of the European Court of Human Rights in *Diennet v France* (1996) 21 EHRR 554 at 566 (para 33):

> 'The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society ...'

This statement reiterates the consistent earlier jurisprudence of the European Court of Human Rights: *Pretto v Italy* (1984) 6 EHRR 182 at 187 (para 21); *Axen v Germany* (1984) 6 EHRR 195 at 200 (para 25). Since *Diennet* this principle has been reaffirmed by the European Court of Human Rights: see *Werner v Austria* (1998) 26 EHRR 310; *Riepan v Austria* [2000] ECHR 35115/97; *Malhous v The Czech Republic* [2001] ECHR 33071/96; *Bakova v Slovakia* [2002] ECHR 47227/99. These

statements by the European Court of Human Rights reveal that under the convention there is a general and strong rule in favour of unrestricted publicity of any proceedings in a criminal trial. Hale LJ rightly observed that the common law has long adopted a similar approach: see *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1 and *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745 at 750, [1979] AC 440 at 450 per Lord Diplock.

[16] It is, however, the interaction between arts 8 and 10 which lies at the heart of this appeal. They provide as follows:

'*Article 8*

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others ...

Article 10

Freedom of expression

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.'

By s 12(4) of the 1998 Act Parliament made special provision regarding freedom of expression. It provides that when considering whether to grant relief which, if granted, might affect the exercise of the convention right to freedom of expression the court must have particular regard to the importance of the right.

[17] The interplay between arts 8 and 10 has been illuminated by the opinions in the House of Lords in *Campbell v Mirror Group Newspapers Ltd* [2004] UKHL 22, [2004] 2 All ER 995, [2004] 2 WLR 1232. For present purposes the decision of the House on the facts of *Campbell*'s case and the differences between the majority and the minority are not material. What does, however, emerge clearly from the opinions are four propositions. First, neither article has *as such* precedence over the other. Secondly, where the values under the two articles are in conflict, an intense focus on the comparative importance of the specific rights being claimed in the individual case is necessary. Thirdly, the justifications for interfering with or restricting each right must be taken into account. Finally, the proportionality test must be applied to each. For convenience I will call this the ultimate balancing test. This is how I will approach the present case.

VI. THE GENERAL RULE

[18] In oral argument it was accepted by both sides that the ordinary rule is that the press, as the watchdog of the public, may report everything that takes place in a criminal court. I would add that in European jurisprudence and in domestic practice this is a strong rule. It can only be displaced by unusual or exceptional circumstances. It is, however, not a mechanical rule. The duty of the court is to examine with care each application for a departure from the rule by reason of rights under art 8.

VII. STATUTE LAW

[19] Parliament has created numerous statutory exceptions to the ordinary rule of open court proceedings in the interests of justice. It is not necessary to refer to all the statutory provisions. CPR 39.2 shows the nature of the exceptions. It provides:

> '(1) The general rule is that a hearing is to be in public.
>
> (2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.
>
> (3) A hearing, or any part of it, may be in private if—(a) publicity would defeat the object of the hearing; (b) it involves matters relating to national security; (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality; (d) a private hearing is necessary to protect the interests of any child or patient; (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing; (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or (g) the court considers this to be necessary, in the interests of justice.
>
> (4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.'

Clearly para 3(d) envisages a hearing involving the child or patient in some way. It is not engaged in the present case.

[20] There are numerous automatic statutory reporting restrictions, eg in favour of victims of sexual offences: see, for example, s 1 of the Sexual Offences (Amendment) Act 1992. There are also numerous statutory provisions, which provide for discretionary reporting restrictions: see, for example, s 8(4) of the Official Secrets Act 1920. Given the number of statutory exceptions, it needs to be said clearly and unambiguously that the court has no power to create by a process of analogy, except in the most compelling circumstances, further exceptions to the general principle of open justice.

[21] Section 39 of the Children and Young Persons Act 1933 is of particular relevance. It provides:

> '(1) In relation to any proceedings in any court ... the court may direct that—(a) no newspaper report of the proceedings shall reveal the name, address, or school, or include any particulars calculated to lead to the identification, *of any child or young person concerned in the proceedings, either as being the person by or against or in respect of whom the proceedings are taken, or as being a witness therein*; (b) no picture shall be published in any newspaper as being or including a picture of any child or young person so concerned in the

proceedings as aforesaid; except in so far (if at all) as may be permitted by the direction of the court.' (My emphasis.)

This provision will be replaced by s 45 of the Youth Justice and Criminal Evidence Act 1999, which is not yet in force: see also s 46(3) of the same Act which came into force on 7 October 2004. For present purposes s 45 is in material respects the same as the extant s 39(1): see s 45(3). As the words, which I have italicised, make clear s 39(1) is not engaged in the present case. My reason for referring to it is, however, the reflection that, in regard to children not concerned in a criminal trial, there has been a legislative choice not to extend the right to restrain publicity to them. This is a factor which cannot be ignored.

VIII. THE INHERENT JURISDICTION

[22] At all stages in this litigation the provisions of the convention have been carefully taken into account. But at first instance, and in the Court of Appeal, much of the debate centred on the inherent jurisdiction of the High Court to restrain publicity. Hedley J and the Court of Appeal were asked to exercise this inherent jurisdiction. Hale LJ (with the agreement of the other members of the court) observed ([2003] 2 FCR 577 at [40]):

> 'Now that the [Human Rights Act 1998] is in force, the relevance of the jurisdiction may simply be to provide the vehicle which enables the court to conduct the necessary balancing exercise between the competing rights of the child under art 8 and the media under art 10.'

In their printed cases, and in oral argument, both counsel adopted this approach. This is the context in which in oral argument the House was taken on a tour of the following decisions on the inherent jurisdiction: *Re X (a minor) (wardship: restriction on publication)* [1975] 1 All ER 697, [1975] Fam 47; *Re C (a minor) (wardship: medical treatment) (No 2)* [1989] 2 All ER 791, [1990] Fam 39; *Re M and anor (minors) (wardship: freedom of publication)* [1990] 1 All ER 205, [1990] Fam 211; *Re W (a minor) (wardship: freedom of publication)* [1992] 1 All ER 794, [1992] 1 WLR 100; *Re H-S (minors) (protection of identity)* [1994] 3 All ER 390, [1994] 1 WLR 1141; *R v Central Independent Television plc* [1994] 3 All ER 641, [1994] Fam 192; *Re R (a minor) (wardship: restrictions on publication)* [1994] 3 All ER 658, [1994] Fam 254; *Re Z (a minor) (freedom of publication)* [1995] 4 All ER 961, [1997] Fam 1. The question arises whether such an exercise, in a case such as the present, is still necessary or useful.

[23] The House unanimously takes the view that since the 1998 Act came into force in October 2000, the earlier case law about the existence and scope of inherent jurisdiction need not be considered in this case or in similar cases. The foundation of the jurisdiction to restrain publicity in a case such as the present is now derived from convention rights under the convention. This is the simple and direct way to approach such cases. In this case the jurisdiction is not in doubt. This is not to say that the case law on the inherent jurisdiction of the High Court is wholly irrelevant. On the contrary, it may remain of some interest in regard to the ultimate balancing exercise to be carried out under the convention provisions. My noble and learned friend Lord Bingham of Cornhill invited the response of counsel to this approach. Both expressed agreement with it. I would affirm this approach. Before passing on I would observe on a historical note that a study of the case law revealed that the approach adopted in the past under the inherent jurisdiction was remarkably similar to that to be adopted under the

convention. Indeed the convention provisions were often cited even before it became part of our law in October 2000. Nevertheless, it will in future be necessary, if earlier case law is cited, to bear in mind the new methodology required by the convention as explained in *Campbell*'s case.

IX. ARTICLE 8

[24] On the evidence it can readily be accepted that art 8 is engaged. Hedley J observed ([2004] EWHC 254 (Fam) at [18]) 'that these will be dreadfully painful times for the child'. Everybody will sympathise with that observation.

[25] But it is necessary to measure the nature of the impact of the trial on the child. He will not be involved in the trial as a witness or otherwise. It will not be necessary to refer to him. No photograph of him will be published. There will be no reference to his private life or upbringing. Unavoidably, his mother must be tried for murder and that must be a deeply hurtful experience for the child. The impact upon him is, however, essentially indirect.

[26] While art 8(1) is engaged, and none of the factors in art 8(2) justifies the interference, it is necessary to assess realistically the nature of the relief sought. This is an application for an injunction beyond the scope of s 39, the remedy provided by Parliament to protect juveniles directly affected by criminal proceedings. No such injunction has in the past been granted under the inherent jurisdiction or under the provisions of the convention. There is no decision of the Strasbourg court granting injunctive relief to non-parties, juvenile or adult, in respect of publication of criminal proceedings. Moreover, the United Nations Convention on The Rights of the Child 1989 (New York, 20 November 1989; TS 44 (1998); Cm 1976) which entered into force on 2 September 1990, protects the privacy of children directly involved in criminal proceedings, but does not protect the privacy of children if they are only indirectly affected by criminal trials: arts 17 and 40(2)(vii); see also Geraldine Van Bueren *The International Law on the Rights of the Child* (1994) pp 141 and 182. The verdict of experience appears to be that such a development is a step too far.

[27] The interference with art 8 rights, however distressing for the child, is not of the same order when compared with cases of juveniles, who are directly involved in criminal trials. In saying this I have not overlooked the fact that the mother, the defendant in the criminal trial, has waived her right to a completely public trial, and supports the appeal of the child. In a case such as the present her stance can only be of limited weight.

X. ARTICLE 10

[28] Article 10 is also engaged. This case is concerned with the freedom of the press, subject to limited statutory restrictions, to report the proceedings at a criminal trial without restriction. It is necessary to assess the importance of this freedom. I start with a general proposition. In *Reynolds v Times Newspapers Ltd* [1999] 4 All ER 609 at 622, [2001] 2 AC 127 at 200 Lord Nicholls of Birkenhead described the position as follows:

> 'It is through the mass media that most people today obtain their information on political matters. Without freedom of expression by the media, freedom of expression would be a hollow concept. The interest of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment.'

These observations apply with equal force to the freedom of the press to report criminal trials in progress and after verdict.

[29] The importance of the freedom of the press to report criminal trials has often been emphasised in concrete terms. In *R v Legal Aid Board, ex p Kaim Todner (a firm)* [1998] 3 All ER 541 at 549–550, [1999] QB 966 at 977, Lord Woolf MR explained:

> 'The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases. This is the reason it is so important not to forget why proceedings are required to be subjected to the full glare of a public hearing. It is necessary because the public nature of the proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially. It can result in evidence becoming available which would not become available if the proceedings were conducted behind closed doors or with one or more of the parties' or witnesses' identity concealed. It makes uninformed and inaccurate comment about the proceedings less likely ... Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it. However Parliament has recognised there are situations where interference is necessary.'

These are valuable observations. It is, however, still necessary to assess the importance of unrestricted reporting in specifics relating to this case.

[30] Dealing with the relative importance of the freedom of the press to report the proceedings in a criminal trial Hale LJ drew a distinction. She observed ([2003] 2 FCR 577 at [56]):

> 'The court must consider what restriction, if any, is needed to meet the legitimate aim of protecting the rights of CS. If prohibiting publication of the family name and photographs is needed, the court must consider how great an impact that will in fact have upon the freedom protected by art 10. It is relevant here that restrictions on the identification of defendants before conviction are by no means unprecedented. The situation may well change if and when the mother is convicted. There is a much greater public interest in knowing the names of persons convicted of serious crime than of those who are merely suspected or charged. These considerations are also relevant to the extent of the interference with CS's rights.'

I cannot accept these observations without substantial qualification. A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the values of the rule of law.

[31] For these reasons I would, therefore, attribute greater importance to the freedom of the press to report the progress of a criminal trial without any restraint than Hale LJ did.

XI. CONSEQUENCES OF THE GRANT OF THE PROPOSED INJUNCTION

[32] There are a number of specific consequences of the grant of an injunction as asked for in this case to be considered. First, while counsel for the child wanted to confine a ruling to the grant of an injunction restraining publication *to protect a child*, that will not do. The jurisdiction under the convention could equally be invoked by an adult non-party faced with possible damaging publicity as a result of a trial of a parent, child or spouse. Adult non-parties to a criminal trial must therefore be added to the prospective pool of applicants who could apply for such injunctions. This would confront newspapers with an ever wider spectrum of potentially costly proceedings and would seriously inhibit the freedom of the press to report criminal trials.

[33] Secondly, if such an injunction were to be granted in this case, it cannot be assumed that relief will only be sought in future in respect of the name of a defendant and a photograph of the defendant and the victim. It is easy to visualise circumstances in which attempts will be made to enjoin publicity of, for example, the gruesome circumstances of a crime. The process of piling exception upon exception to the principle of open justice would be encouraged and would gain in momentum.

[34] Thirdly, it is important to bear in mind that from a newspaper's point of view a report of a sensational trial without revealing the identity of the defendant would be a very much disembodied trial. If the newspapers choose not to contest such an injunction, they are less likely to give prominence to reports of the trial. Certainly, readers will be less interested and editors will act accordingly. Informed debate about criminal justice will suffer.

[35] Fourthly, it is true that newspapers can always contest an application for an injunction. Even for national newspapers that is, however, a costly matter which may involve proceedings at different judicial levels. Moreover, time constraints of an impending trial may not always permit such proceedings. Often it will be too late and the injunction will have had its negative effect on contemporary reporting.

[36] Fifthly, it is easy to fall into the trap of considering the position from the point of view of national newspapers only. Local newspapers play a huge role. In the United Kingdom according to the website of The Newspaper Society there are 1,301 regional and local newspapers which serve villages, towns and cities. Apparently, again according to the website of The Newspaper Society, over 85% of all British adults read a regional or local newspaper compared to 70% who read a national newspaper. Very often a sensational or serious criminal trial will be of great interest in the community where it took place. A regional or local newspaper is likely to give prominence to it. That happens every day up and down the country. For local newspapers, who do not have the financial resources of national newspapers, the spectre of being involved in costly legal proceedings is bound to have a chilling effect. If local newspapers are threatened with the prospect of an injunction such as is now under consideration it is likely that they will often be silenced. Prudently, *The Romford Recorder*, which has some 116,000 readers a week, chose not to contest these proceedings. The impact of such a new development on the regional and local press in the United Kingdom strongly militates against its adoption. If permitted, it would seriously impoverish public discussion of criminal justice.

XII. THE DECISION OF HEDLEY J

[37] In agreement with Hale LJ the majority of the Court of Appeal took the view that Hedley J had not analysed the case correctly in accordance with the provisions of the convention. I do not agree. In my view the judge analysed the case correctly under the convention. Given the weight traditionally given to the importance of open reporting of criminal proceedings it was in my view appropriate for him, in carrying out the balance required by the convention, to begin by acknowledging the force of the argument under art 10 before considering whether the right of the child under art 8 was sufficient to outweigh it. He went too far in saying that he would have come to the same conclusion even if he had been persuaded that this was a case where the child's welfare was indeed the paramount consideration under s 1(1) of the Children Act 1989. But that was not the shape of the case before him.

XIII. THE DISPOSAL

[38] I would dismiss the appeal. The effect of the opinions delivered in the House today is that there is no injunction in respect of publication of the identity of the defendant or of photographs of the defendant or her deceased son.

LORD HOFFMANN.

[39] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Steyn. For the reasons he gives, with which I agree, I would dismiss this appeal.

LORD CARSWELL.

[40] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Steyn, and for the reasons which he has given I would dismiss the appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

R (on the application of the Director of Public Prosecutions) v Camberwell Youth Court

R (on the application of H) v Camberwell Youth Court

[2004] EWHC 1805 (Admin)

DIVISIONAL COURT

KENNEDY LJ AND TREACY J

16 JULY, 23 JULY 2004

Magistrates – Jurisdiction – Youth Court – Power of Youth Court to commit young persons to Crown Court – Challenging decision of Youth Court on jurisdiction – Procedure – Magistrates' Court Act 1980, s 24(1) – Powers of Criminal Courts (Sentencing) Act 2000, s 91.

Where the Director of Public Prosecutions is concerned about the decision of a Youth Court to retain jurisdiction rather than committing a young person to the Crown Court pursuant to s 24(1)[a] of the Magistrates' Courts Act 1980 so that the young person could be sentenced under s 91[b] of the Powers of Criminal Courts (Sentencing) Act 2000, the course which should normally be followed is for him to apply for judicial review rather than seeking a voluntary bill of indictment. In order that jurisdictional challenges brought by way of judicial review can be dealt with within a time scale similar to seeking a voluntary bill of indictment, an expedited hearing of the application for judicial review should be sought (by completing form N463). Therefore, if an application for a voluntary bill is made, without adequate explanation, other than in a supporting role in a jurisdictional case, the court will probably refuse consent on the basis that no good reason has been shown to depart from the normal procedure, and the interests of justice do not require it (see [34]–[37], below).

Notes

For the jurisdiction of youth courts, see 29(2) *Halsbury's Laws* (4th edn reissue) para 746.

a Section 24 provides, so far as material: '(1) Where a person under the age of 18 years … is brought before a magistrates' court on an information charging him with an indictable offence … he shall be tried summarily unless—(a) the offence is such as is mentioned in subsection (1) … of section 91 of the Powers of Criminal Courts (Sentencing) Act 2000] … and the court considers that if he is found guilty of the offence it ought to be possible to sentence him in pursuance of subsection (3) of that section …'

b Section 91 provides, so far as material: '(1) Subsection (3) below applies where a person aged under 18 is convicted on indictment of—(a) an offence punishable in the case of a person aged 21 or over with imprisonment for 14 years or more, not being an offence the sentence for which is fixed by law … (3) If the court is of the opinion that none of the other methods in which the case may legally be dealt with is suitable, the court may sentence the offender to be detained for such period, not exceeding the maximum term of imprisonment with which the offence is punishable in the case of a person aged 21 or over, as may be specified in the sentence.'

For the Magistrates' Courts Act 1980, s 24, see 27 *Halsbury's Statutes* (4th edn) (2000 reissue) 105.

For the Powers of Criminal Courts (Sentencing) Act 2000, s 91, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1869.

Cases referred to in judgments

A-G's Ref (Nos 4 and 7 of 2002) (Lobban and Sawyers) [2002] EWCA Crim 127, [2002] 2 Cr App R (S) 345.

A-G's Ref (Nos 31, 45, 43, 42, 50 and 51 of 2004) [2004] EWCA Crim 1934, [2004] All ER (D) 292 (Jul).

R v Joseph (Bol) [2001] EWCA Crim 304, [2001] 2 Cr App R (S) 398.

R (on the application of C and D) v Sheffield Youth Court, R (on the application of N) v Sheffield Youth Court [2003] EWHC 35 (Admin), (2003) 167 JP 159.

R (on the application of C) v Balham Youth Court [2003] EWHC (Admin) 1332, [2004] 1 Cr App R (S) 143, DC.

R (on the application of M) v West London Youth Court, R (on the application of W) v West London Youth Court [2004] EWHC 1144 (Admin), [2004] All ER (D) 362 (Apr).

R (on the application of W) v Southampton Youth Court, R (on the application of K) v Wirral Borough Magistrates' Court [2002] EWHC 1640 (Admin), [2003] 1 Cr App Rep (S) 455, DC.

R v Manchester Crown Court, ex p Williams (1990) 154 JP 589, DC.

R v O'Brien [2003] EWCA Crim 302, [2003] 2 Cr App R (S) 390.

R v Snaresbrook Crown Court, ex p Serious Fraud Office (1998) 95 (44) LSG 35, DC.

R v Ward (31 October 1996, unreported), CA.

Applications

R (on the application of the Director of Public Prosecutions) v Camberwell Youth Court

The Director of Public Prosecutions applied (i) for permission to apply for judicial review of the decision of the District Judge in Camberwell Youth Court on 15 April 2004 not to commit ten defendants under the age of 18 jointly charged with three offences of robbery to the Crown Court; and (ii) for leave to prefer a voluntary bill of indictment. The defendants appeared as interested parties. The facts are set out in the judgment of Kennedy LJ.

R (on the application of H) v Camberwell Youth Court

H, a minor, charged with two others under the age of 18 with religiously aggravated criminal damage, applied by his mother and litigation friend, with permission of Stanley Burnton J given on 30 June 2004, for judicial review of the decision the District Judge in Camberwell Youth Court on 4 May 2004 to commit him to the Crown Court. The facts are set out in the judgment of Kennedy LJ.

Richard Horwell and *Catherine Pattison* (instructed by the *Crown Prosecution Service*) for the DPP.

Adrian Kayne (instructed by *GT Stewart*) for the defendants and H.

16 July 2004. The court announced that the applications would be refused for reasons to be given later.

23 July 2004. The following judgments were delivered.

KENNEDY LJ.

INTRODUCTION

[1] On 16 July 2004 we heard an application for permission to apply for judicial review brought by the Director of Public Prosecutions (the DPP) which had been referred to the Divisional Court by Harrison J on 8 July 2004, and an application for judicial review brought by the mother and litigation friend of a minor H, permission for that application having been granted by Stanley Burnton J on 30 June 2004. At the conclusion of the hearing we refused both applications, and said that we would give our reasons later, which we now do in this judgment. We were then asked to consider an application by the DPP for a voluntary bill of indictment which, although it would only have been directly relevant if the DPP's primary application had been successful, raised issues on which the DPP wants to have guidance from this court. We therefore deal with that issue at the end of this judgment.

[2] Both the DPP's primary application and the application of H arise out of decisions of the same youth court on different occasions as to whether to commit defendants aged between 12 and 16 to the Crown Court for trial, or to retain jurisdiction. In the DPP's case ten defendants jointly charged with three offences of street robbery were not committed to the Crown Court, whereas in the case of H three defendants charged with religiously aggravated criminal damage were committed to the Crown Court. Both of those decisions of the youth court are now challenged in this court, in the first case by the DPP, and in the second case by those acting on behalf of one defendant. Before we look at the two cases individually we must consider the legal framework within which the youth court had to make its decisions, and the powers of this court.

POWERS AND DUTIES OF THE YOUTH COURT

[3] The relevant statutory provisions which the youth court have to bear in mind are to be found in s 24(1) of the Magistrates' Courts Act 1980, and ss 91, 100 and 101 of the Powers of Criminal Courts (Sentencing) Act 2000. As applied to the present cases, they can be summarised as follows: (1) When anyone under the age of 18 is convicted of an offence punishable with imprisonment in the case of an adult, and the case is so serious as to be unsuitable for non-custodial disposal, then the youth court can make a detention and training order for a maximum of 24 months, but—(2) if the offender is under the age of 15 at the time of conviction no such order can be made unless he is a persistent offender. Such offenders are not normally to be subjected to custody. (3) However, for grave offences, punishable in the case of an adult with a sentence of 14 years or more (and both robbery and religiously aggravated criminal damage are so punishable), if the youth court considers that no other method of dealing with the offender is suitable it can commit the offender to the Crown Court which, under s 91(3) of the 2000 Act, has power to order that he be detained for a period up to the maximum sentence of imprisonment available in the case of an adult. An additional factor to which the youth court must always have regard is that it is

generally much better equipped than the Crown Court to deal with young offenders. The lay-out of the court and the procedures are better adapted. a

[4] The statutory provisions have been considered by this court on a number of occasions. We can restrict ourselves to four of them. In *R (on the application of W) v Southampton Youth Court, R (on the application of K) v Wirral Borough Magistrates' Court* [2002] EWHC 1640 (Admin), [2003] 1 Cr App Rep (S) 455 Lord Woolf CJ adopted what had been said by Gage J in an earlier case, namely that b the use of s 91 should be regarded as exceptional, and it should not be used to enable the Crown Court to impose a custodial sentence of less than two years on a non-persistent offender under the age of 15. In the *Southampton Youth Court* case Kay LJ said (at [25])—

> 'The simple principle underlying the current legislation for sentencing very c young offenders is that, generally speaking, first-time offenders aged 13 and 14, and all offenders aged 11 and 12, should not be detained in custody. For 13 and 14 year olds, where the youth persists in offending, the position changes. Clearly some offences or offending are so serious in themselves that the Court has to contemplate the possibility of sending an under 15 year d old for a period in custody, despite the general approach of the legislation. That may be to protect the public or it may be that the long-term interests of the offender require such a drastic course, even though he is under 12 or under 15 but not a persistent offender. To cater for this possibility Parliament has left open to the courts the use of s.91 of the Powers of Criminal Courts (Sentencing) Act 2000. The need in exceptional cases to e make use of these powers cannot, however, have been intended to water down the general principle.'

[5] In *R (on the application of C and D) v Sheffield Youth Court, R (on the application of N) v Sheffield Youth Court* [2003] EWHC 35 (Admin) at [39], [40], (2003) 167 JP 159 at [39], [40], Stanley Burnton J said that in making its decision the youth court f should take into account any undisputed fact put forward in mitigation, such as the good character of the accused. All of the accused with whom we are concerned were of good character. He also said that the youth court must consider the sentencing powers of the Crown Court under s 91(3) and the guidance that has been given as to their exercise: 'If, on the basis of that guidance, g there is no real possibility of such a sentence, committal is inappropriate.' In *R (on the application of C) v Balham Youth Court* [2003] EWHC (Admin) 1332 at [33], [2004] 1 Cr App Rep (S) 143 at [33] Scott Baker LJ reiterated what had been said by Gage J, namely—

> 'the fact than an offender ... does not qualify for a detention and training h order because he is only 14 and not a persistent offender, is not an exceptional circumstance to justify passing a sentence of detention of less than two years under s.91 of the 2000 Act.'

He said (at [34]) that the relevant question in that case was whether it was such a j serious case that detention above two years would or might realistically be required.

[6] In *R (on the application of M) v West London Youth Court* [2004] EWHC 1144 (Admin) at [17], [2004] All ER (D) 362 (Apr) at [17] Leveson J put the same question in slightly different terms:

> 'Whether there is a real prospect that a custodial sentence of, or in excess of, two years might be required, or is there any unusual feature of this case which might justify a sentence of less than two years, pursuant to s 91(3), for which purpose the absence of a power to impose a detention and training order because the offender is under the age of 15 is not an unusual feature?'

Plainly therefore it is necessary in each of the cases in which we are concerned to consider the gravity of the alleged offending.

POWERS OF THE DIVISIONAL COURT

[7] As to the powers of this court, we adopt what was said by Stanley Burnton J in the *Sheffield Youth Court* case (2003) 167 JP 159 at [41], namely:

> '... was the decision of the youth court wrong? The test is one appropriate to a review court rather than one making the original decision. Parliament has clearly given the original decision to the youth court, and in terms that admit of some latitude ... There is normally a range of appropriate sentencing decisions available, and a sentence within that range cannot be said to be wrong ... It is not sufficient for the High Court to consider that it would have made a different decision under s.24(1) to that of the youth court. Only if the High Court is satisfied that the original decision was wrong may it interfere.'

ROBBERY—THE DPP'S APPLICATION

(*A*) *The facts alleged*

[8] At about 7.15 pm on Saturday 28 February 2004 three white boys G, W and T, were waiting at a bus stop in Dunkery Road, London, SE9. G and T were 13 years of age and W was 12 years of age. They were fellow students at the same technology college in Sidcup. There were also two adults at the bus stop, Karen Holdup and her partner Anthony Evans.

[9] A bus stopped on the other side of the road, and a number of black youths got off. They crossed the road towards G, W and T. One of the black youths asked 'who's G?' and G replied 'that's me'. G was then attacked. He was asked if he had a mobile phone, he said he had not, and was asked if he had any money. His pockets were searched, revealing a bus pass, a booklet and a pair of red Nike gloves. The first two items were returned to him, but the gloves were stolen. They were recovered on 8 March 2004 from BO.

[10] The aggressors asked who had stabbed Marcus. G knew nothing about that, and said so. His interrogator then took out a Coca Cola bottle and threatened him with it. G thought that if hit he might be killed. He was then punched on the back of the head by another youth, and pulled to the ground. He curled up to protect himself whilst he was being kicked and stamped on.

[11] Meanwhile the other black youths were attacking T. He was dragged towards a wall and asked if he had a mobile phone. He was threatened and searched and a pair of black Nike gloves were stolen from him, as well as the gloves he was wearing. They were later recovered from AS. T was not allowed to zip up his jacket, and he too was knocked to the floor and kicked.

[12] Whilst this was going on W was dragged against a wall and hit in the ribs. He was asked if he had money or a phone and was searched. He had no phone, but his money was stolen.

[13] G tried to run off. He was chased and kicked in the head by his original assailant. He ran into a house to seek help. W followed and was hit on the back of the head by the black youth who had chased G.

[14] The two adults, Miss Holdup and Mr Evans, saw some of what occurred. A large group of black youths was kicking T as hard as they could, and when they ran off the adults went to his aid. He was on the floor crying in pain and spitting out blood. He had some visible injuries, and Miss Holdup telephoned the police, as did Mr Frenchman from the house to which G and W had fled. T was later found to have a number of bruises and abrasions to various parts of his body and was detained in hospital overnight for observation.

[15] Two police officers located a group of six black youths. Some were identified by W and G, and all six were arrested. They were BW, TG, RT, AS, SO and BO. When cautioned none of them replied.

[16] BW was 14. When interviewed he admitted being in the posse which crossed the road. He heard the victims being asked if they had mobile phones. He saw T have his jacket taken and on the ground being kicked. He also saw G pulled to the ground and kicked but he denied active involvement.

[17] TG, aged 15, when interviewed said he was with the others, but denied being at the scene.

[18] RT, aged 14, answered 'no comment' to all questions. So did AS, aged 15, SO, aged 15, and BO, aged 14.

[19] On 2 March 2004, a couple of days after the incident, DB, aged 14, was arrested at home. He said 'I know about it, I was sitting at the bus stop.' A jacket resembling one seen during the attack was found at his home. He said he had been given it by VW and went on: 'That's not the jacket. The one taken was similar, but it was thrown in the front garden by someone else.' A search where he indicated produced nothing. When interviewed he admitted some discussion about phones and a scuffle, during which a boy was punched in the face and his jacket was taken. He denied involvement.

[20] DL, aged 14, was arrested at home on 3 March 2004. He admitted being there and knowing of the offence, but made no comment in interview.

[21] SS, aged 14, was arrested on 4 March 2004. He made no comment in interview.

[22] IB-T, aged 13, who was also arrested on 4 March 2004, admitted knowing of the incident and being there with others, but denied involvement and claimed to have been on the other side of the road.

[23] On 9 and 11 March 2004 all ten black youths were charged with three offences of robbery. On 18 March 2004 they made their first appearance in Camberwell Youth Court. The case was adjourned to 15 April 2004, when the issue of jurisdiction was considered, and the district judge decided to accept jurisdiction. It seems from the clerk's note that she was only given a very brief outline of the material facts, and she observed that no weapon was used. She also expressed the view that the defendants were 'not likely to get more than two years'.

(B) Possible sentences

[24] Plainly this was a nasty offence with a gang of ten youths attacking the three boys at the bus stop in the dark, threatening to use a bottle as a weapon and inflicting significant injury on at least one of the victims. It is not clear whether there was any racial element, but that is an obvious possibility. The immediate objective seems to have been the theft of money and mobile

phones. As Mr Kayne for the defendants (the interested parties before us) points out, no weapon was actually used, no grave physical injury was sustained, the value of the goods stolen was not great, if there was pre-planning it was probably of short duration, and the alleged offenders are all young and of previous good character.

[25] Mr Horwell for the DPP reminded us that in *R v Joseph (Bol)* [2001] EWCA Crim 304, [2001] 2 Cr App R (S) 398 the Court of Appeal Criminal Division upheld a sentence of three years' detention imposed under s 91(3) of the 2000 Act on a 14-year-old boy who had with others attempted to rob a man of his computer and his wallet. The offence was worse than the offence with which we are concerned in that it was later at night, the appellant produced a knife with a four-inch blade, and he was the one who had taken the prime role. Furthermore, although young, he was larger than his victim.

[26] In *A-G's Ref (Nos 4 and 7 of 2002) (Lobban and Sawyers)* [2002] EWCA Crim 127, [2002] 2 Cr App R (S) 345 Lord Woolf CJ accepted (at [6]) that for a mobile phone street robbery by an adult where no weapon is used 'the upper limit is three years', but an important factor is whether a team of offenders is involved. In the *Balham Youth Court* case [2004] 1 Cr App Rep (S) 143 where two 14-year-olds attempted to rob another 14-year-old and no weapons were used, although one was threatened, this court found it inappropriate to think in terms of two years or more; but Scott Baker LJ contrasted the case with those involving 'multiple assailants, a weapon and offences committed at night'. Mr Horwell submits that the present case falls on the other side of the line. But Mr Kayne points out that in its report to the Sentencing Guidelines Council of March 2004 the Sentencing Advisory Panel classified offences of robbery by reference to the level of violence and the age of the offenders. For an offence at level 2, that is to say involving significant force equating to actual bodily harm, and/or the use of a weapon to threaten or to put the victim in fear, the suggested sentencing range in the case of a young offender was up to 24 months' detention, with a starting point of 10 months' detention. It was recognised that group offending is an aggravating circumstance, as is the involvement of a weapon in the use or threat of force, but, Mr Kayne submits, if the panel's approach were to be adopted no sentence in the present case would exceed two years. At the moment as far as we are aware the panel's advice has yet to be acted on, so it has no legal force, but it is helpful as an indication of a considered response to the sentencing problem posed by a case such as this. We also derived some assistance from the very recent decision of the Court of Appeal Criminal Division in *A-G's Ref (Nos 31, 45, 43, 42, 50 and 51 of 2004)* [2004] EWCA Crim 1934, [2004] All ER (D) 292 (Jul).

OUR CONCLUSION

[27] Mr Kayne conceded that this was a borderline case. In our judgment he was right to do so. We think it possible that a different youth court might have come to the conclusion that there is a real prospect that a custodial sentence of, or in excess of, two years might be required, and if that had been the conclusion of the youth court in the present case we would not have thought it right to interfere. But, as Mr Kayne pointed out, the district judge does seem to have adopted a sensible approach to the very brief outline of the facts with which she was provided, and in the light of the authorities we cannot say that she was plainly wrong. That is why we decided that her decision must stand.

RELIGIOUSLY AGGRAVATED CRIMINAL DAMAGE—THE APPLICATION OF H

(A) The facts alleged

[28] Charlton cemetery in southeast London has a section for those of Turkish or Cypriot descent and Muslim faith. The graves in that area have headstones on plinths, and some headstones have photographs on them of the deceased. As is clear from the photographs before us, the cemetery was well maintained with flowers on many of the graves. During the night of Wednesday 17 March 2004 the Muslim section of the locked cemetery was desecrated. Forty-seven headstones were pushed over or smashed, some photographs were smashed or went missing, and it was estimated that the damage would cost £12,500 to repair. However, the real gravamen of the offence was the anguish caused to the relatives of the deceased, and the justifiable sense of outrage experienced by the local community.

[29] On 3 April 2004 H, born 28 May 1990, so then not quite 14 years of age, was arrested. A claw hammer was recovered from under his bed. He admitted presence at the scene with two others, and participation until a headstone fell on his foot. But he denied any religious or racial motivation. Two slightly older youths who were arrested on 4 April 2004 also admitted involvement, and on 13 April 2004 all three were charged.

[30] Further investigations at the cemetery revealed damage or desecration to about 72 graves, and on 4 May 2004 the youth court declined to accept jurisdiction.

[31] This was not only a group offence. It seems to have been pre-planned. It was necessary to pass a number of other graves in order to reach the Muslim section of the cemetery. Only one of the damaged headstones was outside that section, and it was in an adjacent section. So it can be inferred that this was a religious or racial attack, causing considerable damage, distress to many, and inflaming tensions.

(B) Possible sentences

[32] As Mr Horwell pointed out, the maximum penalty for the offence charged is 14 years' imprisonment in the case of an adult, and where it is possible to show that an offence has been racially or religiously aggravated that is likely to increase the sentence by at least 40%. There are no directly comparable authorities but Mr Kayne invited us to consider *R v Ward* (31 October 1996, unreported), where three defendants who were intending to attack a Jewish cemetery received sentences of 12–18 months' imprisonment. Their appeals against sentence were dismissed. In that case the situation was complicated by the fact that had the offenders done as they intended and had they been charged with the substantive offence they could not at the time have received more than three months' imprisonment, so the decision is really of no assistance in the present case. The only other decision to which our attention was invited, namely *R v O'Brien* [2003] EWCA Crim 302, [2003] 2 Cr App R (S) 390 is also of limited assistance. The defendant in that case threw bricks through the window of a neighbouring house in which asylum seekers were housed, and used an iron bar to attack a car which he believed to belong to them. He was sentenced to 14 months' imprisonment. He had a medical history, and the sentencing judge considered that without the element of racial aggravation the appropriate sentence would have been as low as two months' imprisonment. The Court of Appeal reduced that overall sentence to six months' imprisonment.

OUR CONCLUSION

[33] We bear in mind the age of H and his previous good character, but it seems from what his co-defendants said in interview that he may have played a leading role in a very serious offence which not only caused damage and grief but which could easily have caused serious unrest. We can well understand why the district judge concluded that in his case there is a real prospect that a custodial sentence of, or in excess of, two years might be required. We are satisfied that he was entitled to reach that conclusion and that is why we dismissed his application.

APPLICATION FOR A VOLUNTARY BILL OF INDICTMENT

[34] When the DPP is concerned about the decision of a youth court to retain jurisdiction he can either apply for judicial review or seek a voluntary bill of indictment. Time considerations apart, Mr Horwell readily accepted that the better course is to seek judicial review, because that gives both the youth court and the interested parties a full opportunity to be heard. That is also the thrust of what was said by Brooke LJ in *R v Snaresbrook Crown Court, ex p Serious Fraud Office* (1998) 95 (44) LSG 35 (para 41). But, as Mr Horwell pointed out, if there is an application for a voluntary bill the consolidated Practice Direction [2002] 3 All ER 904 at 926, [2002] 1 WLR 2870 at 2893 (paras 35.5, 35.6) does now safeguard the position of defendants to a considerable extent. In particular, save where there are good grounds for doing otherwise: (1) they must receive notice of an application for a voluntary bill with copies of all documents relied upon to support the application; (2) they must have an opportunity to make written submissions, and—(3) they may be invited to make oral submissions if the judge considers it necessary or desirable to hear their oral submissions.

[35] Nevertheless an application for a voluntary bill does not give to a defendant the rights he enjoys when acting as an interested party in response to an application for judicial review, and, as is said in para 35.3 of the Practice Direction:

> 'The preferment of a voluntary bill is an exceptional procedure. Consent should only be granted where good reason to depart from the normal procedure is clearly shown and only where the interests of justice, rather than considerations of administrative convenience, require it.' (See [2002] 3 All ER 904 at 925–926, [2002] 1 WLR 2870 at 2893.)

Why then should there be resort to this exceptional procedure in the type of case with which we are concerned? As Mr Horwell points out, an application for judicial review normally takes three to four months from the commencement of proceedings to the delivery of judgment, and after that there is always the possibility of an appeal, whereas a decision in relation to an application for a voluntary bill can normally be obtained within two or three weeks, so the DPP feels obliged to consider that alternative because of his statutory duty to deal with cases involving children and young people expeditiously, both for the sake of the defendants and for the sake of the witnesses, who may also be young. That need for expedition has been emphasised in recent years, for example in guidance from the Youth Justice Board.

[36] As Mr Kayne helpfully pointed out when urging caution in the use of the voluntary bill procedure, an application for a voluntary bill is plainly a useful procedure where, for example, the prosecution assert that the youth court was wrong to find no case to answer, and it can also be useful in support of an application by the DPP for judicial review in a jurisdictional case because, if the

application for judicial review is successful, the hearing in the Crown Court can then be expedited. But if an application to prefer a voluntary bill is successful there is no right of appeal, nor can the decision be made subject to judicial review (see *R v Crown Court at Manchester, ex p Williams* (1990) 154 JP 589). So, Mr Kayne submits, the rights of the defendant are better safeguarded if the DPP in any case where he wishes to challenge the decision of a youth court in relation to jurisdiction seeks judicial review. We agree with that submission, and in our judgment that is the course which should normally be followed. However we do consider it necessary to meet the concerns of the DPP as to time, and to that end we have made inquiries of the judge in charge of the Administrative Court and of the head of the Administrative Court Office, as a result of which we are satisfied that if jurisdictional challenges are brought by way of judicial review, and if an expedited hearing is sought (by completing form N463), the matter can be dealt with within the sort of timescale mentioned in relation to obtaining a voluntary bill. Accordingly that it is the procedure which should now be used, and if without adequate explanation an application for a voluntary bill is made other than in a supporting role in a jurisdictional case the court will probably refuse consent on the basis that no good reason has been shown to depart from the normal procedure, and the interests of justice do not require it.

TREACY J.

[37] I agree.

Applications dismissed.

Dilys Tausz Barrister.

R (on the application of M) v Islington London Borough Council

[2004] EWCA Civ 235

COURT OF APPEAL, CIVIL DIVISION
WALLER, BUXTON AND MAURICE KAY LJJ
26, 27 JANUARY, 2 APRIL 2004

Housing – Persons in need of care and attention – Duty of local authority to provide accommodation – Illegal immigrant having child holding British nationality – Immigration proceedings pending – Whether immigrant entitled to accommodation in interim – Children Act 1989, s 17 – Nationality, Immigration and Asylum Act 2002, Sch 3, paras 1(1)(g), 7 – Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002, SI 2002/3078, reg 3.

The claimant was a national of Guyana who had arrived in the United Kingdom in 1998 and had stayed after the expiration of her visitor's visa. She was the subject of immigration proceedings and her appeal to the Immigration Appeal Tribunal was pending. In 1999, she had married a man with indefinite leave to remain in the United Kingdom, and they had a child who was a British citizen. The marriage did not prosper and the claimant's husband left her. She came to the attention of the defendant local authority's social services department as being destitute. Under s 17[a] of the Children Act 1989, it was the duty of a local authority, inter alia, to safeguard and promote the welfare of children who were in need and any service provided by the authority might be provided for a child's family if it was provided with a view to safeguarding and promoting the child's welfare. The authority embarked upon an assessment of the child's needs. Under paras 1(1)(g)[b] and (7)[c] of Sch 3 to the Nationality, Immigration and Asylum Act 2002 a person who was in the United Kingdom in breach of the immigration laws and who was not an asylum seeker was not eligible for support or assistance under, inter alia, s 17 of the 1989 Act. Regulation 3 of the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 empowered an authority to arrange travel and provide accommodation for certain persons to whom para 1 of Sch 3 to the 2002 Act applied. The 2002 regulations provided that a local authority had to have regard to guidance issued by the Secretary of State in making travel arrangements and arrangements for accommodation. The guidance stated that it was preferable, for persons returning to countries other than EEA member states, if accommodation should not continue for more than ten days from the date the family first presented for support or assistance. On the basis of its understanding of Sch 3 to the 2002 Act and the 2002 regulations, and having regard to the guidance, the authority decided to offer the claimant and her child one-way air tickets to Guyana and to provide them with accommodation for 21 days pending removal. She applied for judicial review. The judge criticised the

a Section 17, so far as material, is set out at [6], below
b Paragraph 1, so far as material, is set out at [7], below
c Paragraph 7, so far as material, is set out at [9], below

authority's procedure in coming to its decision and ruled that the assessment had not given attention to the rights of the child and her father to respect for private and family life under the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). He quashed the decision to offer tickets and ordered the authority to reconsider its decision, holding that it would not be lawful for the authority to offer accommodation to a person in the claimant's situation for any more than a short period pending removal. Both parties sought the guidance of the court as to the approach the authority should adopt in assessing the family's needs.

Held – (1) Such power as the authority had to offer tickets was severely circumscribed by the rights of the various parties under the convention. However, if it could be concluded that that power could be exercised without infringing those rights, it would not be open to the authority to exercise it in a way that encouraged or in practice enforced the expulsion of the child before the effect of her citizenship on the mother's immigration status had been decided by the proper authority for that purpose, the Immigration Appeal Tribunal (see [30], [46], [47], [53], [81], below).

(2) (Buxton LJ dissenting) Where travel arrangements had not been made by the Home Office, it was open to an authority to provide accommodation for a period longer than the ten days in the guidance. Although the power to make the regulations and the title of the 2002 regulations referred to 'temporary' accommodation, the categorisation of something as 'temporary' in the context of immigration law was not synonymous with duration of extreme brevity. It meant no more than 'lacking permanence'. The guidance stated that local authorities would be able to provide such accommodation to those unlawfully in the United Kingdom 'whilst they await removal directions from the Immigration Service'. The claimant was in that position and, whilst her appeal was pending, she had to remain in the country because, by the operation of s 104 of the 2002 Act, the appeal would be treated as abandoned if she left the country. Furthermore, the thrust of the guidance and the power given to the authority was consistently linked with the existence of travel arrangements being in place. It followed that the authority had the power to provide accommodation to the claimant under Sch 3 of the 2002 Act and the matter should be reconsidered by the authority in the light of the guidance of the court. The appeal would therefore be allowed (see [57], [59], [79], [82], below).

Notes

For the duty of local authorities to provide for children in need, and for persons for whom support may be provided, see respectively, 5(3) *Halsbury's Laws* (4th edn reissue) para 1301, and Supp to 4(2) *Halsbury's Laws* (4th edn) (2002 reissue) para 246.

For the Children Act 1989, s 17, see 6 *Halsbury's Statutes* (4th edn) (2003 reissue) 415.

For the Nationality, Immigration and Asylum Act 2002, Sch 3, paras 1, 7, see 31 *Halsbury's Statutes* (4th edn) (2003 reissue) 552, 7.

For the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002, SI 2002/3078, reg 3, see 14 *Halsbury's Statutory Instruments* (2004 issue) 360.

Cases referred to in judgments

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

De Falco v Crawley BC [1980] 1 All ER 913, [1980] QB 460, [1980] 2 WLR 664, CA.

Laker Airways Ltd v Dept of Trade [1977] 2 All ER 182, [1977] QB 643, [1977] 2 WLR 234, CA.

Lobe v Minister for Justice, Equality and Law Reform [2003] IESC 1, Ir SC.

Marckx v Belgium (1979) 2 EHRR 330, [1979] ECHR 6833/74, ECt HR.

Poku v UK (1996) 22 EHRR CD 94, E Com HR.

R (on the application of G) v Barnet London BC [2001] EWCA Civ 540, [2002] LGR 34.

R (on the application of Samaroo) v Secretary of State for the Home Dept, R (on the application of Sezek) v Secretary of State for the Home Dept [2001] EWCA Civ 1139, [2001] UKHRR 1150.

R v Hammersmith and Fulham London BC, ex p D [1999] LGR 575.

R v Secretary of State for the Home Dept, ex p Mahmood [2001] 2 FCR 63, [2001] 1 WLR 840, CA.

R v Wandsworth London Borough Council, ex p O, R v Leicester City Council, ex p Bhikha [2000] 4 All ER 590, [2000] 1 WLR 2539, CA.

Appeal

The claimant, M, a national of Guyana unlawfully in the United Kingdom with a dependent child of British citizenship, appealed from the decision of Wilson J on 5 June 2003 ([2003] EWHC 1388 (Admin), [2003] 2 FLR 903), in proceedings for judicial review of the decision of Islington London Borough Council to offer the claimant and her child one-way air tickets to Guyana and accommodation for 21 days pending removal. The Secretary of State for the Home Department appeared as an interested party. The facts are set out in the judgment of Buxton LJ.

Stephen Knafler (instructed by *Pierce Glynn*) for M.

Bryan McGuire (instructed by *Louise Round*) for Islington.

Kristina Stern (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

2 April 2004. The following judgments were delivered.

BUXTON LJ (giving the first judgment at the invitation of Waller LJ).

THE FACTS AND ISSUES

[1] The claimant, Mrs M, is a national of Guyana. She came to the United Kingdom in 1998 on a visitor's visa, staying here after that visa expired. It is accepted that both at the time of the hearing before the judge and at the time of the present hearing she was and is unlawfully in this country. She is, however, the subject of current immigration proceedings. An appeal against the Secretary of State's refusal of her application for indefinite leave to remain was rejected by an adjudicator on 23 September 2003. She has however been granted permission by the Immigration Appeal Tribunal to appeal against that decision; we understand that the appeal is to be heard on 23 June 2004.

[2] That application on Mrs M's part is largely based on her family circumstances. In November 1999 Mrs M married Mr M, a native of Antigua with indefinite leave to remain in this country, and set up home with him in his council flat in the area of the respondent council, the London Borough of Islington (Islington). On 17 October 2001 a daughter (the child) was born. By the operation of s 1(1)(b), read with s 50(2), of the British Nationality Act 1981 the child is a British citizen. She was not only born in the United Kingdom, but born there in lawful wedlock to a father who has indefinite leave to remain here.

[3] Unfortunately, the marriage did not prosper, and in about August 2002 Mr M left the claimant. The tenancy of the flat was transferred to Mrs M, but she is unable to pay the rent, and has no means of subsistence for herself or the child apart from the provision that Islington has, very properly, made pending the outcome of the present proceedings. As to the husband, we were told from the bar that arrangements have been made for contact between him and the child, arrangements that Mr M has in the main fulfilled.

[4] Again very properly, the situation of Mrs M and the child attracted the concern of Islington's Social Services Department, which embarked upon an assessment of the child's needs under the provisions of the Children Act 1989. On the basis of that assessment Islington concluded that the needs of the child could be met by providing Mrs M and the child with tickets to enable Mrs M to return to her family in Guyana. That step was not, in itself, outside Islington's proper powers under the 1989 Act: see *R v Hammersmith and Fulham London BC, ex p D* [1999] LGR 575 per Kay J. However, it then came to be accepted that, as set out above, Mrs M was unlawfully in the United Kingdom. That was thought by Islington to impact on its 1989 Act obligations towards the child, by the operation of Sch 3 to the Nationality, Immigration and Asylum Act 2002 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002, SI 2002/3078. I shall have to return to these provisions in much more detail later in the judgment. On the basis of its understanding of them, Islington sent a long and detailed letter to the claimant's solicitors on 27 March 2003, the salient points of which were:

- Islington maintained its earlier decision—

> 'to offer [Mrs M] and [the child] one way plane tickets to Guyana because [the child's] welfare would be best safeguarded and promoted by being cared for in Guyana where she has a Grandmother, Aunt, Uncle and cousins, and therefore a greater prospect of family support than she has in the UK.'

- If Mrs M none the less remained in the United Kingdom in order to pursue her immigration proceedings—

> 'circumstances could very well arise whereby mother and child might be separated in breach of art 8 [of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as set out in Sch 1 to the Human Rights Act 1998 (ECHR)] if [Mrs M] remained in this country pursuing your application to remain here without any means of supporting your child. Without deciding what the authority would do in

a circumstances which have not arisen, there would be a real prospect that the authority would reach a decision that the child had to be taken into care as a means of addressing its [scil the child's] needs.'

• None the less, Islington had—

b 'not made any decision as to what would happen in the event that the offer was refused even after having been found by the court to have been lawfully made. This is not a case where a decision has been made, still less a threat made, to take [the child] into care. In the event that [Mrs M] refuse[s] to accept the offer made even following court proceedings, the c Islington would continue to assess what is in the best interests of [the child] in the light of developing circumstances.'

[5] Mrs M has throughout adamantly opposed any return to Guyana either for herself or for the child. In these proceedings she seeks an order quashing d the decision to offer tickets to Guyana contained in Islington's letter of 20 January 2003; and directions that Islington should further assess the needs of Mrs M and the child under s 17 of the 1989 Act, and pending the completion of that assessment provide Mrs M with accommodation and maintenance.

e THE LEGISLATION

[6] The inquiry starts with Islington's powers and duties under s 17 of the 1989 Act. The most immediately relevant provisions are in s 17(1)–(3), which read:

f '(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—(a) to safeguard and promote the welfare of children within their area who are in need; and, (b) so far as is consistent with that duty, to promote the upbringing of such children by their families, by providing a range and level of services appropriate to those children's needs.

g (2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.

(3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a h particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.'

There is no dispute that the child in the present case is 'in need'.

[7] The local authority's position has however been severely affected by, j and these proceedings address, Sch 3 to the 2002 Act. That is entitled 'Withholding and Withdrawal of Support', and by para 1(1) provides that 'A person to whom this paragraph applies shall not be eligible for support or assistance under' and there are then set out a very large number of statutory provisions that otherwise provide health, welfare and housing benefits. Importantly for present purposes there is included, under para 1(1)(g)

'section 17, 23C, 24A or 24B of the Children Act 1989 ... (welfare and other powers which can be exercised in relation to adults)'.

[8] Schedule 3 then goes on to indicate various exceptions to the blanket exclusion of rights under the listed statutes. The exceptions relevant to our case are to be found in paras 2 and 3:

> '2.—(1) Paragraph 1 does not prevent the provision of support or assistance—(a) to a British citizen, or (b) to a child ...
>
> 3. Paragraph 1 does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of—(a) a person's Convention rights ...'

[9] Schedule 3 then goes on to set out the four classes of persons who are by para 1, and subject to the above exceptions, rendered ineligible for the statutory benefits that Sch 3 addresses, and then makes further provision for the limited amount of assistance that local authorities are permitted to give to persons falling within those categories. Those provisions are important in the determination of this appeal, and need to be set out in full:

> '4. *First class of ineligible person: refugee status abroad.*—(1) Paragraph 1 applies to a person if he—(a) has refugee status abroad, or (b) is the dependant of a person who is in the United Kingdom and who has refugee status abroad.
>
> (2) For the purposes of this paragraph a person has refugee status abroad if—(a) he does not have the nationality of an EEA State, and (b) the government of an EEA State other than the United Kingdom has determined that he is entitled to protection as a refugee under the Refugee Convention.
>
> 5. *Second class of ineligible person: citizen of other EEA State.*—Paragraph 1 applies to a person if he—(a) has the nationality of an EEA State other than the United Kingdom, or (b) is the dependant of a person who has the nationality of an EEA State other than the United Kingdom.
>
> 6. *Third class of ineligible person: failed asylum-seeker.*—(1) Paragraph 1 applies to a person if—(a) he was (but is no longer) an asylum-seeker, and (b) he fails to cooperate with removal directions issued in respect of him.
>
> (2) Paragraph 1 also applies to a dependant of a person to whom that paragraph applies by virtue of sub-paragraph (1).
>
> 7. *Fourth class of ineligible person: person unlawfully United Kingdom.*—Paragraph 1 applies to a person if—(a) he is in the United Kingdom in breach of the immigration laws within the meaning of section 11, and (b) he is not an asylum-seeker.
>
> 8. *Travel assistance.*—The Secretary of State may make regulations providing for arrangements to be made enabling a person to whom paragraph 1 applies by virtue of paragraph 4 or 5 to leave the United Kingdom.
>
> 9. *Temporary accommodation.*—(1) The Secretary of State may make regulations providing for arrangements to be made for the

accommodation of a person to whom paragraph 1 applies pending the implementation of arrangements made by virtue of paragraph 8.

(2) Arrangements for a person by virtue of this paragraph—(a) may be made only if the person has with him a dependant child, and (b) may include arrangements for a dependant child.

10.—(1) The Secretary of State may make regulations providing for arrangements to be made for the accommodation of a person if—(a) paragraph 1 applies to him by virtue of paragraph 7, and (b) he has not failed to cooperate with removal directions issues in respect of him.

(2) Arrangements for a person by virtue of this paragraph—(a) may be made only if the person has with him a dependant child, and (b) may include arrangements for a dependant child ...'

[10] The regulation-making power has been exercised by the Secretary of State by the 2002 regulations. The relevant parts of the 2002 regulations read as follows:

'**3.** *Power for local authorities to arrange travel and provide accommodation.*—(1) A local authority may make arrangements ("travel arrangements") enabling a person with refugee status abroad or who is an EEA national to leave the United Kingdom to travel to the relevant EEA State.

(2) A local authority may make arrangements for the accommodation of a person in respect of whom travel arrangements have been or are to be made pending the implementation of those arrangements.

(3) A local authority may make arrangements for the accommodation of a person unlawfully in the United Kingdom who has not failed to co-operate with removal directions issued in respect of him.

(4) Arrangements for a person by virtue of paragraph (2) or (3)—(a) may be made only if the person has with him a dependant child, and (b) may include arrangements for that child

4. *Requirements relating to travel and accommodation arrangements.*—(1) Travel arrangements and arrangements for accommodation must be made so as to secure implementation of those arrangements at the lowest practicable cost to the local authority.

(2) Subject to the requirements in paragraph (1), travel arrangements made in respect of a person must be made so that the person leaves the United Kingdom as soon as practicable.

(3) Travel arrangements and arrangements for accommodation may not include cash payments to a person in respect of whom arrangements are made and must be made in such a way as to prevent the obtaining of services or benefits other than those specified in the arrangements.

(4) A local authority must have regard to guidance issued by the Secretary of State in making travel arrangements and arrangements for accommodation.'

THE PROCEEDINGS BEFORE WILSON J

[11] It was assumed on all sides before Wilson J, and he accepted, that the issue was to be determined by the construction, or at least the application, of the 2002 regulations. Mrs M's contention was that the 2002 regulations made

it unlawful for Islington to perform its s 17 duty by offering tickets for a return to Guyana. Islington had the power under the 2002 regulations, which in this case it should exercise, to accommodate Mrs M and the child until the outcome of Mrs M's immigration proceedings was known. Wilson J ([2003] EWHC 1388 (Admin) at [45], [2003] 2 FLR 903 at [45]), rejected that contention. He held that if Islington properly concluded that it would safeguard and promote the welfare of the child to return with Mrs M to Guyana, it would not be unlawful for Islington 'at least to offer tickets for travel', which latter, the judge concluded, was all that Islington had so far done. He was fortified in that view by his conclusion (at [36]), that it would not be lawful under the 2002 regulations for a local authority to offer a person in the fourth class, a person unlawfully in the United Kingdom, not travel but accommodation for any more than a short period pending removal, such as the 21 days that Islington had originally offered to Mrs M.

[12] The judge however went on to criticise Islington's procedure in coming to the decision that an offer of travel would meet Islington's obligations. He drew attention to para 3 of Sch 3, set out above, which permitted the exercise of a s 17 power if such was necessary to avoid a breach of a person's convention rights. In the judge's view, the assessment conducted by Islington had not given attention to the mutual rights of the child and of Mr M for family contact with each other; and had inadequately investigated the actual prospects for the child's welfare were she to be returned to Guyana. He therefore concluded (at [59]):

> 'For each of those two reasons Islington's assessment was flawed. Its decision to offer tickets under s 17 must be quashed and Islington must reconsider what decision to make about any exercise of its powers for the benefit of the child, including in relation to the claimant, under that section.'

[13] Mrs M does not of course quarrel with that conclusion so far as it goes; but by this appeal she contends that the judge should have gone considerably further. As the argument in the appeal developed, it became clear that the parties were principally concerned to have guidance as to how Islington should perform the reconsideration ordered by Wilson J. The precise terms of the relief sought may not therefore be of central importance. However, after discussion with Mr Knafler, for Mrs M, I think that the substance of Mrs M's case can be expressed in terms of a declaration that Sch 3 to the 2002 Act and the 2002 regulations permit local authorities to provide accommodation to persons unlawfully in the United Kingdom who have dependent children, and require that power to be performed when the family is destitute and has no other recourse. As a result, it was not open to Islington, and until failure to comply with removal directions is not open to Islington, to offer tickets to the home country against the wishes of Mrs M.

[14] This issue, and the statutory background against which it is ventilated, has given rise to a series of problems, going some way beyond the case as it appeared before the judge, and all of which have been explored before us with considerable force and subtlety. I have concluded that the judge was correct in remitting the case to Islington. However, that conclusion has to be reached through a detailed examination of the statutory provisions with which those

working in this difficult field now have to wrestle, which in my view impose a scheme somewhat different from that which was debated before the judge. And that examination involves the resolution of a number of essentially preliminary points that I will address first. These are: the ambit of para 1(1)(g) of Sch 3 to the 2002 Act; the respective roles of the Secretary of State and of the local authority; and position of the child as a British citizen.

THE AMBIT OF PARA 1(1)(G) OF SCH 3

[15] It was assumed without question before the judge, and the judge accepted, that the issue for him was as set out in para [1] of his judgment:

> 'What powers do local authorities now have to provide accommodation for an adult who, not being an asylum-seeker, is unlawfully present in the United Kingdom and who is caring for a child?'

[16] I was initially concerned, and still am concerned, by this formulation. The local authority only becomes involved, at least in the terms of this case, because it is confronted by a *child* in need. It is accepted in the circumstances of this case that its powers, either original or as modified by Sch 3 to the 2002 Act and the 2002 regulations, can only be exercised in the context of the interests of the child. When the judge ordered Islington to reconsider its decision, at least in relation to conditions in Guyana he did so because Islington had not sufficiently considered whether to live there would safeguard and promote the child's welfare. Save as it impacted upon the welfare of the child, the welfare of the mother would be an irrelevant and unlawful consideration for Islington to take into account. Paragraph 1(1)(g) of Sch 3 addresses those cases where under 1989 Act provisions support or assistance 'can' be provided to an adult: either in his capacity as such, as a person formerly in care, under ss 23C, 24A and 24B; or as part of the provision of services to the child's family or a member of it under s 17(3), though always in such case with a view to safeguarding and promoting the child's welfare. But why should it be assumed in a case such as the present, where as a matter of fact the child cannot be accommodated without accommodating the mother, that the disqualification of the mother from any assistance under the 1989 Act must by the same token deprive the child of the assistance to which she is entitled under s 17?

[17] In our case, Mrs M is not eligible for support or assistance under welfare powers that can be exercised in relation to adults under s 17 of the 1989 Act because she is a person in the fourth class, unlawfully in the United Kingdom. That proposition says nothing, as a matter of law, about the provision of support or assistance to the child. However, it is contended that if the local authority performs its duty by accommodating the child, it will thereby unavoidably break its duty under para 1 of Sch 3 to the 2002 Act of withholding accommodation from the mother: because in practice, bearing in mind the local authority's duty under s 17(1)(b) to promote the upbringing of children by their families, the child's accommodation will be with her mother. That would seem on its face to be inconsistent with para 2(1)(a) and (b) of Sch 3. Paragraph 1 does not prevent the provision of support or assistance to a British citizen or to a child. But in our case, that is exactly what para 1 appears to do. The daughter's status as a British citizen, with a right to remain in this country, is completely ignored. Her status as a child does reappear in the equation under

the accommodation provisions of para 10 of Sch 3 to the 2002 Act and reg 3(3) of the 2002 regulations. That, however, is not in her own right, but as the dependent child upon whom the mother's rights in turn depend. And she serves that function not because she is a child *in need*, owed duties under the 1989 Act, but because she is dependent on the person who (unlike herself) is unlawfully in the United Kingdom: in just the same way, but only in the same way, as for instance the presence of a dependent child would activate the provisions of paras 9 and 10 of Sch 3 in the case of a person rendered ineligible by para 1(1)(a) of Sch 3 for the provision of accommodation in case of illness under s 21 of the National Assistance Act 1948.

[18] The approach adopted by the judge, and by all counsel before him, therefore produces some surprising results. In particular, although the point of departure is the needs of the child, the duty of the local authority to provide for those needs depends on whether the child happens to live in a household headed by a person falling into one of the ineligible categories in Sch 3 to the 2002 Act. And the protection of British citizens from the removal of services under Sch 3 depends, in the case of a child in need, not on whether that child is a British citizen, but on whether the head of the household in which the child lives is a British citizen. I have, however, been persuaded by the submissions of Mr McGuire (which it is fair to say were not strenuously opposed by Mr Knafler) that that is indeed what this legislation provides.

[19] That is essentially because the reality will often or usually be that services to protect the child will be provided, as in the present case, by providing services to the child's family or at least to the child's custodial parent. That is what is envisaged by s 17(1)(b), read with s 17(3), of the 1989 Act. Paragraph 1(1)(g) of Sch 3 to the 2002 Act must, therefore, be read at least in part as addressing that case; and thus as providing that where a 1989 Act power is exercised through assistance to an adult, the power, even though it is a power to assist the child, is taken away if the adult in question falls within one of the ineligible classes. I say nothing as to the policy that that provision implements. I do however accept that the provision indeed operates in the way that lies behind the judge's formulation, as set out in [14], above.

THE ROLE OF THE SECRETARY OF STATE AND OF THE LOCAL AUTHORITY

[20] Immigration policy is the concern of the Secretary of State. Welfare provision is in the main the concern of the local authorities. That not only reflects the constitutional roles of the two parties, but also the relative skills that they have at their disposal, as Hale LJ (as she then was) expounded in her seminal judgment in *R v Wandsworth London Borough Council, ex p O, R v Leicester City Council, ex p Bhikha* [2000] 4 All ER 590 at 607–608, [2000] 1 WLR 2539 at 2557.

[21] Schedule 3 is an instrument of the Secretary of State's immigration control policy. That is made plain in evidence before the court from the Director of the International Policy Directorate, Immigration and Nationality Directorate, of the Home Office. However, the machinery adopted to implement that policy to some extent disturbs the constitutional balance referred to in [20], above. In the first and second 'ineligible' classes under Sch 3 (persons with refugee status in an EEA state or EEA nationals) the local authority by reg 3(1) of the 2002 regulations 'may' make 'travel arrangements' for that person's return to the relevant EEA state. Whether in such

circumstances the local authority is obliged to make such arrangements remains obscure. The implication must however be that local authorities are expected to act to further the national policy referred to by the director. By contrast, the third ineligible class, failed asylum seekers, remains the responsibility of the Secretary of State. The extent of the local authority's powers and obligations towards the fourth class, persons unlawfully in the United Kingdom, is the subject of this appeal.

[22] The construction of Sch 3 to the 2002 Act and, in particular, of the 2002 regulations therefore has to be undertaken against the background of the scheme that the legislation promotes. It is also necessary to remember that although part of the scheme envisages the local authority providing persons affected by Sch 3 with the means to leave the United Kingdom, immigration control as such remains in the hands of the Secretary of State. Decisions as to immigration status are therefore for the Secretary of State and not for the local authority.

BRITISH CITIZENSHIP

[23] As a British citizen the child enjoys, by s 2(1)(a) of the Immigration Act 1971, the right of abode in the United Kingdom. By s 1(1) of that same Act—

> 'All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and come and go into and from, the United Kingdom without let or hindrance ...'

That proud statement seems plainly to say, and subject to further discussion below, that immigration controls simply do not apply to a British citizen, and he cannot be expelled against his will.

[24] We were however told on behalf of the Secretary of State that he has power to remove from the United Kingdom the custodial parent of a British citizen, even though the practical result of that step would be the forcible removal of the British citizen from her country of citizenship. The only controlling factor so far as the British citizen was concerned was whether that step would infringe her rights under art 8 of the ECHR. The child's citizenship would be a factor to be put into that balance. Two comments are necessary. First, it is established convention jurisprudence that art 8 (nor any other article of the ECHR) does not create a direct right to enter or remain in any particular country: see for instance *Poku v UK* (1996) 22 EHRR CD 94 at 97, cited with approval by Lord Phillips of Worth Matravers MR in *R v Secretary of State for the Home Dept, ex p Mahmood* [2001] 2 FCR 63 at 83–84, [2001] 1 WLR 840 at 858–859 (para 47). It is therefore difficult to see how the child's right of abode could play an independent role in any art 8 assessment. Second if (as Islington concluded in the present case) family life can be reproduced in the country of removal, then it is difficult to see how the case could fall under art 8 at all: because, as made clear in *Mahmood*'s case [2001] 2 FCR 63 at 86, [2001] 1 WLR 840 at 861 (para 55(3)), art 8 creates no right to enjoy family life in one country rather than another.

[25] The issue of the child's British citizenship, which I find one of some considerable difficulty, was not confronted in the proceedings below, so we unfortunately do not have the benefit of the judge's view upon it. Nor does it seem to be addressed in any English authority. Ms Stern showed us the

judgment of this court in *R (on the application of Samaroo) v Secretary of State for the Home Dept, R (on the application of Sezek) v Secretary of State for the Home Dept* [2001] EWCA Civ 1139 at [4], [2001] UKHRR 1150 at [4], where the court mentioned, apparently with approval, the Secretary of State's inclusion within the 'compassionate circumstances' pointing against the deportation of Mr Samaroo, a convicted drug dealer 'the existence of [his son] and his age [nine years] and the fact that he is a British citizen with his own independent right to live here and his relationship to his father ...' In that case, however, the art 8 rights under consideration were those of the father, not those of the son; and there was no suggestion that, unlike in our case, the inevitable effect of the expulsion of the father would be the expulsion of the son in his company.

[26] This issue was, however, addressed in the Supreme Court of the Irish Republic in *Lobe v Minister for Justice, Equality and Law Reform* [2003] IESC 1 where, similarly to our case, non-national parents of an infant child born in Ireland claimed the right to remain in Ireland with their child as an Irish citizen. In the majority judgment Keane CJ held that the child did not have an unqualified right to reside in the state. Rather, the right of a citizen was to choose whether or not to reside in the state. Infants were incapable of exercising that or any choice, so the right 'may reasonably be regarded as a right which does not vest in them until they reach an age at which they are capable of exercising it' (see [35]). In the meantime, any decision on the part of the child had to be taken by its parents, who simply were unable to acquire for themselves a right to remain indefinitely in the state by purporting to make that choice on behalf of their infant child (see [40]). In reaching that conclusion Keane CJ was strongly influenced by United States authority, that similarly regarded the right of a United States citizen as being to reside where he chose: so the right did not attach to a minor who was fortuitously born in the United States through the choice of his parents, not of himself, to reside there.

[27] If that authority can be applied in our case, then the status of the child as a British citizen becomes effectively irrelevant. I would wish to approach that proposition with caution. It would appear that the courts in Ireland and the United States regarded the effect of citizenship with some reserve because that status was acquired by the simple fact of being born in the country. That is certainly the case under s 6 of the Irish Nationality and Citizenship Act 1956, cited by Keane CJ at [28]. The child in our case has however acquired citizenship not simply by birth, but by a deliberate parliamentary decision expressed in the British Nationality Act 1981. The child is a British citizen because she was not only born here, but born to a parent falling into a carefully limited class: see [2], above. That careful conferment of citizenship is to be contrasted with the somewhat adventitious acquisition of citizenship of the Irish Republic that troubled the court in *Lobe*'s case. Second, there does not appear to be in the law of either the Irish Republic or the United States the strong and general statement of freedom to live in the United Kingdom that is to be found in s 1(1) of the 1971 Act: see [21], above. It is not immediately obvious that that right should be construed simply as a right to choose, not available to a person until he reaches years of discretion.

[28] In my view, therefore, the implications of the child's British citizenship need further exploration. The immigration status of Mrs M is a matter for the Secretary of State. In the current proceedings referred to in [1], above the implications of the child's citizenship do not seem to have been addressed, a

matter to which Mrs M's advisers may wish to give attention before the case is heard by the Immigration Appeal Tribunal. However, the issue also impacts on how Islington should perform whatever functions are conferred on it.

[29] Even if we accept as valid for the United Kingdom the analysis of citizenship in terms of a right to choose that was adopted in *Lobe*'s case, I am very doubtful whether it is open to a local authority, which has no powers of immigration control, effectively to force upon a British citizen a decision not to assert the right given her by s 2(1)(a) of the 1971 Act. That in my view was the effect of Islington's letter of 21 March 2003, summarised in [4], above, carefully worded though it was. The offer was of tickets. Although no decision had been made as to what would be done if the offer were refused, the reference to the 'real prospect' of the child being taken into care if the mother remained in the United Kingdom to pursue her immigration claim; and the prospect of no other support being available for the mother herself; could only in the eyes of Mrs M point strongly in the direction of accepting the offer.

[30] In the event, and for reasons that I shall shortly demonstrate, I have reached the conclusion that such power as Islington may have to offer tickets is, as the judge held, severely circumscribed by the rights of various parties under the ECHR. But if it were to be concluded that the power could be exercised without infringing those rights, then I do not think that it would be open to Islington to exercise it in a way that encourages or in practice enforces the expulsion of the child before the effect of her citizenship on Mrs M's immigration status has been decided by the proper authority for that purpose, the Immigration Appeal Tribunal.

THE POWERS AND OBLIGATIONS OF ISLINGTON

[31] On this aspect of the case I have the misfortune to differ in an important respect from the view of Waller and Maurice Kay LJJ, whose judgments I have had the benefit of reading in draft. The remission of the case to Islington must therefore take place in the terms that they have determined. I would however venture to continue to set out my own view of how the case should be resolved, and in the course of doing so to indicate why I cannot adopt the disposal of it that appeals to Waller and Maurice Kay LJJ.

[32] It will be convenient if I first summarise my own conclusions. (i) Islington only has powers under the 1989 Act if the application to Mrs M's case of Sch 3 to the 2002 Act is excluded by para 3 thereof, avoidance of a breach of a person's ECHR rights. (ii) If Sch 3 does apply to Mrs M's case, it operates as a complete code, separate from the 1989 Act. (iii) Under the code, there is no power to make travel arrangements in respect of a person in the fourth class of ineligible persons. (iv) In the case of such a person, the only power is to provide accommodation, for a very limited period. (v) But in the present case, serious consideration must be given to whether the operation of Sch 3 is excluded by the need to avoid a breach of the ECHR rights of all of the child, Mrs M and Mr M. (vi) That consideration involves an assessment by Islington of what *1989 Act* powers, if any, are necessary to be exercised to avoid such a breach. Guidance is given as to the factors that Islington may think should be taken into account. I will first indicate what will be the position if Islington concludes that Sch 3 does apply to this case. I then consider the issues arising in relation to the ECHR.

THE LOCAL AUTHORITY'S POWERS UNDER THE 2002 REGULATIONS

[33] For the reasons already explained, the local authority only has power under the 2002 regulations to make 'travel arrangements' in respect of the first and second ineligible classes: see reg 3(1). Where such arrangements have been or are to be made there is a further power to provide accommodation, pending travel: see reg 3(2).

[34] A good deal of confusion has been caused in this case by Islington's decision to continue its earlier, 1989 Act, offer of tickets: see [4], above. On the construction of Sch 3 to the 2002 Act and the 2002 regulations for which Islington contends, and which as indicated in [20], above I accept, Islington no longer had power to offer tickets *under the 1989 Act*, because Mrs M was ineligible for support or assistance under the 1989 Act. Islington's powers were strictly limited to what was allowed to it under Sch 3 to the 2002 Act and the 2002 regulations, in substitution for 1989 Act support, by reason of Mrs M having a dependent child. Those powers do not include the making of travel arrangements in the case of a person unlawfully in the United Kingdom. And there is a very good reason for that, in that a local authority is not qualified to determine contentious matters relating to immigration: see the observations of Hale LJ (as she then was) cited in [20], above.

[35] In the case of Mrs M, therefore, Islington's power is limited to that in reg 3(3) of the 2002 regulations. Provided, as in this case, there is a dependent child—

> 'A local authority may make arrangements for the accommodation of a person unlawfully in the United Kingdom who has not failed to co-operate with removal directions in respect of him.'

Wilson J however held ([2003] 2 FLR 903 at [36]), that that apparently general power was severely circumscribed by guidance issued by the Secretary of State (*Nationality, Immigration and Asylum Act 2002, Section 54 and Schedule 3 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 Guidance to Local Authorities and Housing Authorities*). I respectfully agree in broad terms with the view that the judge took of the meaning and implications of that guidance. Waller and Maurice Kay LJJ do not. I must first therefore explain my own opinion, and then indicate how this difference affects the outcome of the appeal.

THE SECRETARY OF STATE'S GUIDANCE

[36] Regulation 4(4) of the 2002 regulations provides:

> 'A local authority must have regard to guidance issued by the Secretary of State in making travel arrangements and arrangements for accommodation.'

The Secretary of State issued such guidance in December 2002. As Wilson J pointed out, one of the problems in understanding the guidance is that it seeks to apply the same regime and criteria to the two different cases identified in [32] and [33], above; and that even though local authorities are expressly reminded in para 27 of the guidance that—

'No arrangements may be made in respect of failed asylum seekers and those unlawfully in the UK—responsibility for making travel arrangements for these groups of person rests with the Home Office Immigration and Nationality Directorate.'

Put shortly, the guidance requires all offers of accommodation to be for a short period, no more than ten days from the time at which the family first presented for assistance. On the basis of that guidance, the judge found that the 21 days offered by Islington was the very limit of what could lawfully be done.

[37] The difficulty of the approach in the guidance is that it takes as the paradigm case the offering of accommodation as an adjunct to the making of travel arrangements. In that case, control over when the subjects should leave is in the hands of the local authority that is making the travel arrangements. It is therefore understandable that, even if only to encourage promptitude in the making and enforcing of those arrangements, the local authority should be limited in the length of time for which it can accommodate pending departure. But where, as under reg 3(3), the local authority (contrary to Islington's offer in our case) has no power to make travel arrangements, the date of departure of the person who has not yet failed to co-operate with removal directions is not within the control of the local authority, and may well be, as in our case, distant and uncertain.

[38] In those circumstances, I have to say that it makes no sense to limit the local authority, irrespective of the needs of the individuals concerned, to a very short period of accommodation. The present case demonstrates that to the full. Islington made its decision on 27 March 2003, offering 21 days' accommodation 'to provide you with the opportunity to make travel arrangements'. For the reasons set out in [30], above, the lawfulness of that step in the present case must be in serious question. Nor had removal directions then been issued by the Secretary of State, nor could their issue be contemplated before the termination of the appeal process. Mrs M's appeal against refusal of indefinite leave to remain had then already stood unheard for thirteen months, and was not resolved until September 2003. An appeal against that decision, brought with the permission of the Immigration Appeal Tribunal, is not to be heard until June 2004. Mrs M and the child will therefore be in the United Kingdom for at the very least fifteen months after Islington's decision. To offer accommodation, but only for the first three weeks of that period, cannot be an appropriate response to the condition of Mrs M and of the child.

[39] That, however, is what the guidance plainly requires. It re-emphasises that it indeed addresses non-EEA cases, that is, ineligibility class four cases where removal directions have not been disobeyed, by making a distinction between them and EEA cases in its para 32. We were taken to various authorities limiting the effect of 'guidance' and of an obligation 'to have regard to'. Thus Roskill LJ in *Laker Airways Ltd v Dept of Trade* [1977] 2 All ER 182 at 199, [1977] QB 643 at 714 said that 'guidance is assistance in reaching a decision proffered to him who has to make the decision, but guidance does not compel any particular decision'; Lord Denning MR in *De Falco v Crawley BC* [1980] 1 All ER 913 at 921, [1980] QB 460 at 478 said that 'the council of course had to have regard to the code ... but, having done so, they could depart from it if they thought fit'. Those observations however related to latitude to depart from guidance when it did not fit the obvious statutory needs of a particular case.

They do not give the local authority a licence, and much less impose on it a duty, to depart from a general policy set out in the guidance just because it appears, as this policy appears, to be unreasonable.

[40] Nor, I have to say with regret, can I agree with Maurice Kay LJ's view that the reference in the guidance to a limit on the period of accommodation being 'preferable' entitles the local authority to decide that it should not apply in a case such as that of Mrs M. Although the implications of so doing do not seem to have been properly thought out, there is no doubt that, for the reasons given at the beginning of [39], above, persons in the same class as Mrs M are intended to be covered by the guidance. She may be different from some others in that class, in that she is engaged in active appeal proceedings; but in all category four cases there is likely to be uncertainty about removal arrangements, extending over a substantially longer period than the *10 days from the date the family first presented for support* that is the criterion laid down by para 32 of the guidance. Any limited licence to depart from guidance in a special case, and any cautious expression of the guidance in terms of that period of ten days being preferable, cannot therefore be used to supply a much longer period effectively to the whole class of non-EEA cases.

[41] Nor can it be said that the guidance is plainly inconsistent with the statutory powers. The regulation-making power is referred to in Sch 3 under the heading of 'temporary' accommodation. I would not regard that fact, if it stood on its own, as particularly compelling, either as an aid to construction or as determining what is meant by 'temporary'. But it can at least be used to demonstrate that the author of the guidance did not plainly depart from his statutory powers. And, indeed, this point goes further, because the schedule and the 2002 regulations, with which the guidance has to be construed, are all about the withholding and withdrawal of support. It would be odd if category four cases, having been removed from 1989 Act support by Sch 3, were then reinstated into a substantial period of support by the guidance.

[42] Nor is it possible to revert to Islington's obligations under s 17 of the 1989 Act. The whole point of Sch 3 to the 2002 Act is to substitute the Sch 3 obligations, limited as they are, for the original 1989 Act duties. And that is why no assistance can be gained from *Ex p O*, where an exceptionally strong constitution of this court held that the use, or rather the withholding, of welfare provision could not be used to implement immigration policy without clear statutory authority. That authority has now been provided by Parliament in the 2002 Act.

[43] It is for these reasons also that, with regret, I cannot adopt the approach of Waller LJ, that the guidance permits the provision of accommodation for a period until travel arrangements are made by the Home Office. I would venture in that regard to mention two further considerations. First, para 2 of the guidance indicates that the object is to provide to category four cases 'similar' accommodation to that envisaged in EEA cases. It would be odd if later in the guidance a completely different regime were provided for category four. Second, I revert to the specific starting point, the date of presentation for support, that is given for all cases in para 32 of the guidance (see also [40], above). It is very unlikely that there is none the less intended to be a different and unstated starting point, whatever date upon which removal directions are finally made, in category four cases.

THE EFFECT OF MY UNDERSTANDING OF THE GUIDANCE

[44] The guidance, if it does indeed treat all three ineligible cases together, makes clear that the very limited, in effect non-existent, accommodation that is all that Islington can offer is intended, as in the EEA cases, to encourage or force Mrs M to leave the United Kingdom; even though, paradoxically, in her case Islington has no power to make travel arrangements. It is therefore necessary to consider whether that will lead to a breach of ECHR rights; because, if it will, para 3 of Sch 3 to the 2002 Act requires reversion to the original Children Act powers.

BREACH OF A PERSON'S ECHR RIGHTS

[45] I entirely accept Ms Stern's submission, countering an ill-considered suggestion on my own part, that 'a' person in para 3 means any person, and not that person. So even though the disqualification from 1989 Act assistance turns on the status of Mrs M and not on that of the child (see [19], above), the lifting of that disqualification can address the position of the child, or indeed of her father.

[46] In paras [49]–[59] of his judgment ([2003] 2 FLR 903) Wilson J gave cogent reasons why the ECHR rights at least under art 8 of all of the child, Mrs M and Mr M are in issue in this case. All of those rights would be likely to be seriously affected if all that Islington could do were to exercise its powers under the 2002 regulations, with the effects summarised in [40], above. First. Mrs M is adamant that she will not leave the United Kingdom. Absent removal directions, she cannot be forced to do so; and since, as we have seen, Islington cannot fund her travel arrangements under Sch 3 it is difficult to see how a destitute woman could leave, let alone find her way back to Guyana, even if she wanted to do so. Islington made it clear in its letter of 21 March 2003 that that would raise 'a real prospect' of the child being taken into care. I for my part would find it difficult not to see an offer of tickets with an alternative of no accommodation (made not for social reasons but in an attempt to enforce immigration control other than by the issuing of removal directions) as an unjustifiable interference with the art 8 rights both of Mrs M and of the child. Second, as the judge pointed out, whilst Mrs M and the child may be able to maintain family life in Guyana, if the object of removing them there succeeds, there has to be substantial certainty on that point before removal can confidently be said not to raise issues under art 8. Third, it would be quite unreasonable to expect Mr M, settled in the United Kingdom and separated from Mrs M, to follow her to Guyana. Depending on the strength of the bond between Mr M and the child, the art 8 rights of both of them would be threatened by the prospect of the child's removal to Guyana.

[47] While this would be in the first instance a matter for Islington, it might have found it difficult not to conclude that, on any view of Mrs M's possible reaction, the limitation of its powers to those under the 2002 regulations will involve interference with the parties' ECHR rights. I should also make plain that, in assessing any future decision that Islington might have made, the criterion would not simply be that of *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). The test of necessity under para 3 of Sch 3 to the 2002 Act imposes a condition precedent to the exercise of a statutory function, under the (restored) 1989 Act powers. That test must be applied according to objective criteria, which the court retains the power to review.

ISLINGTON'S POWERS UNDER THE 1989 ACT

[48] On the assumption that action constrained by Sch 3 is seen as infringing ECHR rights, Islington would become again free to, and would be obliged to, exercise its powers under the 1989 Act. That was what the judge saw Islington as doing in the offer of tickets that it had made to Mrs M.

[49] Islington would have to bear three considerations in mind before it could lawfully discharge its 1989 Act duty by an offer of tickets rather than by providing support, including accommodation, in the United Kingdom. First, it would have to be confident that the child will cease to be 'in need' if removed to Guyana. Wilson J, who has unrivalled experience in these matters, pointed to the detailed and circumstantial inquiry needed in this case, none of which appears to have taken place. Second, the various parties' ECHR rights must be respected in any action taken under the 1989 Act, just as they are relevant to putative action under the 2002 regulations. The considerations set out in [46], above remain directly in point. Here again, because what is in issue is the state's positive obligation under art 8 of the ECHR to protect family life (see for instance *Marckx v Belgium* (1979) 2 EHRR 330 at 342 (para 31)), Islington would have to act in the light of that obligation, and not simply reach a decision that is not *Wednesbury* unreasonable. Third, Islington would have to bear in mind the implications of seeking to remove a British citizen from the United Kingdom, as indicated in [30], above.

POWERS AND DUTIES

[50] It will be recalled (see [13], above) that counsel for Mrs M argued that there was a general power to provide accommodation under Sch 3, and that in the circumstances of Mrs M's case there was a duty on Islington to exercise that power. I have found that the power under Sch 3 is far more circumscribed: see [38], above. And, even if that were not the case, there is simply no justification for translating whatever power is conferred by Sch 3 into a duty. For that to be the case, Sch 3 would at least have to impose obligations as to the general welfare of the subject. That is the last thing that it does.

[51] By contrast, Islington does have a general duty under the 1989 Act to provide for children in need, such as the child in this case. It must exercise those powers with that end in mind, as well as with regard to its duties under the ECHR.

DISPOSAL

[52] Wilson J concluded that Islington's decision, whether taken under 1989 Act powers or under Sch 3 to the 2002 Act, had to be reconsidered in the light of ECHR obligations. I have reached the same conclusion by a slightly different route. If the decision were my own I would allow the appeal only to the extent of varying the judge's order to provide that the case must be reconsidered by Islington in the light of the guidance given in [46]–[49], above. In that process, the criticism of the consideration of the case so far that is set out in Wilson J's judgment ([2003] 2 FLR 903 at [47]–[58]) would have to be borne very carefully in mind. However, since that conclusion is based upon a view of Islington's powers and duties that is not that of the majority of the court, the appeal must be determined according to the order proposed by Waller and Maurice Kay LJJ.

MAURICE KAY LJ.

[53] I agree with what Buxton LJ has said about the import of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as set out in Sch 1 to the Human Rights Act 1998 (ECHR) in the circumstances of this case. However, I take a different view of the power of Islington to provide accommodation pursuant to reg 3(3) of the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002, SI 2002/3078.

[54] The legislative sequence is as follows. By s 54 of and para 1(1)(g) of Sch 3 to the Nationality, Immigration and Asylum Act 2002 eligibility for support or assistance under s 17 of the Children Act 1989 is withdrawn. Nevertheless, the subsequent provisions of Sch 3 provide for exceptions. I adopt the reasoning of Buxton LJ in relation to the exceptions set out in paras 2 and 3 of Sch 3. Paragraph 7 provides that para 1 applies to a person—that is, renders him ineligible—if he is in the United Kingdom in breach of the immigration laws and he is not an asylum seeker. It therefore applies to M. However, it is not the end of the story. By para 10 the Secretary of State is empowered to make regulations providing for arrangements to be made for the accommodation of a person to whom para 7 applies if he has not failed to comply with removal directions issued in respect of him, provided that he has with him a dependant child, in which case the arrangements may include arrangements for that child. Thus, the position of M is precisely one of those contemplated by the regulation empowerment.

[55] Regulation 3(1) and (2) of the 2002 regulations do not apply to M as they relate only to persons with refugee status abroad and European Economic Area (EEA) nationals. The crucial provision is therefore reg 3(3) which provides that a local authority—

> 'may make arrangements for the accommodation of a person unlawfully in the United Kingdom who has not failed to cooperate with removal directions issued in respect of him'

provided that he has with him a dependant child (see reg 3(4)). If the regulations stopped there, it would be beyond dispute that Islington would have the power to provide accommodation in M's case. However, reg 4 goes on to provide that—

> '(1) ... arrangements for accommodation must be made so as to secure implementation of those arrangements at the lowest practicable cost to the local authority ...
>
> (4) A local authority must have regard to guidance issued by the Secretary of State in making ... arrangements for accommodation.'

I do not consider that the reg 4(1) imposes a temporal restriction. It simply requires economy in the context of whatever the appropriate duration may be.

[56] It is the published guidance which persuaded Wilson J and Buxton LJ to conclude that Islington has no power to make arrangements for accommodation for more than two or three weeks (*Nationality, Immigration and Asylum Act 2002, Section 54 and Schedule 3 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 Guidance to Local Authorities and Housing Authorities*). I therefore explain why I disagree with that conclusion.

[57] Although para 10 of Sch 3 to the 2002 Act (the power to make regulations) and the title of the 2002 regulations themselves refer to *temporary* accommodation, I do not think that that points to an unduly short period. It is common knowledge that the categorisation of something as 'temporary' in the context of immigration law is not synonymous with duration of extreme brevity. It means no more than 'lacking permanence'. Some insight into the purpose of this power to provide temporary accommodation can be obtained from the introduction to the guidance, which states that local authorities will be able to provide such accommodation to those unlawfully in the United Kingdom 'whilst they await removal directions from the Immigration Service'. Again it is common knowledge, and was in 2002, that there are many circumstances in which that wait may last for months or even years. The case of M is an obvious example. She is pursuing an appeal against the refusal to grant her indefinite leave to remain. Her case is not obviously hopeless or abusive. The Secretary of State did not certify it so as to curtail her appeal rights and the Immigration Appeal Tribunal has given her leave to appeal, thereby accepting that her appeal has a real prospect of success. Whilst her appeal is pending, she must remain in this country because the appeal would be treated as abandoned if she left the country (see s 104 of the 2002 Act). In all these circumstances, there is no question of the Secretary of State issuing removal directions unless and until the appeal process has been exhausted and has ended in failure.

[58] The part of the guidance which has a part to play in these circumstances is under the heading of the grant of 'temporary *short-term* accommodation'. It is a fact that neither the 2002 Act nor the 2002 regulations use the expression 'short-term'. The crucial paragraph is para 32:

> 'For those persons returning to EEA Member States, it is preferable if accommodation does not continue for a period of more that a further 5 days from the date the family first presented for support or assistance to the local authority. *For those returning to other countries, it is preferable if accommodation does not continue for a period of more than a further 10 days from the date the family first presented for support or assistance to the local authority.*' (My emphasis.)

Wilson J ([2003] EWHC 1388, (Admin) [2003] 2 FLR 903) and Buxton LJ have concluded that, because of para 32, Islington has no power to provide accommodation for more than two or three weeks, even though, in the words of Buxton LJ (at [38], above), 'it makes no sense to limit the local authority, irrespective of the needs of the individual concerned, to a very short period of accommodation'.

[59] In these proceedings, there is no challenge to the lawfulness of the guidance. We have to approach it on the basis that, to comply with reg 4(4) of the 2002 regulations, Islington must 'have regard' to it. In my judgment, it would be consistent with the authorities referred to in [38], above for Islington to conclude that, notwithstanding that it is 'preferable' to limit the provision of accommodation to the sort of period referred to in para 32, it would be inappropriate to do so in the circumstances of this case. If the wait is likely to be measured in months, there would be no point in a provision which exists for the benefit of children being limited to a period of days. I base this conclusion on the fact that para 32 is expressed in the language of preference and must be

considered in the context of the stated purpose of providing accommodation 'whilst they await removal directions'. I also agree with Waller LJ, whose judgment I have seen in draft, that the words 'for those returning to other countries' in para 32 of the guidance provide further support for this conclusion.

[60] I emphasise that, on this analysis, Islington has a statutory power rather than a duty to provide accommodation. I accept that there can be circumstances in which any proper consideration of the exercise of a power can only result in a positive conclusion but I stop short of saying that this is necessarily such a case. It is a matter for Islington to consider in the course of the reconsideration which is to take place. For my part, I would hesitate before granting a declaration of the width suggested by Mr Knafler.

WALLER LJ.

[61] I have read in draft the judgments of Buxton and Maurice Kay LJJ. There is a point on which they disagree. That point is the very point on which Sedley LJ gave permission to appeal, and is of general importance to local authorities who have to consider how they should react to persons in the position of Mrs M of whom there may be many. She is a mother with a child who without assistance would be destitute; she is also unlawfully present in the United Kingdom but exercising her rights of appeal challenging that unlawfulness a process which for reasons not within her control is taking a very substantial period. If Islington had been free to exercise their powers under s 17 and other sections of the Children Act 1989 they would, as indeed they first did, have offered tickets to Mrs M to enable her to fly to Guyana. The subtext of such an offer would have been that if she did not accept the offer, consideration would have been given to taking her child into care. The Court of Appeal in *R (on the application of G) v Barnet London BC* [2001] EWCA Civ 540, [2002] LGR 34 upheld as lawful the decision of the local authority in that case to provide tickets for a child and its parent to return together abroad, in circumstances where the local authority had concluded that the provision of such tickets did 'safeguard and promote the child's welfare'.

[62] What was intended to be the effect of the bringing into force of Sch 3 to the 2002 Act on persons such as Mrs M and her child? That schedule had its effect by virtue of s 54. As Wilson J points out ([2003] EWHC 1388 (Admin), [2003] 2 FLR 903) s 54 describes Sch 3 in these terms 'which makes provision for support to be withheld or withdrawn in certain circumstances'. Schedule 3 applied to four categories of adult persons who were not British citizens (para 2(1)(a) and (b)), and provided that such persons should not be eligible for support or assistance under, among other provisions, s 17 of the 1989 Act (para 1(g)).

[63] Mrs M was not a British citizen or a child and falls by virtue of para 7 of Sch 3 within the fourth category of ineligible persons being a 'person unlawfully in the United Kingdom', and, as Buxton LJ has concluded it is clear that the starting point for consideration of the effect of the remainder of Sch 3 is that Islington's powers under s 17 of the 1989 Act and in particular the powers under s 17(3) which might have been exercised in favour of Mrs M for the child's benefit were withdrawn.

[64] But as para 2(1)(c) of Sch 3 makes clear, para 1 does not prevent the provision of support or assistance 'under or by virtue of regulations made under para 8, 9, or 10 ...' Furthermore, para 3 makes clear that para 1—

> 'does not prevent the exercise of a power or the performance of a duty if, and to the extent that, its exercise or performance is necessary for the purpose of avoiding a breach of ... a person's Convention rights ...'

[65] Paragraphs 8 and 9 of Sch 3 empower the making of regulations relating to the first two categories of ineligible persons (European Economic Area (EEA) classes). It is para 10, which is critical so far as considering the position of Mrs M is concerned. It empowers the making of regulations—

> 'providing for arrangements to be made for the accommodation of a person if—(a) paragraph 1 applies to him by virtue of paragraph 7, and (b) he has not failed to cooperate with removal directions issues in respect of him.'

[66] Mrs M was and is of course both a person ineligible by virtue of para 7 and has not failed to co-operate with removal directions. There is nothing in para 10 which gives any indication as to the duration for which the regulations should provide for accommodation to be provided, save that non-compliance with 'removal directions' places a long stop on the power to arrange accommodation.

[67] Paragraph 11 of Sch 3 sets out that for which the regulations may provide, and that includes at (e) that they may 'require a local authority or another person to have regard to guidance issued by the Secretary of State in making arrangements'.

[68] Pursuant to his powers under paras 8–10 and other provisions irrelevant for present purposes, the Secretary of State made the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002, SI 2002/3078. Regulation 3 dealt first with the EEA classes of ineligible persons empowering a local authority to make travel arrangements for such persons and the making of arrangements for accommodation in respect of whom travel arrangements 'have been or are to be made pending implementation of those arrangements'. (See reg 3(1) and (2).) Regulation 3 dealt second with persons unlawfully in the United Kingdom empowering a local authority to make arrangements for the 'accommodation of a person unlawfully in the United Kingdom who has not failed to cooperate with removal directions issued in respect of him'. (See reg 3(3).) Arrangements could only be made for accommodation in either case if the person had with them a 'dependant child' (see reg 3(4)). In reg 3 there was no indication as to the speed with which travel arrangements had to be made or the duration of any accommodation.

[69] Regulation 4 dealt with 'Requirements relating to travel and accommodation arrangements'. Regulation 4(1) provided that both travel and accommodation must be at lowest practicable cost; reg 4(2) provided for travel arrangements having to be made (subject to cost) 'so that the person leaves the United Kingdom as soon as practicable'; reg 4(3) forbade cash payments in lieu of travel or accommodation arrangements, and required the making of arrangements in such a way as to 'prevent the obtaining of services or benefits

other than those specified in the arrangements'; and reg 4(4) provided that 'a local authority must have regard to guidance issued by the Secretary of State ...'

[70] Thus as regards EEA classes for whom travel arrangements had to be made some indication of duration was given by reg 4 in combination with reg 3(2), in that the arrangements had to be made so that those persons left as soon as practicable and the power to provide accommodation was a power 'pending the implementation of those arrangements', and that was the limit of the local authority's power.

[71] As regards persons unlawfully present with a child, ie persons such as Mrs M the 2002 regulations provided no indication as to duration unless it is by reference to 'removal directions'. So far as travel arrangements were concerned, the local authority was not given power to make them; it would be a matter for the Home Office to make such arrangements as the guidance to which I am about to turn (*Nationality, Immigration and Asylum Act 2002, Section 54 and Schedule 3 and the Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 Guidance to Local Authorities and Housing Authorities*) makes clear.

[72] It is in the above context that the guidance to which the local authority 'must have regard' has to be considered. The key provisions seem to me to be:

> '27. The Withholding and Withdrawal of Support (Travel Assistance and Temporary Accommodation) Regulations 2002 (hereafter referred to as "the Regulations 2002") give limited powers to local authorities to make arrangements for:
>
> (a) Nationals of other EEA Member States; and
>
> (b) Those with refugee status in another EEA Member State.
>
> to travel back to that member state. No arrangements may be made in respect of failed asylum seekers and those unlawfully present in the UK—responsibility for making travel arrangements for these groups of person rests with the Home Office Immigration and Nationality Directorate."
>
> 28. Additionally, Local Authorities are also granted a power under the regs 2002 to grant temporary short-term accommodation to some classes of person listed in Sch 3 pending departure from the United Kingdom. The powers to grant temporary accommodation are limited to the following classes of person who have with them a dependent child:
>
> (a) Nationals of EEA states other than the UK;
>
> (b) Those with Refugee status in another EEA Member State; and
>
> (c) Those unlawfully present in the UK ...
>
> 31. Accommodation is purely a temporary measure to allow a person with dependent children to be accommodated pending departure from the UK. Local authorities should have regard to the desirability of ensuring that the overall costs of accommodation and the return journey is as cost-effective as possible.
>
> 32. For those persons returning to EEA Member States, it is preferable if accommodation does not continue for a period of more than a further 5 days from the date the family first presented for support of assistance to the local authority. For those returning to other countries, it is preferable if accommodation does not continue for a period of more than a further 10 days from the date the family first presented for support or assistance to the local authority.

33. In the event of failure to travel, should the person have an acceptable reason and be able to provide acceptable proof, further accommodation could, in principle, be provided. New travel arrangements should ideally be made at the first possible opportunity and it is preferable if accommodation does not continue for a period of a further 5 days (returns to EEA member states) or 10 days (for those returning to non-EEA States).

34. Where an individual fails to travel and they do not provide an acceptable reason or cannot provide acceptable proof, further accommodation should not be provided to them as set out in the regs 2002. Offers of care may be made to any children under s 20 of the Children Act 1989. But further accommodation, or any other form of support as defined in para 1(1) of Sch 3 of the Nationality, Immigration and Asylum Act 2002 should not be provided to the adults.

35. In respect of individuals(s) here unlawfully, the Home Office Immigration and Nationality Directorate will inform local authorities should the individual refuse to cooperate with removal directions. In such an event, all accommodation must be immediately terminated as set out in the regs 2002. Offers of care may be made to any children under s 20 of the Children Act 1989. Again, it follows from the regs 2002 that no further accommodation, or any other form of support as defined in para 1(1) of Sch 3 of the Nationality, Immigration and Asylum Act 2002 should be provided to the adults.'

[73] Paragraph 32 clearly does provide guidance as to the duration of the provision of accommodation. Paragraph 35 emphasises that the relevance of being in breach of removal directions is that there is simply no power to provide accommodation once a person is in breach. But what precisely is the guidance? Is it that in all circumstances the local authority should consider about ten days as the limit or could there be circumstances where much longer would be appropriate? The answer is by no means obvious.

[74] The second sentence of para 32 provides:

'For those returning to other countries, it is preferable if accommodation does not continue for a period of more than a further 10 days from the date when the family first presented for support.'

Is that a guide that ten days should be about the limit to all persons unlawfully present including those in Mrs M's position, or do the opening words leave room for arguing that if no travel arrangements have either been made or are in the process of being made by the Home Office, then there is greater flexibility? The words 'For those returning to other countries' seems to contemplate a decision already taken that the persons should return, and possibly in the context a situation in which travelling arrangements were either about to be made or already made. Why, it could be said, ten days in this context and five days in the EEA classes' context other than to give a little more time for travel arrangements to be made by the Home Office as compared with the travel arrangements that the local authority could make themselves?

[75] On the other hand, where s 17 powers are being withdrawn, it would at first sight seem strange to grant a power to provide accommodation almost as extensive, and strange to place limits on the power as per reg 4(3).

[76] I considered paras 37–50 under the heading 'Travel Arrangements' to see whether any assistance could be gained from those paragraphs. But as I

read paras 37–50, they apply only to persons and situations where travel arrangements have been made by the local authority, ie the EEA classes. At times the language is general and could be applied literally to a person for whom travel arrangements have been made by the Home Office, ie those unlawfully present. But starting as the paragraphs do with para 37 which clearly applies only to EEA classes, the intention must be that the other paragraphs apply only to EEA classes.

[77] If paras 36–50 had applied to those unlawfully present, that would have lent considerable support to a possible interpretation of para 32 of the guidance that ten days was a time, contemplating that the Home Office would be making travel arrangements, inapposite if the Home office had no intention of doing so.

[78] I have not found it easy to know precisely what the guidance had in mind. But (a) it seems to me that the thrust of the guidance and the power being given to the local authority is consistently linked with there being travel arrangements; (b) the wording 'For those returning to other countries' seems to show a link even in the cases of those unlawfully present, and even though the travel arrangements must be made by the Home Office; and (c) the result in a case such as Mrs M, of placing a limit of ten days or some short duration where no travel arrangements have been made, leads to an unsatisfactory result (see further below). I have therefore concluded that the guidance provides the indication of the duration for which accommodation can be supplied under Sch 3 to the 2002 Act, but where travel arrangements have not been made by the Home Office, it is open to Islington to provide accommodation for a period longer than ten days pending arrangements being made by the Home Office.

[79] I find support for the above view in considering what would be the result of there being a limit of about ten days in the case of Mrs M. The offer of accommodation of such limited duration would clearly lead to a breach of 'a person's ECHR rights' (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, as set out in Sch 1 to the Human Rights Act 1998 (ECHR)) as Buxton LJ has pointed out. In posing the question which I did at the outset, what was intended to be the position in relation to persons in position of Mrs M, it must have been foreseen that having withdrawn s 17 powers with one hand, if about ten days was the limit for the duration of any accommodation, the likelihood was that the powers would be handed back with the other but subject to a constraint. What Islington would then have to determine is what power or duty they could perform under s 17 of the 1989 Act to prevent the breach of ECHR rights; their freedom to go back to s 17 is only to the extent that the exercise of the power under s 17 'is necessary' for the purpose of avoiding a breach. If that means all that could be supplied was accommodation, then it is of no practical consequence whether the guidance is construed in the way I have suggested or has the more limited construction favoured by the judge and Buxton LJ. If the regaining of s 17 powers provides the local authority with the option of providing air tickets, then the result (I suggest) is somewhat bizarre. Was it really contemplated by Sch 3 to the 2002 Act and the 2002 regulations that, despite local authorities not having the power to make travel arrangements for those unlawfully within the United Kingdom, and being placed under the constraints as to the making of cash payments or the provision of any other benefits (reg 4(3)), the result of confining the duration of the accommodation would be to give local authorities the powers to make travel arrangements, and provide other benefits? The

answer appears to be that if to provide air tickets would safeguard and promote the welfare of the child, and promote the upbringing of such child by its family, and if to do so was necessary to prevent a breach of the ECHR in relation to Mrs M, the child or the father, it would be an option available, if the guidance is construed as limiting the duration of accommodation to ten days. That seems to place on local authorities responsibilities in relation to immigration where the guidance would suggest that they were still with the Home Office. That, it seems to me, would be an unsatisfactory result, and supports the construction of the guidance, which I have advocated.

[80] If I were wrong about the proper construction of the guidance, then I would agree with Buxton LJ's conclusions and his guidance to Islington.

[81] The above, however, being my view and that of Maurice Kay LJ, this appeal should, (I would suggest, and subject to the submissions of counsel), be disposed of by allowing the appeal and making a declaration that Islington have the power to provide accommodation under Sch 3 to M pending her being in breach of removal instructions. That does not impose a duty, simply reflecting the ambit of Islington's powers. However, it is right to add that in exercising those powers Islington will have to be aware of their ECHR obligations. That, in real terms, may leave them little choice but to offer accommodation. But that question can only be answered finally once Islington have reviewed the matter in the light of our judgments.

Appeal allowed.

Dilys Tausz Barrister.

Re Citybranch Group Ltd

Gross and others v Rackind and others

[2004] EWCA Civ 815

COURT OF APPEAL, CIVIL DIVISION

KEENE, JACOB LJJ AND SIR MARTIN NOURSE

21 MAY 2004

Company – Member – Unfair prejudice to member's interests – Conduct of company 'unfairly prejudicial' to interests of member – Whether affairs of company including affairs of subsidiary company – Companies Act 1985, s 459(1).

The company was owned 50% by the G family and 50% by the R Family. It had two directors, one from each family. The company had two wholly owned subsidiary companies. The same two individuals were the only directors of one of the subsidiaries, and, together with another member of the G family, were the directors of the other subsidiary. The personal relationship of trust and confidence which formed the basis of the quasi-partnership by which the business of the companies was operated broke down and the R family presented a petition to wind up the company on just and equitable grounds. The G family countered by presenting a petition for an order regulating the future management of the company's affairs under s 459(1)[a] of the Companies Act 1985 on the ground that the company's affairs were being or had been conducted in a manner unfairly prejudicial to the interests of its members. The R family failed in their application to strike out that petition and appealed to the Court of Appeal. The main question before the court was whether it had power to make an order under s 459 of the 1985 Act in relation to a holding company where (i) it was the affairs of its wholly-owned subsidiary that were being or had been conducted in an unfairly prejudicial manner; and (ii) the directors of the holding company were also directors of the subsidiary.

Held – The conduct of the affairs of one company could also be conduct of the affairs of another, since a holding company had been held to have been conducting the affairs of a subsidiary. The expression 'the affairs of the company' was one of the widest import which could include the affairs of a subsidiary of that company. Equally, however, the affairs of a subsidiary could also be the affairs of its holding company, especially where, as in the instant case, the directors of the holding company, which necessarily controlled the affairs of the subsidiary, also represented a majority of the directors of the subsidiary. Accordingly, the appeal would be dismissed (see [24], [26], [29], [33], [35]–[37], below)

Nicholas v Soundcraft Electronics Ltd [1993] BCLC 360 and *R v Board of Trade, ex p St Martin Preserving Co Ltd* [1964] 2 All ER 561 considered.

Re a Company (No 001761 of 1986) [1987] BCLC 141 distinguished.

a Section 459, so far as material, is set out at [2], below

Re Norvabron Pty Ltd (No 2) (1986) 11 ACLR 279 and *Re Dernacourt Investments Pty Ltd, Baker Davis Supply Co Pty Ltd v Dernacourt Investments Pty Ltd* (1990) 2 ACSR 553 followed.

Notes

For the protection of a company's members against unfair prejudice, see 7(2) *Halsbury's Laws* (4th edn) (1996 reissue) paras 1405, 1407, 1408.

For the Companies Act 1985, s 459, see 8 *Halsbury's Statutes* (4th edn) (1999 reissue) 508.

Cases referred to in judgments

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Company (No 001761 of 1986), Re a [1987] BCLC 141.
Dernacourt Investments Pty Ltd, Re, Baker Davis Supply Co Pty Ltd v Dernacourt Investments Pty Ltd (1990) 2 ACSR 553, NSW SC.
Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492, [1973] AC 360, [1972] 2 WLR 1289, HL.
Guerinoni v Argyle Concrete & Quarry Supplies Pty Ltd (No 53 of 1999), Guerinoni v Guerinoni Investments Pty Ltd (No 54 of 1999) (1999) 34 ACSR 469, W Aust SC.
Morgan v 45 Flers Avenue Pty Ltd (1987) 5 ACLC 222, NSW SC.
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Norvabron Pty Ltd (No 2), Re (1986) 11 ACLR 279, Qld SC.
R v Board of Trade, ex p St Martin Preserving Co Ltd [1964] 2 All ER 561, [1965] 1 QB 603, [1964] 3 WLR 262.
Reid v Bagot Well Pastoral Co Pty Ltd, Shannon v Reid [1993] 12 ACSR 197, S Aust SC.
Salomon v Salomon & Co Ltd [1897] AC 22, [1895–9] All ER Rep 33, HL.
Scottish Co-operative Wholesale Society Ltd v Meyer [1958] 3 All ER 66, [1959] AC 324, [1958] 3 WLR 404, HL; *affg* 1954 SC 381, Ct of Sess.

Cases referred to in skeleton arguments

Baltic Real Estate Ltd (No 2), Re [1993] BCLC 503.
Brunninghausen v Glavanics (1999) 32 ACSR 294, NSW CA.
Company (No 00314 of 1989), Re a, ex p Estate Acquisition and Development Ltd [1991] BCLC 154.
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Legal Costs Negotiators Ltd, Re [1999] 2 BCLC 171, CA.
Percival v Wright [1902] 2 Ch 421.
Peskin v Anderson [2001] 1 BCLC 372, CA.

Stewarts (Brixton) Ltd, Re [1985] BCLC 4.
Unisoft Group Ltd (No 3), Re [1994] 1 BCLC 609.
Wilton-Davies v Kirk [1998] 1 BCLC 274.

Appeal

Peter Elliot Rackind, Julie Pactor, and Robert Rackind (the Rackind family), the holders of 50% of the shares in Citybranch Group Ltd (the company), appealed with leave of Judge Weeks QC, sitting as a judge of the High Court, from his decision on 11 December 2003 refusing the application of the Rackind family to strike out a petition relating to the company presented under s 459 of the Companies Act 1985 by Raymond Malcolm Gross, Gerald Gross, Adam Gross, and Laura Pittal (the Gross family), the holders of the other 50% of the shares in the company. The facts are set out in the judgment of Sir Martin Nourse.

David Oliver QC and *Rosalind Nicholson* (instructed by *Halliwell Landau*) for the Rackind family.

Robin Potts QC and *Andrew Thompson* (instructed by *SJ Berwin*) for the Gross family.

KEENE LJ.

[1] I will ask Sir Martin Nourse to give the first judgment.

SIR MARTIN NOURSE.

[2] Section 459(1) of the Companies Act 1985 provides:

> 'A member of a company may apply to the court by petition for an order under this Part on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that any actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.'

Broadly stated, the main question arising on this appeal is whether an order may be made under that provision in relation to a holding company where, first, it is the affairs of its wholly-owned subsidiary that are being or have been conducted in an unfairly prejudicial manner and, secondly, the directors of the holding company are also directors of the subsidiary.

[3] The question arises on an application by the holders of 50% of the shares in a company called Citybranch Group Ltd (the company) to strike out a petition presented under s 459 by the holders of the remaining 50% of the shares. On 11 December 2003 Judge Weeks QC, sitting as a judge of the Chancery Division ([2003] EWHC 3298 (Ch)), declined to strike out the petition and, with his leave, the respondents now appeal to this court.

[4] The petitioners (collectively 'the Gross family') are Raymond Malcolm Victor Gross (Mr Gross), his brother Gerald Gross and Mr Gross's children, Adam Gross and Laura Pittal. They hold 25%, 14·5%, 5·25% and 5·25% of the shares respectively. The respondents (collectively 'the Rackind family') are Peter Elliott Rackind (Mr Rackind) and his children, Julia Pactor and Robert Rackind, who hold 39·5%, 5·25% and 5·25% of the shares respectively. The company was incorporated on 5 October 2001 and Mr Gross and Mr Rackind have been its only directors.

[5] The company has two wholly-owned subsidiaries, Citybranch Ltd (Citybranch) and Blaneland Ltd (Blaneland). Citybranch was incorporated on 5 October 1982 and since 28 April 2000 its directors have been Mr Gross, Mr Gerald Gross and Mr Peter Rackind. Blaneland was incorporated on 27 April 1999 and its only directors have been Mr Rackind and Mr Gross. Before 11 December 2001, the shares in Citybranch and Blaneland were held as to 50% each by the Gross family and the Rackind family. On that date they exchanged their shares in Citybranch and Blaneland for shares in the company, whereupon Citybranch and Blaneland became wholly-owned subsidiaries of the company. Citybranch has a wholly-owned subsidiary, Manchester Syndicates Ltd, which was incorporated on 1 September 1989. Mr Rackind and Mr Gross were the directors of Manchester Syndicates Ltd until 20 June 2003 when Mr Gerald Gross was appointed as an additional director. Manchester Syndicates Ltd plays no part in the subsequent history of the case.

[6] The business of the group has been conducted through the three subsidiaries. It consists of investment in property in the north or north-west of England. It is common ground that all four companies were quasi-partnership companies based on a quasi-partnership between Mr Rackind and Mr Gross and/or Mr Gerald Gross, and that that state of affairs continued until July 2003, when the personal relationship of trust and confidence which formed the basis of the quasi-partnership irrevocably broke down. On 14 July 2003 the Rackind family presented a petition to wind up the company under s 122(1)(g) of the Insolvency Act 1986, on the ground that it was just and equitable to do so (see *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492, [1973] AC 360). The Gross family did not want the company to be wound up and countered by presenting their s 459 petition on 23 August 2003.

[7] The petition claims an order regulating the future management of the affairs of the company and the subsidiaries, an order that the Rackind family, alternatively Mr Rackind alone, should sell their or his shares to Mr Gross and ancillary relief. Mr Oliver QC, for the Rackind family, has submitted that the relief sought is very unusual and in that he may be right. However, he has been unable to persuade me that that is a relevant consideration for today's purposes.

[8] No evidence has been filed and since this is a strike-out application we must accept the facts as stated in the petition. They include the following. The purpose of the quasi-partnership was to generate profits and capital value in the long term by the acquisition of property with investment potential and the enhancement and realisation of the value in that property in the long term. The properties held by the group were acquired and held in accordance with that purpose; all had or have investment potential and value which would be best realised by the group over the long term.

[9] In para 59 of the petition the allegedly unfairly prejudicial conduct is summarised in five subparagraphs. In each case it is said, first, that the conduct was the conduct of Mr Rackind; secondly, that the conduct was both individually and collectively conduct of the affairs of the company (and/or one or more of its subsidiaries which amounted also to conduct of the affairs of the company); thirdly, that the conduct was unfairly prejudicial to the interests of the Gross family and each of them as members of the company.

[10] I will refer to each of the five allegations in turn, in three cases supplementing them by reference to the more detailed allegations made earlier in the petition. First, it is said that Mr Rackind caused, or substantially caused, an irrevocable breakdown in the relationship of trust and confidence between

himself and Mr Gross and/or Mr Gerald Gross which formed the basis of their quasi-partnership association through the company and the other companies in the group. Secondly, it is said that Mr Rackind threatened a winding up of the company by the court in order to put pressure on Mr Gross and the other Gross family shareholders to agree to Mr Rackind's demands for control or a purchase of the Gross family's shares, despite the fact that there was (and remains) no basis for the company being wound up on the petition of Mr Rackind. Thirdly, it is said that Mr Rackind breached his fiduciary duties owed to the company and/or to Blaneland by refusing to agree to and/or obstructing attempts to finance a payment by Blaneland of corporation tax due from it, in order to put pressure on Mr Gross and the other Gross family shareholders to agree to Mr Rackind's demands for control or a purchase of the Gross family's shares.

[11] In relation to the third allegation, paras 37 and 38 identify the claim for corporation tax due from Blaneland as being originally made in January 2002. In November 2002 it was quantified by the Inland Revenue, after negotiations, at £434,707 plus interest of £31,837. At that stage the Revenue said that they would accept an interim payment of £100,000 by 29 November 2002 and payment of the balance by 31 January 2003. But it is alleged that at a meeting between Mr Rackind and Mr Gross on 25 November 2002 Mr Rackind threatened that, if Mr Gross did not agree to Mr Rackind's demands for control of the company or a purchase of the Gross family shares, Mr Rackind would allow Blaneland to be put into liquidation by the Revenue and would himself force the company into liquidation.

[12] In the result, the Revenue's offer was not accepted. On 6 January 2003 they obtained judgment against Blaneland in the sum of £471,059 in respect of the unpaid corporation tax and interest. On 20 February 2003 Mr Rackind finally agreed that Blaneland should accept a facility offered by the Bank of Scotland in order to allow that liability to be discharged. There has been some discussion as to whether we should proceed on the assumption that the cost incurred by Blaneland in relation to that claim was greater than it would have been if the Inland Revenue's offer of November 2002 had been accepted. We certainly cannot proceed on an assumption that the cost was greater. Conversely, it appears to be a real possibility that it was. On that footing the third allegation can be treated as an allegation of unfairly prejudicial conduct by Mr Rackind of the affairs of Blaneland.

[13] The fourth allegation made in para 59 is that Mr Rackind continued to use Citybranch's office at 8, The Square, Hale Barnes and continued to draw a consultancy fee, or a full consultancy fee, in each case despite not working full-time for the group. In relation to that allegation, it is said in paras 39 and 40 that, in about February 2000, Mr Gross expressly agreed that Mr Rackind should be allowed to use the office rent free on the expressly agreed basis that he would work full-time for Citybranch and its related companies. It is also said that Mr Rackind has been paid, on the same basis, a consultancy fee by Citybranch for his work for the group, which was initially £40,000 pa and has since risen to £60,000 pa, in each case plus expenses. It is said that in fact Mr Rackind has spent little of his time on the business of the group, contrary to his express agreement with Mr Gross. Again, that conduct is capable of constituting unfairly prejudicial conduct of the affairs of Citybranch.

[14] The fifth allegation is that Mr Rackind dishonestly or improperly appropriated the funds of Citybranch and attempted to hide that fact. That is the most serious allegation against Mr Rackind. It is dealt with at some length in

paras 41–48. In essence it is an allegation of a conspiracy between Mr Rackind and a firm of surveyors acting for Citybranch to render false invoices to that company resulting in the unlawful extraction by Mr Rackind of £8, 320 (plus value added tax) of Citybranch's moneys. It was the discovery by Mr Gross of that matter in May and June 2003 which finally led to the irrevocable breakdown in the relationship of trust and confidence. Again, that allegation is capable of being an allegation of unfairly prejudicial conduct of the affairs of Citybranch.

[15] The principal submission of Mr Oliver and Miss Nicholson, for the Rackind family, is that none of the five allegations is capable in law of constituting an allegation as to the conduct of the affairs of the company, as opposed to the affairs of one or more of its subsidiaries. Accordingly they say that s 459 cannot be invoked in relation to the company. They rely on what they claim is the plain wording of the section, on what they say is the principle of the thing and also on the principle of *Salomon v Salomon & Co Ltd* [1897] AC 22, [1895–9] All ER Rep 33.

[16] In regard to the first and second allegations, it has become apparent that that is only their fall-back submission. They submit that the matters complained of, causing an irrevocable breakdown in the relationship of trust and confidence and threatening the winding up of the company in order to put pressure on the Gross family, were not conduct of the affairs of the company, or indeed of any company, but conduct of the affairs of the shareholders. Here I am entirely content to adopt the approach of Judge Weeks. As to the first allegation he said:

> 'It seems to me at least arguable that causing an irrevocable breakdown in the relationship of trust and confidence is capable of being considered conduct of the company's affairs against the background of a quasi-partnership and an agreement that both should co-operate in the conduct of the affairs.'

[17] In dealing with the second allegation, which he described as more questionable, the judge said:

> 'The threat of a winding up of the company by the court is, I think, a threat made by Mr Rackind—if indeed it was made—in his capacity as shareholder or contributory, and only by a very wide stretch of the imagination could it be said to be conduct of the company's affairs. However, I have to bear in mind the fact that the Rackind side have presented a petition to wind up the company, and it would seem to me almost inevitable that that petition will be heard together with the s 459 petition, and I think it would be undesirable to strike out this subparagraph in the s 459 petition at this stage when it will no doubt re-appear as part of the defence to the winding-up petition and one of the reasons for not making an order under s 122 of the Act.'

[18] Both those points were essentially matters for the judgment or discretion of the judge. Despite Mr Oliver's strenuous argument, particularly in relation to the second allegation, no ground for interfering with the judge's decision on either point has been made out. In relation to the second allegation, Mr Oliver has submitted that the certainty of its being raised by way of defence in the winding-up petition is not enough for it to found a positive cause of action in the s 459 petition. I see the force of that submission, but I repeat that it was a question essentially for the judge. I doubt whether it will make the slightest difference in the end because one petition is unlikely to be settled without the other. If, however, they both come to trial, the point will be reduced to one of mere technicality.

[19] Before turning to their principal submission, I will deal with some subsidiary submissions made by Mr Oliver and Miss Nicholson. They submit that, even if the conduct complained of in the third, fourth and fifth allegations did constitute conduct of the company's affairs, such conduct was incapable of prejudicing the Gross family's interests in their capacity as members of the company. The short answer to that submission is that the conduct complained of is certainly capable of prejudicing the interests of the subsidiary concerned, on which footing there will be a risk of a diminution in value of the company's investment in the subsidiary, which in turn will mean actual or potential prejudice to the interests of the shareholders in the company.

[20] The Rackind family further submit that in relation to the fifth allegation, Mr Rackind's false invoicing in Citybranch, his conduct was 'dehors' that company, an expression used by Harman J in one of the authorities cited (see *Re a Company (No 001761 of 1986)* [1987] BCLC 141). They also raise a new point, or at any rate one not dealt with by the judge, to the effect that in relation to the Citybranch allegations, allegations (4) and (5), the Gross family themselves, by virtue of their majority on the board of that company, have it in their power to remedy the consequences of the acts complained of by means other than a petition under s 459. The factual premise of that second submission is questioned by Mr Potts QC and Mr Thompson in their skeleton argument on behalf of the Gross family. Each of these two submissions appears to be one raising an issue which can only be satisfactorily determined at a trial.

[21] I now come to the main question. Does the court have power to make an order under s 459 in relation to a holding company where, first, it is the affairs of its wholly-owned subsidiary that are being or have been conducted in an unfairly prejudicial manner and, secondly, the directors of the holding company are also directors of the subsidiary? I emphasise that here Mr Gross and Mr Rackind are the only directors of the company and of Blaneland and are also directors of Citybranch, of which Mr Gerald Gross is an additional director.

[22] There is no English authority which directly answers this question. The nearest case appears to be *Nicholas v Soundcraft Electronics Ltd* [1993] BCLC 360, where the company in respect of which the s 459 petition was presented was a 75% subsidiary of Soundcraft Electronics Ltd (Electronics), the remaining 25% of the shares being held equally by the plaintiff, Mr Nicholas, and another. It was agreed that Electronics would support the company until it was financially viable, though the extent of the support was not discussed or defined. In any event, Electronics withheld support which it ought to have given to the company. It was held that, since Electronics exercised detailed control over the affairs of the company and since, when it withheld payments to the company, it was doing so as part of its general control over the company's affairs, the non-payment of what it owed did relate to the manner in which the affairs of the company were conducted.

[23] Fox LJ said (at 364):

> 'It seems to me that Electronics, when it withheld payments from the company, was doing so as part of [its] general control of the financial affairs of the company. It exercised that general control by deciding how much the company should receive (by withholding sums due to the company) and restricting the company's ability to spend money (by the signature requirements on cheques drawn by the company). In my view Electronics,

when it withheld from the company payments which were due to the company, was conducting the affairs of the company.' a

Ralph Gibson LJ, having read from the judgment of Slade J in *Re Bovey Hotel Ventures Ltd* (31 July 1981, unreported) and having said that Slade J's statement had subsequently been cited with approval, continued (at 368):

'It is in accordance with the view expressed by Lord President Cooper [in b *Scottish Co-operative Wholesale Society Ltd v Meyer* 1954 SC 381] that the section warrants the court in looking at the business realities of a situation, and does not confine them to a narrow, legalistic view. Those statements apply, in my judgment, to the current provisions of the Companies Act 1985, which Fox LJ has set out in his judgment.'

c

[24] That case was the converse of the present in that the holding company was held to have been conducting the affairs of the subsidiary. However, I agree with Judge Weeks that it shows that conduct of the affairs of one company can also be conduct of the affairs of another. Mr Oliver submits that the circumstances there were very unusual in that the holding company was actually d carrying on the subsidiary's business. He adds that it is only in such exceptional circumstances that the rationale of that decision can apply. It cannot be said, he submits, that Blaneland or Citybranch carried on the company's business here.

[25] The observations of Ralph Gibson LJ in *Nicholas's* case [1993] BCLC 360 may have been an echo of those made in the Divisional Court of the Queen's Bench Division presided over by Lord Parker CJ, in *R v Board of Trade, ex p St Martin Preserving Co Ltd* [1964] 2 All ER 561, [1965] 1 QB 603. In that case e a company sought an order of mandamus against the Board of Trade for the appointment of an inspector to investigate the affairs of the company under what is now s 431 of the 1985 Act. The question was whether the affairs of the company ceased to be its affairs on the appointment of a receiver and manager. It was held that they did not. Phillimore J, who gave the leading judgment, said: f

'In speaking of "its affairs" in connexion with a company, the natural meaning of the words connotes "its business affairs". What are "its affairs" when the company is in full control? They must surely include its goodwill, its profits or losses, its contracts and assets including its shareholding in and g ability to control the affairs of a subsidiary, and perhaps in the latter regard a sub-subsidiary such as Atholl Houses, Ltd. In ordinary parlance, the affairs of the applicant company must surely have included its shareholding in T.G. Tickler, Ltd., and its power in virtue of that shareholding to control the board of that subsidiary and the disposition of Atholl Houses, Ltd., the wholly owned sub-subsidiary.' (See [1964] 2 All ER 561 at 565, [1965] 1 QB 603 at 613.) h

TG Tickler Ltd was a 98% subsidiary of the company and Atholl Houses Ltd was a wholly-owned subsidiary of TG Tickler Ltd.

[26] The observations of Phillimore J demonstrate that the expression 'the j affairs of the company' is one of the widest import which can include the affairs of a subsidiary. Equally, I would hold that the affairs of a subsidiary can also be the affairs of its holding company, especially where, as here, the directors of the holding company, which necessarily controls the affairs of the subsidiary, also represent a majority of the directors of the subsidiary. (In the case of Blaneland they are identical.)

[27] In support of the contrary view, Mr Oliver and Miss Nicholson have referred us to a number of other authorities which do not take the matter significantly further. I need only refer to *Re a Company (No 001761 of 1986)* [1987] BCLC 141, a decision of Harman J, where he said (at 144):

> 'All these cases together, in my judgment, lead one clearly to the understanding that the conduct to be complained of must be in the affairs of the very company in respect of which the petition is presented.'

Mr Oliver relies on the words 'in the affairs of the very company in respect of which the petition is presented'. However, I agree with the observations of Judge Weeks, who said:

> 'Those words must be read in context. Harman J was not considering a group structure in that case and did not have to deal with the proposition that the conduct of one company's affairs may also be the conduct of another company's affairs.'

[28] The view I have formed is consistent with two Australian authorities to which Judge Weeks felt it was unnecessary for him to be referred. The first is *Re Norvabron Pty Ltd (No 2)* (1986) 11 ACLR 279. Norvabron was a holding company which had a wholly-owned subsidiary called Transfield (Qld). The affairs of whose conduct complaint was made under a provision equivalent to s 459 were the affairs of Transfield (Qld). Derrington J, sitting in the Supreme Court of Queensland, said (at 292):

> 'It has been argued that this conduct upon which the application relies is limited to the affairs of Transfield (Qld), whereas the application is necessarily directed at Norvabron, and the suggestion is that the directors of Norvabron have not been shown to be at fault in the affairs of that company in the same way as they were in respect of Transfield (Qld). However, such an approach is artificial in the extreme. The technical answer is that the directors of Norvabron knew very well what was happening in respect of Transfield (Qld) because they were the persons involved.'

In the same way Mr Rackind, as a director of the company, knew very well what was happening in Citybranch and Blaneland because he was the person involved.

[29] The decision in *Re Norvabron* was followed and applied by Powell J, sitting in the Equity Division of the Supreme Court of New South Wales, in *Re Dernacourt Investments Pty Ltd, Baker Davis Supply Co Pty Ltd v Dernacourt Investments Pty Ltd* (1990) 2 ACSR 553, where the facts were similar to those in *Re Norvabron*. It was held that the conduct of the affairs of the holding company towards a subsidiary may constitute the conduct of the affairs of the subsidiary and vice versa. Powell J said (at 556):

> 'The words "affairs of a company" are extremely wide and should be construed liberally: (a) in determining the ambit of the "affairs" of a parent company for the purposes of s 320, the court looks at the business realities of a situation and does not confine them to a narrow legalistic view; (b) "affairs" of a company encompass all matters which may come before its board for consideration; (c) conduct of the "affairs" of a parent company includes refraining from procuring a subsidiary to do something or condoning by inaction an act of a subsidiary, particularly when the directors of the parent

and the subsidiary are the same ...' (Reference was there made to three authorities including *Re Norvabron*.)

Powell J said (at 561):

> '... although the relevant plaintiff must demonstrate that it is the relevant company's affairs which are being so conducted, I am prepared to proceed upon the bases, first, that, in an appropriate case, the conduct of a holding company, or of such of its directors who happen to be directors of the relevant subsidiary, towards a subsidiary, may constitute conduct in the affairs of that subsidiary (*Scottish Co-operative Wholesale Society Ltd v Meyer* [1958] 3 All ER 66, [1959] AC 324), and, secondly, that, in an appropriate case, the conduct of a subsidiary, or of some or all of its directors who happen as well to be directors of the holding company, may be regarded as part of the conduct of the affairs of the holding company: *Re Norvabron Pty Ltd.*'

In my view the second basis identified by Powell J, following and applying the decision in *Re Norvabron*, is of great value in the decision of the present case. I accept that decisions of courts in other Commonwealth countries are of persuasive value only. But those two decisions certainly persuade me that the view taken by Judge Weeks, without their assistance, was correct.

[30] Mr Oliver and Miss Nicholson have relied on three other Australian authorities. In their supplemental skeleton argument they say that what they call the liberal approach exemplified in *Re Norvabron* and articulated in *Re Dernacourt* has been considered and has been consistently rejected. In my view that is putting it far too high. Indeed, I do not think that in his oral submissions Mr Oliver has put it that high. What he has really said is that the other three decisions show a different and preferable approach to the construction of provisions such as s 459 which is inconsistent with *Re Norvabron* and *Re Dernacourt*.

[31] That view of the matter is rejected by Mr Potts and Mr Thompson in their supplemental skeleton argument. Without dealing with any of the other points they make, I would accept their argument for the following reasons. First, the earliest of the decisions relied on, *Morgan v 45 Flers Avenue Pty Ltd* (1987) 5 ACLC 222, was decided before any of the other cases, including *Re Norvabron*. Secondly, *Morgan's* case was not referred to in *Re Norvabron*. Although it was referred to in *Re Dernacourt*, it does not appear to have been referred to on the point with which we are concerned. Thirdly, although *Morgan's* case was referred to in the second case relied on by Mr Oliver and Miss Nicholson, *Reid v Bagot Well Pastoral Co Pty Ltd, Shannon v Reid* [1993] 12 ACSR 197, neither *Re Norvabron* nor *Re Dernacourt* was there referred to. Fourthly, in the third case, *Guerinoni v Argyle Concrete & Quarry Supplies Pty Ltd (No 53 of 1999), Guerinoni v Guerinoni Investments Pty Ltd (No 54 of 1999)* (1999) 34 ACSR 469, Master Sanderson, sitting in the Supreme Court of Western Australia, although he referred to *Morgan's* case and *Re Norvabron*, did not refer to *Re Dernacourt*. We are told that his decision was affirmed on appeal, but that the particular point was not referred to in the judgment.

[32] In my judgment none of the three further authorities can be said to diminish the persuasive value of the decisions in *Re Norvabron* and *Re Dernacourt*. Those were considered judgments of judges of the Supreme Courts of Queensland and New South Wales respectively and they are directly in point. I would follow them accordingly.

[33] For these reasons, I would decide the main question, like the subsidiary questions, in favour of the Gross family. In conclusion I refer to the decisive passage in Judge Weeks's judgment:

> 'In my judgment, there is no authority which forces me to hold that conduct of a subsidiary's affairs can never also be conduct of the parent company's affairs, and in the circumstances of the present case I think it not beyond the bounds of possibility that the court may reach the conclusion that the acts complained of were also acts in the conduct of the parent company's affairs. This is a strike-out application, and I should not strike out the petition if it has any realistic prospect of success. In my judgment, those paragraphs do have a realistic prospect of success.'

That was an entirely correct approach to the main question.

[34] I must also deal with the Rackind family's appeal against the judge's decision to permit the s 459 petition to be amended. That was a decision entirely within the discretion of the judge and I would affirm it.

[35] I would dismiss this appeal.

JACOB LJ.

[36] I agree.

KEENE LJ.

[37] I also agree.

Appeal dismissed.

Martyn Gurr Barrister.

Department of Economic Policy and Development of the City of Moscow and another v Bankers Trust Co and another

[2004] EWCA Civ 314

COURT OF APPEAL, CIVIL DIVISION
SIR ANDREW MORRITT V-C, MANCE AND CARNWATH LJJ
10, 11 FEBRUARY, 25 MARCH 2004

Arbitration – Award – Setting aside award – Application – Judgment – Application heard in private – Whether judgment or summary thereof should be available for publication – Guidance – Arbitration Act 1996, s 68 – CPR 62.10.

CPR 62.10(1)[a] provided that the court might order that an arbitration claim be heard in either public or private. CPR 62.10(3) provided that 'Subject to any order made under paragraph (1) ... (b) all other arbitration claims will be heard in private.' The applicants applied to the court pursuant to s 68[b] of the Arbitration Act 1996 challenging an arbitrator's award. The arbitration had taken place in private, and the s 68 application was also heard in private pursuant to CPR 62.10(3)(b). The application was dismissed pursuant to a handed down judgment. The judgment was not marked private, and although the issue of privacy was raised immediately and stood over, an online law reporting service obtained a copy of the judgment, and in good faith summarised it. That summary appeared on its website and was sent by email to its subscribers, in each case with a link to the full text of the judgment which appeared on its website. Objection was raised and the material on the website was deleted. The email summaries, however, remained on computers belonging to all or some of those subscribers who had received it. The respondents applied to the court seeking an order, inter alia, that the judgment, or failing that the summary, should be available for general publication. The judge determined that the earlier judgment dismissing the s 68 application should remain private and that neither it nor the summary should be available for publication. The respondents appealed.

Held – The range of arbitration claims within the definition of CPR 62.10 was very wide, and there could not properly be a blanket protection of non-publication for all cases which fell initially to be heard in private under CPR 62.10. In every case, while it would be appropriate to start the hearing in private as contemplated by CPR 62.10, the court should be ready to hear representations from one or other party that the hearing should be constituted in public, and in any case should, if appropriate, raise that possibility with the parties. Further, even though the hearing might have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where that could be done without disclosing

a CPR 62.10, so far as material, is set out at [3], below
b Section 68, so far as material, is set out at [3], below

confidential information. The public interest in ensuring the appropriate standards of fairness in the conduct of arbitrations militated in favour of a public judgment in respect of judgments given on applications under s 68 of the 1996 Act. The desirability of a public judgment was particularly present in any case where a judgment involved points of law or practice or which might offer future guidance to lawyers or practitioners. The factors militating in favour of publicity had to be weighed together with the desirability of preserving the confidentiality of the original arbitration. When weighing the factors a judge had to consider primarily the interests of the parties in the litigation before him or in other pending or imminent proceedings. The concerns or fears of other parties could not be a dominant consideration. Moreover, there could be no question of withholding publication on reasoned judgments on a blanket basis out of a generalised concern that their publication would upset the confidence of the business community in English arbitration. In the circumstances of the instant case, the judge's conclusion that the judgment should remain private was justified. The online summary, however, offered a brief and factually neutral insight into the legal issues which the judge had addressed, and was not without some interest to practitioners. There was no reason of arbitral sensitivity or confidentiality militating against its publication, and there was no reason for any court order precluding its publication by Moscow. To that extent, the order of the judge below would be discharged and varied (see [38]–[41], [48], [49], [51], [57], below).

Scott v Scott [1911–13] All ER Rep 1, *R v Legal Aid Board, ex p Kaim Todner (a firm)* [1998] 3 All ER 541, *B v UK* (2002) 34 EHRR 529 and *Clibbery v Allan* [2002] 1 All ER 865 considered.

Notes

For challenge or appeal of arbitral awards generally, see 2(3) *Halsbury's Laws* (4th edn reissue) para 76.

For the Arbitration Act 1996, s 68, see 2 *Halsbury's Statutes* (4th edn) (2003 reissue) 700.

Cases referred to in judgments

A-G v Leveller Magazine Ltd [1979] 1 All ER 745, [1979] AC 440, [1979] 2 WLR 247, HL.

Agrimex Ltd v Tradigrain SA [2003] EWHC 1656 (Comm), [2003] 2 Lloyd's Rep 537.

Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich [2003] UKPC 11, [2003] 1 All ER (Comm) 253, [2003] 1 WLR 1041.

B v UK (2002) 34 EHRR 529, ECt HR.

Clibbery v Allan [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261, [2002] 2 WLR 1511.

Electrosteel Castings Ltd v Scan-Trans Shipping and Chartering Snd Bhd [2002] EWHC 1993 (Comm), [2002] 2 All ER (Comm) 1064.

Equatorial Traders Ltd v Louis Dreyfus Trading Ltd [2003] EWHC 2023 (Comm), [2002] 2 Lloyd's Rep 638.

Ex p P (1998) Times, 31 March, [1998] CA Transcript 431.

Forbes v Smith [1998] 1 All ER 973.

Guardcliffe Properties Ltd v City & St James [2003] EWHC 215 (Ch), [2003] 2 EGLR 16.
Häkansson v Sweden (1991) 13 EHRR 1, [1990] ECHR 11855/85, ECt HR.
Hodgson v Imperial Tobacco Ltd [1998] 2 All ER 673, [1998] 1 WLR 1056, CA.
Hussman (Europe) Ltd v Pharaon (formerly t/a Al Ameen Development and Trade Establishment) [2003] EWCA Civ 266, [2003] 1 All ER (Comm) 879.
Lesotho Highlands Development Authority v Impregilo SpA [2003] EWCA Civ 1159, [2004] 1 All ER (Comm) 481.
Nisshin Shipping Co Ltd v Cleaves & Co Ltd [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38.
P v BW [2003] EWHC 1541 (Fam), [2003] 4 All ER 1074, [2004] 2 WLR 509.
R (on the application of Pelling) v Bow County Court [2001] UKHRR 165, DC.
R v Legal Aid Board, ex p Kaim Todner (a firm) [1998] 3 All ER 541, [1999] QB 966, [1998] 3 WLR 925, CA.
R v Secretary of State for the Home Dept, ex p Simms [1999] 3 All ER 400, [2000] 2 AC 115, [1999] 3 WLR 328, HL.
Scott v Scott [1913] AC 417, [1911–13] All ER Rep 1, HL.
Suovaniemi v Finland App No 31737/96 (23 February 1999, unreported), ECt HR.
Television New Zealand Ltd v Langley Productions Ltd [2000] 2 NZLR 250, NZ HC.
Trusts of X Charity, Re [2003] EWHC 1462 (Ch), [2003] 3 All ER 860, [2003] 1 WLR 2751.
Werner v Austria (1998) 26 EHRR 310, [1997] ECHR 21835/93, ECt HR.

Appeal

The Department of Economic Policy and Development of the City of Moscow and the Government of Moscow (together 'Moscow') appealed with permission of Cooke J against his judgment of 5 June 2003 ([2003] EWHC 1377 (Comm), [2003] 1 WLR 2885) by which he held that a judgment given by him dated 21 March 2003 on an application made by the Bankers Trust Co (BTC) and International Industrial Bank (IIB) pursuant to s 68 of the Arbitration Act 1996 should remain private, and that neither it nor a Lawtel summary should be available for publication. The facts and grounds of appeal are set out in the judgment of Mance LJ.

Graham Dunning QC and *Paul Key* (instructed by *Hogan & Hartson*) for Moscow.
Michael Bloch QC (instructed by *Clifford Chance LLP*) for BTC.
Michael Sullivan (instructed by *Watson Farley & Williams*) for IIB.

Cur adv vult

25 March 2004. The following judgments were delivered.

MANCE LJ (giving the first judgment at the invitation of Sir Andrew Morritt V-C).

INTRODUCTION

[1] Party autonomy is fundamental in modern arbitration law. Section 1 of the Arbitration Act 1996 provides that the provisions of Pt I (ss 1–84)—

'are founded on the following principles, and shall be construed accordingly—(a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense; (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest; (c) in matters governed by this Part the court should not intervene except as provided by this Part.'

[2] Among features long assumed to be implicit in parties' choice to arbitrate in England are privacy and confidentiality. The 1996 Act's silence does not detract from this. In its Report on the Arbitration Bill dated February 1996 (pp 8–9 (paras 10–17)), the Departmental Advisory Committee (DAC) (chaired by Lord Saville) recorded that 'there is ... no doubt whatever that users of commercial arbitration in England place much importance on privacy and confidentiality as essential features'. The DAC cited a survey conducted among 'Fortune 500' United States corporations for the London Court of International Arbitration by the London Business School in 1992. It observed that it was open to arbitration institutions to express corresponding principles in their rules (as the United Nations Commission on International Trade Law (UNCITRAL) rules relevant in this appeal do). It was the difficulty of reaching a statutory formulation, in the light of 'the myriad exceptions' and the qualifications that would have to follow, that led the DAC to conclude that the courts should be left to continue to work out the implications 'on a pragmatic case-by-case basis'.

[3] Section 68 is one of the safeguards 'necessary in the public interest', mentioned in s 1. It enables a party to arbitral proceedings to—

'apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.'

Pursuant to the Civil Procedure (Amendment No 5) Rules 2001, SI 2001/4015, the relevant rules governing such applications have since 25 March 2002 been CPR 62.2–62.10 ('Section I' of CPR Pt 62). For the purposes of claims under the 1996 Act, CPR 62.2 contains a wide definition of 'arbitration claim', which includes any application under s 68:

'(1) In this Section of this Part "arbitration claim" means—(a) any application to the court under the 1996 Act; (b) a claim to determine—(i) whether there is a valid arbitration agreement; (ii) whether an arbitration tribunal is properly constituted; or what matters have been submitted to arbitration in accordance with an arbitration agreement; (c) a claim to declare that an award by an arbitral tribunal is not binding on a party; and (d) any other application affecting—(i) arbitration proceedings (whether started or not); or (ii) an arbitration agreement.

(2) This Section of this Part does not apply to an arbitration claim to which Sections II or III of this Part apply.'

CPR 62.10 provides:

'(1) The court may order that an arbitration claim be heard either in public or in private.

(2) Rule 39.2 does not apply.

(3) Subject to any order made under paragraph (1)—(a) the determination of—(i) a preliminary point of law under section 45 of the 1996 Act; or (ii) an appeal under section 69 of the 1996 Act on a question of law arising out of an award, will be heard in public; and (b) all other arbitration claims will be heard in private.

(4) Paragraph (3)(a) does not apply to—(a) the preliminary question of whether the court is satisfied of the matters set out in section 45(2)(b); or (b) an application for permission to appeal under section 69(2)(b).'

CPR 62.11–62.16 (Section II) regulate pre-1996 Act arbitration claims and include no equivalent of CPR 62.10.

[4] The issue on this appeal is whether a judgment dismissing an application made under s 68 or failing that a Lawtel summary should be available either for general publication or for limited publication to specified financial institutions. The appellants, the Department of Economic Policy and Development of the City of Moscow and the government of Moscow (together 'Moscow'), submit that it should be. The respondents, Bankers Trust Co (Bankers Trust) and International Industrial Bank (IIB), resist this. The judgment was given by Cooke J on 21 March 2003, dismissing applications under s 68 by Bankers Trust and IIB, seeking respectively the remission and the setting aside of a single arbitrator's award dated 30 May 2002 for serious irregularity. The following circumstances are already in the public domain: that the arbitration involved three sets of parties, Bankers Trust, Moscow and IIB; that the arbitration was under UNICTRAL rules in London; that Bankers Trust was claiming to recover funds allegedly advanced under a Credit Agreement No 750 dated 24 October 1997 made originally between Moscow and IIB; and that under the award Bankers Trust succeeded against IIB, but not against Moscow. UNCITRAL rules provide:

'25.4 Hearings shall be held *in camera* unless the parties agree otherwise ...

32.2 The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay ...

32.5 The award may be made public only with the consent of both parties.'

The arbitration took place in private, and the award was published only to the parties. Bankers Trust's and IIB's application under s 68 were themselves heard 'in private' under CPR 62.10(3)(b). No contrary application or order was made under CPR 62.10(1).

[5] Prior to and during the arbitration Bankers Trust gave notice to various financial institutions who had at IIB's or its instance acquired an interest as sub-participants in Credit Agreement No 750; and, after receiving the award it wrote to those investors implying that its failure to establish any default by Moscow was due to a 'surprising' application of Russian law by the arbitrator.

While the London arbitration was in progress, on 23 October 2001 the City of Moscow issued an offering circular, through ING Barings and UBS Warburg as lead managers in London with Chase Manhattan (London) as trustee, to raise $300m by way of loan participation notes due 2004. The circular referred to claims against it in an ongoing arbitration by 'an international bank' in respect of a loan allegedly made to it by a Russian bank, and recorded that Moscow contested these claims on the basis that it had never received the funds and said that it believed that the funds had been 'improperly misappropriated' by the Russian bank. Further, the judgment which Cooke J handed down in writing on 21 March 2003 was not marked private, and, although the point about privacy was immediately raised with him and stood over for further argument, Lawtel received a copy of the judgment, which in good faith it summarised on its website and by email to its 15,000 or so subscribers, in each case with a link to the full text on its website. Objection was at once raised by Bankers Trust and the material on Lawtel's website was deleted. There is no evidence that any subscriber in fact downloaded all or any part of the full transcript during the limited time that this was on the web. But the relevant email summaries remained, and may still remain, on computers belonging to all those subscribers who received the email summary.

[6] Both before Cooke J and before us, Moscow's primary case has been that the judgment or failing that the Lawtel summary should be available for general publication. Only alternatively has Moscow applied for limited permission to send the judgment, or the Lawtel summary, to the sub-participants in Credit Agreement No 750. There are two potential problems about this alternative. First, I find it difficult to see how, if such publication were permitted, publication could or would be restricted to sub-participants. But I do not think that could be critical if publication to them was otherwise justified, and it does not arise if more general publication is justified. Second, Bankers Trust has in its skeleton, although it did not stress this orally, objected that use of the sub-participants' identities for the proposed distribution would conflict with Moscow's implied obligation to keep confidential information obtained by way of disclosure in the course of the arbitration. That problem is not before us, and we are not in a position to adjudicate on it. Moscow's expressed reason for wishing for publication is that it should be able to demonstrate 'to the international financial markets' or 'investment community' generally that the arbitration award holding that it had not committed any sort of financial default 'had been the subject of detailed and careful scrutiny by the Commercial Court which rejected all ... attacks' upon it. It is common ground that it was and is open to Moscow 'freely [to] state the end result of the arbitration and the end result of the litigation' under s 68. Having heard submissions, the judge determined, by separate judgment dated 5 June 2003 ([2003] EWHC 1377 (Comm), [2003] 1 WLR 2885), supplemented by short reasons relating to the Lawtel summary, that the earlier judgment dated 21 March 2003 should remain private and that neither it nor the Lawtel summary should be available for any publication. Against that judgment dated 5 June 2003, Moscow now appeals, with permission given by the judge because of the novel point of public interest involved.

THE JUDGMENT UNDER APPEAL

[7] Cooke J's judgment on 5 June 2003 was given in public. As Cooke J said, it raised matters of law and matters of wider interest and contained no confidential information save for the existence of the dispute, the existence of the award and the existence of his earlier judgment, all of which had been freely mentioned by the parties and also mentioned in the press. There was therefore, he said, good reason for its publication and no reason for secrecy in respect of it. The present judgment is also public.

[8] In his judgment of 5 June 2003 Cooke J started by setting out the provisions of CPR 62.10 in the context of other rules of the CPR (particularly CPR 39.2) and against the background of the common law stated in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, *Forbes v Smith* [1998] 1 All ER 973, *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056 and *Clibbery v Allan* [2002] EWCA Civ 45, [2002] 1 All ER 865, [2002] Fam 261, as well as s 12 of the Administration of Justice Act 1960 and art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). He concluded ([2003] 1 WLR 2885 at [25], [31]) that CPR 62.10 represented a policy decision reflecting the privacy to be accorded to arbitration, and that this was the starting point rather than any principle 'that judgments in private are public documents'. He considered (at [31]) that—

> '[t]he effect of a public hearing, or of automatic publication of proceedings challenging an award, would be to militate against the legitimate pursuit of any challenge to an award where a fundamental basis for agreeing to arbitrate was the requirement for privacy, and would cut across the parties' agreement for the private resolution of their dispute.'

However:

> '[35] ... Where matters fall prima facie within the privacy provisions of rule 62.10, which applies in default of a court order, the issue, if raised, is none the less to be determined on equivalent criteria to those of rule 39.2, *Scott v Scott* and article 6 ... and the other matters to which I have referred, but without the presumption of *Scott*, and with perhaps, if anything, a presumption in favour of privacy given in the rule itself.'

Further, he said:

> '[38] ... the policy which gives rise to private hearings may also be one which the court would wish to carry over into any judgment given.
>
> [39] ... The same policy reasons which would lead to a court deciding that a hearing should take place in private may be equally relevant to the question of publication of the judgment but until the judgment is known, neither the court nor the parties may appreciate the extent to which there are issues of public importance, and the extent to which there may be sensitive matters raised within the judgment which will create problems for the parties if published. Self-evidently, it does not automatically follow

a that, because the hearing of an arbitration claim has taken place in private, the judgment in relation to it should not be available for publication.'

[9] Cooke J described the hearing before him under s 68 as raising 'no real issues of law', but as concerning 'material of a highly sensitive nature both politically and commercially', and continued (at [41]):

b

'The whole subject with which the court was concerned was an arbitration which in itself was confidential. Everything raised in relation to it was confidential. If publicity would damage that confidentiality, then the court may rightly consider privacy both for the hearing and for the c judgment to be necessary in the interests of justice. Such matters can constitute special circumstances where publication of the judgment would prejudice the interests of justice, not only because of the impact on the parties concerned, but also on the future administration of justice in relation to arbitration claims, because of the potential deterrent effect for d those who have a legitimate grievance to pursue in respect of the conduct of an arbitration, the conduct of a tribunal or in relation to a serious irregularity in the award. Persons entitled to justice at the hands of the court could reasonably be deterred from seeking it, if the court was uniformly to adopt an approach that the confidential nature of the information with which it was concerned did not justify privacy both for e the hearing and for the judgment. Indeed, such persons might be dissuaded from arbitration under the supervision of the English court. Each application, hearing and judgment, will be required to be examined by the court to ascertain whether or not a private or public hearing or a private or public judgment is appropriate in the light of the criteria to f which I have already referred.'

[10] Cooke J concluded this part of his judgment as follows (at [45]):

g 'Whilst IIB and Bankers Trust could provide little evidence of actual detriment should the judgment be published, Moscow has provided equally no good reason for requiring publication either, since it can freely state the end result of the arbitration and the end result of the litigation. In these circumstances, the confidentiality of the arbitration, by which the h parties set so much store, is the dominant factor in determining that the hearing and the judgment itself should be private. In many arbitrations the position may be different, but the terms of rule 62.10, for the reasons given, provide a strong pointer to the way in which the courts should approach such matters. It is the very terms of the rule when the word "private" is seen as meaning "in camera" which has weighed most heavily j with me in coming to this conclusion.'

He went on to dismiss Moscow's submission that any privacy had been forfeited by Bankers Trust or IIB by the previous publication of information about the arbitration, or by such publication as Lawtel had effected.

THE COMMON LAW AND STATUTORY BACKGROUND

[11] I agree with the judge that it is necessary to understand and apply the new CPR 62.10 in the light of the common law as well as art 6 of the convention. Some consideration is also necessary of the concepts deployed under previous procedural regimes such as 'in chambers' and 'in camera'. Even the use of modern equivalents such as 'private' and 'secret' has given rise to some apparent inconsistencies.

[12] I start with *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1. The case concerned a finding that a petitioner, who had been granted a decree of nullity in a case heard in camera, had committed contempt by sending copies of the transcript to certain persons, in (she said) defence of her reputation. Two of the main questions addressed by the House of Lords were (a) whether the Divorce Court had power to sit in camera to hear a nullity suit and (b) assuming that it had, whether it had power to enjoin a party from publishing, after judgment, copies of the transcript of proceedings. The House of Lords answered the first question in an emphatic negative, and in terms covering courts of justice generally. Strong negative views were also expressed on the second question.

[13] Viscount Haldane LC said that 'the broad principle of justice' was that (unless the judge 'demits his capacity as a judge and sits as an arbitrator' by agreement: see [1913] AC 417 at 436, [1911–13] All ER Rep 1 at 9, and also [1913] AC 417 at 423, 442, [1911–13] All ER Rep 1 at 12), 'courts must, as between parties, administer justice in public'. The only exceptions reflected the 'yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done' ([1913] AC 417 at 437, [1911–13] All ER Rep 1 at 9). In this respect he identified the court's 'parental and administrative' jurisdiction 'to guard the interests of the ward or the lunatic' and cases concerning a secret process, 'where the effect of publicity would be to destroy the subject-matter'. The Earl of Halsbury said ([1913] AC 417 at 443, [1911–13] All ER Rep 1 at 12) that there was 'not a judgment of authority to justify' an injunction of perpetual secrecy. Earl Loreburn ([1913] AC 417 at 445, [1911–13] All ER Rep 1 at 13) followed Viscount Haldane LC on the first question, speaking of the 'inveterate rule that justice shall be administered in open court'. But he accepted the possibility of exceptions, of which the underlying principle was—

> 'that the administration of justice would be rendered impracticable by [the public's] presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the Court.' (See [1913] AC 417 at 446, [1911–13] All ER Rep 1 at 14.)

On the second question, he considered (see [1913] AC 417 at 448, [1911–13] All ER Rep 1 at 15) that the court could treat as contempt 'any wilful and malicious publication'.

[14] Lord Atkinson considered that a permanent injunction could be granted in cases of secret processes, where publication would cause the entire destruction of the whole matter in dispute. He distinguished a nullity suit where publication could have no such effect after determination of the issue, observing that the law of defamation offered protection. The judge's order to hear the nullity suit in camera meant no more than—

> 'that the place where the case is to be heard shall be a private chamber, not a public court ... The order was, I think, spent when the case terminated, and had no further operation beyond that date.' (See [1913] AC 417 at 453, [1911–13] All ER Rep 1 at 17.)

Lord Shaw shared Viscount Haldane LC's approach to the first question. He concluded ([1913] AC 417 at 476, [1911–13] All ER Rep 1 at 29) that it was beyond the judge's power to hear the case in camera, and that, even if such an order had been within his power 'it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end'. He quoted extensively from Bentham (see [1913] AC 417 at 477, [1911–13] All ER Rep 1 at 30), including the famous lines: 'Publicity is the very soul of justice ... It keeps the judge himself while trying under trial.' (See *Benthamia, or Select Extracts from the Works of Jeremy Bentham* (1843) p 115.) He added ([1913] AC 417 at 477–478, [1911–13] All ER Rep 1 at 30):

> 'There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves.'

[15] The second question in *Scott v Scott* was addressed in a number of subsequent statutes (eg regulating the *reporting* of evidence in certain matrimonial cases, and the hearing of evidence of sexual capacity in nullity proceedings in camera: see also the discussion by Thorpe LJ in *Clibbery v Allan* [2002] 1 All ER 865 at [92]ff.) It was further regulated in 1960 by s 12 of the Administration of Justice Act 1960 as amended by the Children Act 1989, s 108(5) and Sch 13, para 14. Section 12(1) provides generally that publication of information relating to proceedings in private will not of itself be contempt of court, but is subject to exceptions. They include proceedings relating to minors, or under the 1989 Act or provisions in the Mental Health Act 1959, proceedings where the court sits in private for reasons of national security or where the information relates to a secret process, discovery or invention in issue in the proceedings and proceedings—

> '(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published.'

[16] Section 12(2) provides that—

> 'the publication of the text or a summary of the whole or part of an order made by a court sitting in private shall not of itself be contempt of court except where the court (having power to do so) expressly prohibits the publication.'

And s 12(3) states: 'In this section ... references to a court sitting in private include references to a court sitting in camera or in chambers.' The references in s 12(1)(e) and (2) to a court 'having power' expressly to prohibit the publication takes one back to the common law principles indicated in *Scott v*

Scott. A similar phrase appears in the Contempt of Court Act 1981, which provides:

> '4. (2) In any such proceedings the court may, where it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for that purpose ...
>
> **11.** In any case where a court (having power to do so) allows a name or other matter to be withheld from the public in proceedings before the court, the court may give such directions prohibiting the publication of that name or matter in connection with the proceedings as appear to the court to be necessary for the purpose for which it was so withheld.'

The restriction on the prejudice relevant under s 4(2) reflects the tenor of *Scott v Scott*, although the reference in s 12(1) to national security involves an interest not expressly mentioned in *Scott v Scott*, which would not, as it seems to me, fall within a narrow understanding of the exception there identified for cases where privacy was necessary to ensure that justice is done.

[17] Prior to 31 January 1997 RSC Ord 73, r 2 provided that applications to remit an award, remove an arbitrator or umpire or set aside an award or to determine any question of law arising in the course of a reference, appeals under s 1(2) of the Arbitration Act 1979 and applications for a declaration that an award is not binding because made without jurisdiction should be made by originating motion to a single judge in court. The law reports contain many judgments dealing with such applications. Other applications, including applications for leave to appeal under s 1(2) of the 1979 Act were made to a judge in chambers. Following the 1996 Act the Rules Committee (acting under s 84 of the Supreme Court Act 1981 'for the purpose of regulating and prescribing the practice and procedure to be followed in the Supreme Court ...') made the Rules of the Supreme Court (Amendment) 1996, SI 1996/3219. Under Pt II of the new RSC Ord 73, the position remained unchanged with respect to pre-1996 Act arbitrations. But Pt I introduced with respect to post-1996 Act arbitrations a concept of 'arbitration application', very similar to the modern concept of 'arbitration claim' (cf para [3] of this judgment); and Ord 73, r 15 in this Part was along the lines of the present CPR 62.10, but with the important differences that, instead of differentiating between hearings in public and in private, the distinction drawn was between hearings 'in open court and in chambers', and there was no equivalent of para (2). At this stage, there was also no Rule of the Supreme Court dealing explicitly with hearings in camera, but the notes to Ord 33, r 4, dealing with the place and mode of trial, covered the subject briefly.

[18] The implications of an 'in chambers' hearing remained surprisingly unexplored until the decisions in *Forbes v Smith* [1998] 1 All ER 973 in November 1997 and *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056 in February 1998. In the former case Jacob J was concerned with an appeal against the decision of a master refusing leave to a party to send copies of a chambers judgment given by Chadwick J to named persons and professional bodies or to use it in specified proceedings. Jacob J concluded that whether or

not courts sat in chambers or in open court was generally merely a matter of administrative convenience. He pointed to differences in practice between different divisions and at different times, and continued ([1998] 1 All ER 973 at 974–975):

> 'The concept of a secret judgment is one which I believe to be inherently abhorrent. Only in cases where there is a cause for secrecy, such as in a trade secrets case, can it in general be right that a judgment should be regarded as a secret document. Even then it may be only a part of the judgment which needs to be secret. I conclude, in the absence of binding authority to the contrary, that when judgments are given in chambers they are not to be regarded as secret documents. There is in principle all the difference between a judgment given in camera (ie a judgment which the judge has specifically ordered, for cause, to be treated as secret) and a judgment given in chambers merely for administrative reasons.'

He concluded that Chadwick J had ordered the matter to go into camera and ordered that his judgment should be regarded as given in camera. However, Chadwick J had not been asked to rule on the question whether leave might be given for its use in relation to complaints made by the other party to professional organisations or others. On that basis, Jacob J said (at 976):

> '... starting, as I do, with a bias in favour of the publication of judgments, coupled with the legitimate interest of these defendants in sending the judgment to the parties named, I think I should give leave.'

[19] In *Hodgson's* case the judgment of the court was given by Lord Woolf MR. He indorsed Jacob J's approach ([1998] 2 All ER 673 at 685–686, [1998] 1 WLR 1056 at 1070):

> 'The general position is that any judgment including a judgment in chambers is normally a public document. This is the position notwithstanding that under RSC Ord 63, r 4(1) there is no right to inspect a judgment so given without leave. A distinction has to be clearly drawn between the normal situation where a court sits in chambers and when a court sits in camera in the exceptional situations recognised in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1 or the court sits in chambers and the case falls in the categories specified in s 12(1) of the 1960 Act (which include issues involving children, national security, secret processes and the like). Section 12(1) also refers to the court having prohibited publication. Such proceedings are appropriately described as *secret*; proceedings in chambers otherwise are not appropriately so described. Proceedings in chambers, however, are always correctly described as being conducted in *private*. The word "chambers" is used because of its association with the judge's room so as to distinguish a hearing in chambers from a hearing in open court. While the public in general are normally free to come into and go from a court (as long as there is capacity for them to do so) during court hearings

the same is not true of chambers hearings. Other than the parties and their representatives the public need the permission of the judge to attend.' *a*

Lord Woolf MR there used the description 'private' and 'secret' to reflect the distinction expressed in the traditional terms 'in chambers' and 'in camera'. However, the CPR discards these terms, and in my view uses the word 'private' in a sense corresponding with Lord Woolf MR's description 'secret.' *b*

[20] Lord Woolf MR also gave the judgment of the court in *R v Legal Aid Board, ex p Kaim Todner (a firm)* [1998] 3 All ER 541, [1999] QB 966. The appellant solicitors had been granted leave to apply for judicial review in respect of the Legal Aid Board's termination of their legal aid franchise following allegations of dishonesty of former employees; but they were refused *c* an order that the proceedings be anonymous. They appealed and at the outset said that they wished to withdraw the appeal or consent to its dismissal if anonymity was refused. The Court of Appeal refused anonymity and refused to allow the appeal to be withdrawn. Lord Woolf MR ([1998] 3 All ER 541 at 549, [1999] QB 966 at 976) drew from *Scott v Scott* the conclusion that 'an exception can only be justified if it is necessary in the interests of the proper *d* administration of justice', and went on ([1998] 3 All ER 541 at 549, [1999] QB 966 at 977):

'While Viscount Haldane LC in *Scott v Scott* emphasised that the limits to the exceptions to the general principle that proceedings should be *e* conducted in public could not depend on "the individual discretion of the judge" ([1913] AC 417 at 435, [1911–13] All ER Rep 1 at 8), there is an immense variety of situations in which it is appropriate to restrict the general rule. These situations depend very much on their individual circumstances. So if a judge adopts the correct approach in determining *f* any particular application, indicated by the passages from *Scott v Scott* and the *Leveller Magazine* case already cited ([1979] 1 All ER 745, [1979] AC 440), the Court of Appeal will not interfere with the decision of a judge on an issue of this nature.'

He then commented ([1998] 3 All ER 541 at 549, 550, [1999] QB 966 at 977) on *g* the danger of a court simply acceding to parties' wish for privacy:

'Sometimes the importance of not making an order, even where both sides agree that an inroad should be made on the general rule, if the case is *h* not one where the interests of justice require an exception, has been overlooked. Here a comment in the judgment of Sir Christopher Staughton in [*Ex p P* (1998) Times, 31 March, [1998] CA Transcript 431] is relevant. In his judgment, Sir Christopher Staughton states: "When both sides agreed that information should be kept from the public that was *j* when the court had to be most vigilant." The need to be vigilant arises from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases ... Any interference with the public nature of court proceedings is therefore to be avoided unless justice requires it ...'

The court also observed ([1998] 3 All ER 541 at 550, [1999] QB 966 at 978) that the more limited the interference with the general rule of publication, the less objectionable any restriction may be; that the nature of the proceedings is always relevant: interlocutory and financial and other family disputes were 'normally of no interest to anyone other than the parties'; and that another relevant factor is whether it is the plaintiff, the defendant or a third party whose anonymity is at issue (see [1998] 3 All ER 541 at 550–551, [1999] QB 966 at 978).

[21] Lord Woolf MR was the principal architect of the CPR, which were introduced and developed over a period of years under ss 1 and 2 of the Civil Procedure Act 1997. These sections gave power to the new Civil Procedure Rules Committee to make rules of court governing the practice and procedure to be followed in inter alia the High Court, 'with a view to securing that the civil justice system is accessible and efficient'. Under Sch 1, the matters about which rules may be made include any matters governed by the former rules of court. CPR 39.2 came into effect in April 1999. The modern CPR Pt 62 was introduced with effect from 25 March 2002. CPR 39 enacts the general rule, expressed in *Scott v Scott*, that hearings should be public, but provides for circumstances in which a hearing may be 'private':

> '**39.2 General rule—hearing to be in public**
>
> (1) The general rule is that a hearing is to be in public.
>
> (2) The requirement for a hearing to be in public does not require the court to make special arrangements for accommodating members of the public.
>
> (3) A hearing, or any part of it, may be in private if—(a) publicity would defeat the object of the hearing; (b) it involves matters relating to national security; (c) it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality; (d) a private hearing is necessary to protect the interests of any child or patient; (e) it is a hearing of an application made without notice and it would be unjust to any respondent for there to be a public hearing; (f) it involves uncontentious matters arising in the administration of trusts or in the administration of a deceased person's estate; or (g) the court considers this to be necessary, in the interests of justice.
>
> (4) The court may order that the identity of any party or witness must not be disclosed if it considers non-disclosure necessary in order to protect the interests of that party or witness.'

Parallel provisions permitting privacy include CPR 32.13 (inspection of witness statements used in chief) and RSC Ord 52, r 6 (sc 56.6) (committal proceedings).

[22] The first Practice Direction to CPR 39 states that it is for the judge conducting the hearing to decide whether it should be in public or in private under CPR 39.2, after hearing representations and having regard to art 6 of the convention. It identifies certain types of hearing which 'shall in the first instance be listed by the court as hearings in private under rule 39.2(3)(c)' (see CPR PD 39, para 1.5). These include for example some claims for possession or relating to execution or the rate of payment of a judgment debt, claims for charging orders, orders to attend court for questioning and applications for security for costs against a claimant company on the ground that there is reason

to believe that it would be unable to pay the defendant's costs if it lost. The common theme is that such claims may involve confidential financial information. The reference to listing shows that, in these cases, the onus remains on a party seeking to maintain privacy to justify it in the light of the general rule set out in CPR 39.2(1). The Practice Direction continues:

'1.9 If the court or judge's room in which the proceedings are taking place has a sign on the door indicating that the proceedings are private, members of the public who are not parties to the proceedings will not be admitted unless the court permits.

1.10 Where there is no such sign on the door of the court or judge's room, members of the public will be admitted where practicable. The judge may, if he thinks it appropriate, adjourn the proceedings to a larger room or court.

1.11 When a hearing takes place in public, members of the public may obtain a transcript of any judgment given or a copy of any order made, subject to payment of the appropriate fee.

1.12 When a judgment is given or an order is made in private, if any member of the public who is not a party to the proceedings seeks a transcript of the judgment or a copy of the order, he must seek the leave of the judge who gave the judgment or made the order.

1.13 A judgment or order given or made in private, when drawn up, must have clearly marked in the title: "Before [*title and name of judge*] sitting in Private".'

The Practice Direction describes the incidents of privacy, where ordered under CPR 39.2, in terms which appear to me to make clear that 'private' in this context is meant in the sense of 'secret' as used by Lord Woolf MR in *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056. In other words, it may be equated with the old 'in camera' procedure, rather than the old 'in chambers' procedure.

[23] In *R (on the application of Pelling) v Bow County Court* [2001] UKHRR 165, the Divisional Court (Buxton LJ sitting with Penry-Davey J) rejected a submission that CPR 39.2 was ultra vires to the extent that it authorised certain hearings to be heard in private. Buxton LJ, giving the judgment of the court, observed that the principle of publicity in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1 was not an absolute one, because (as there said) it must yield to the yet more more fundamental principle that the chief object of courts must be to secure that justice is done. He went on (at 174):

'(22) ... It is plain from reading it that [r] 39.2 is facultative. It permits in certain limited circumstances the judge to sit in private, always to be assumed subject to that being in the interests of justice; and that is subject to the general rule in r 39.2(1). The general rule is that the hearing is to be in public. It follows from that that this part of the Civil Procedure Rules 1998 does not in any event breach the principle of legality because it does not in itself legislate inconsistently with the content of the rule in *Scott v Scott*, for the reasons that I have indicated.'

More far-reachingly, he added:

> '(23) That is the end therefore of this point, but in any event I would go on and say that it is clear from reading them, and clear from any informed knowledge of their origin, that it was the intention of Parliament in the Civil Procedure Act 1997, and the intention of those who made the Civil Procedure Rules 1998 carrying out Parliament's intention as set out in that Act, to make a new start in those areas of practice to which the ambit of the rule applies. It may well be a necessary inference, to use the formulation adopted by Lord Hoffmann in [*R v Secretary of State for the Home Dept, ex p Simms* [1999] 3 All ER 400, [2000] 2 AC 115], from that circumstance that the general rules made in the Civil Procedure Rules 1998, were it in fact the case that they in turn were inconsistent with the *Scott* principle, had indeed properly reversed, replaced, or at least put another aspect on that principle. I do not need finally to conclude that point for the reasons that I have already indicated, but in considering the vires and status of the Civil Procedure Rules 1998 generally, it seems to me that the potency and the novelty that Parliament clearly intended to attach to the Civil Procedure Rules 1998 cannot be overlooked.'

I return to the latter passage in [33], below. Buxton LJ also concluded that CPR 39.2 was (because of its facultative nature) consistent with art 6 of the convention.

[24] *Clibbery v Allan* [2002] 1 All ER 865, decided in this court in January 2002, was concerned with family proceedings. It is not directly relevant and is concerned with different terminology to that found in the CPR. Nevertheless, it contains some helpful indications as to the general approach to issues like the present. C had sought an occupation and a non-molestation order, in proceedings heard 'in chambers' in accordance with r 3.9 of the Family Proceedings Rules 1991, SI 1991/1247, made under the Matrimonial and Family Proceedings Act 1984. A now sought to restrain C from further disclosure of details about those proceedings to the press, on the general premise that the case was heard in chambers and must therefore remain secret (cf para [83] of Dame Elizabeth Butler-Sloss P's judgment). The court, in upholding the refusal of any such injunction, rejected this premise. The President adopted the explanation given by Jacob J and approved by Lord Woolf MR of the significance of an 'in chambers' hearing. She advanced (at [20]) a threefold distinction between cases 'heard in open court, those heard in private and those heard in secret where the information disclosed to the court and the proceedings remain confidential'. She went on, citing *Scott v Scott*, to affirm (at [51]) that a hearing in the intermediate category ('in private' in her terminology) does not, of itself, prohibit the publication of information about the proceedings or given in the proceedings, and to consider the scope of the implied duty of confidentiality arising in respect of documents disclosed in civil litigation. She said (at [66]):

> 'It would appear, although we have not heard argument on the point, that r 39.2 is wider than s 12 of the Administration of Justice Act 1960 and that the exceptions set out in r 39.2(3) may be treated as heard in secret and

> the information about them may not be made public without the permission of the court. I do not however consider that is necessarily the position with regard to cases heard in private in chambers under the 1991 rules.'

I comment that I prefer the analysis of CPR 39.2 in the first sentence of this passage to Dame Elizabeth Butler-Sloss P's apparent assimilation earlier in her judgment (at [18]) of hearings in private under CPR 39.2 to the old in chambers procedure.

[25] In later passages, Dame Elizabeth Butler-Sloss P emphasised (at [77]) that family proceedings were not and should not be seen as in a separate category 'other than in recognised classes of cases or in other situations which can be shown manifestly to require permanent confidentiality', and that it was necessary, both in family cases and when applying s 11 of the Contempt of Court Act 1981, to take account of all the circumstances against the background of the general principle of open justice, when deciding whether a case fell within such a class of case or situation. She distinguished (at [77], [79]) between hearings in private and subsequent publicity, and said (at [79]):

> 'It cannot properly be a blanket protection of non-publication in all cases heard in private in chambers under the 1991 rules. It can however apply not only to the actual case before the court but also to groups of cases arising out of the same type of circumstances; see Lord Edmund-Davies in *A-G v Leveller Magazine Ltd* [1979] 1 All ER 745, [1979] AC 440.'

When instancing cases in which an order might be made, she referred to applications for occupation orders in which the welfare of children was likely to be a major issue or often the major issue, and cases where 'the financial affairs of any of the parties have to be investigated'. She concluded (at [80]):

> 'The statutory framework, providing the procedures in civil and family cases, recognises the necessity to hold some proceedings in private and that there should be protection against publication of some of those proceedings. Such protection must be proportionate to the requirements of the administration of justice. It might be thought to be inconvenient and time-consuming to have to look at this problem in individual cases heard in private. There are groups of cases in which the answer is obvious and, in my view, there will only be a small number of cases, in particular under Pt IV, where the advocates and the court may have to consider the point.'

[26] Keene LJ agreed with Dame Elizabeth Butler-Sloss P, and indorsed (at [123]) 'the need to scrutinise more closely than has happened in practice in the past whether a hearing in private can be justified', adding (at [124]) that 'in some cases, such as in some instances of applications for occupation orders, there may be little justification for the proceedings to be heard in private'. He observed that the burden of showing that such an application falls within one of the exceptions to art 6(1) of the convention 'is likely to be particularly difficult to discharge where children are not involved'. Thorpe LJ was concerned to emphasise the extent to which family proceedings may be distinguishable from ordinary civil proceedings and outside the principle of

Hodgson v Imperial Tobacco Ltd [1998] 2 All ER 673, [1998] 1 WLR 1056, by virtue of their more inquisitorial nature and the duty of full and frank disclosure which the parties may incur to the court.

ARTICLE 6 OF THE CONVENTION

[27] Article 6(1) of the convention provides:

> 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

The Strasbourg jurisprudence establishes that:

(i) 'The public character of court hearings constitutes a fundamental principle enshrined in paragraph (1) of Article 6': see *Häkansson v Sweden* (1991) 13 EHRR 1 at 16 (para 66); *Werner v Austria* (1998) 26 EHRR 310 at 349 (para 45).

(ii) The rationale, as stated in *Werner v Austria* (1998) 26 EHRR 310 at 349 (para 45), is that—

> 'This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6(1), namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society ...'

(iii) Although art 6(1) states as a general rule that proceedings should take place in public, it is not inconsistent with this for a state to designate an entire class of case as falling within one of the recognised exceptions, subject always to the court's control: see *B v UK* (2002) 34 EHRR 529 at 540 (para 39); and cf domestically, in proceedings under s 97 of the Children Act 1989, *P v BW* [2003] EWHC 1541 (Fam), [2003] 4 All ER 1074, [2004] 2 WLR 509 (Bennett J).

(iv) Nevertheless, as *Häkansson v Sweden* (1991) 13 EHRR 1 at 16 (para 66) also establishes—

> 'neither the letter nor the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public. However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest.'

(v) More fundamentally, nothing in art 6 conflicts with the voluntary waiver by parties of court proceedings in favour of arbitration, although even such a waiver 'should not necessarily be considered to amount to a waiver of all rights under art 6': see *Suovaniemi v Finland* App No 31737/96 (23 February 1999,

unreported), where the European Court of Human Rights added, with reference to *Håkansson v Sweden*, that— *a*

> 'it is clear that the right to a public hearing can be validly waived even in court proceedings ... The same applies, *a* fortiori, to arbitration proceedings, one of the very purposes of which is often to avoid publicity.'

b

The issue in *Suovaniemi v Finland* was whether parties could waive 'the fundamental right to an impartial judge', which the court concluded that they could in arbitral proceedings, without deciding whether they could also do so in the context of purely judicial proceedings.

(vi) Although on a literal reading of art 6 it might appear that there is an absolute obligation to give judgment publicly— *c*

> 'the form of publicity given under the domestic law to a judgment must be assessed in the light of the special features of the proceedings in question and by reference to the object and purpose of Article 6(1).' (See *B v UK* (2002) 34 EHRR 529 at 542 (para 45).)

d

(vii) Thus, where, in that case, applications for a residence order had been conducted in chambers to protect the privacy of children and to avoid prejudice to the interests of justice, it was sufficient that—

> 'anyone who [could] establish an interest [could] consult or obtain a copy of the full text of the orders and/or judgments of first instance courts in child residence cases, and that the judgments ... of special interest [were] routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them.' (See (2002) 34 EHRR 529 at 542 (para 47).)

e *f*

In these circumstances, public pronouncement of judgments—

> 'would not only be unnecessary for the purposes of public scrutiny but might even frustrate the primary aim of Article 6(1), which is to secure a fair hearing.'

g

(viii) Also in *B v UK* Judge Bratza in a concurring opinion observed that the wording and historical background to the convention showed that—

> 'stricter standards have been imposed as regards the publication of court judgments than as regards the public character of the underlying proceedings ... reflecting "the view that some of the factors which might justify a secret hearing would not justify delivery of the judgment in private".' (See (2002) 34 EHRR 529 at 545 (para O-17).)

h

None the less, he was prepared to read into the convention a similar qualification, relating to the interests of juveniles, to that expressed in art 14 of the International Covenant on Civil and Political Rights, on the ground that— *j*

> '[t]here is, as the majority judgment recognises, a logical relationship between the public nature of the proceedings and the public

pronouncement of the judgment which is the result of those proceedings. If the public may legitimately be excluded from the hearing for the purpose of protecting the interests of children or the private lives of parties to a matrimonial dispute, the requirement that the judgment should be pronounced publicly should not be interpreted in such a way as to undermine that protection.' (See (2002) 34 EHRR 529 at 545 (para O-19).)

(ix) The exceptions formulated in art 6(1) are permissive. However, in so far as they contemplate the possibility of private hearings to protect convention rights, such as 'the private life of the parties', which do not feature directly in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1, they seem to require the court (having regard to s 6(1) of the Human Rights Act 1998) to consider whether the strictness of the rules in *Scott v Scott* require some qualification. The alternative, supported perhaps by Lord Woolf MR's statement of principle in *R v Legal Aid Board, ex p Kaim Todner (a firm)* [1998] 3 All ER 541, [1999] QB 966 (see [20], above) and Dame Elizabeth Butler-Sloss P's approach in *Clibbery v Allan* [2002] 1 All ER 865 (see [26], above), is that they involve a more developed understanding of the interests of justice than *Scott v Scott* might suggest. It is not surprising that principles now recognised in the convention, particularly those relating to privacy, should involve a somewhat expanded or developed view of such interests in certain contexts. The Strasbourg jurisprudence considered in sub-paras (iii) and (iv), above can also be seen as taking a more relaxed view of the possibility of parties waiving publicity where this does 'not run counter to any important public interest'. However, there is nothing in Strasbourg jurisprudence, any more than in *Scott v Scott*, to suggest that parties can by simple agreement insist on a court restricting publication.

APPLICATION OF THESE PRINCIPLES

[28] The move towards greater privacy in the hearing of arbitration applications starts with the rule amendments made with effect from 31 January 1997 in the light of the 1996 Act. But these only provided for hearings in chambers. The limited significance of a hearing being in chambers may not always have been appreciated, until *Forbes v Smith* [1998] 1 All ER 973 and *Hodgson v Imperial Tobacco Ltd* [1998] 2 All ER 673, [1998] 1 WLR 1056. But I do not think that such hearings were, even prior to those decisions, equated in all respects with hearings in camera. Further, it was common for a judge, at the parties' request or of his own motion, to release a judgment given in chambers for publication, when it contained any matter of general interest. Nevertheless, when, under the CPR, the old RSC Ord 73 was eventually replaced by the new CPR 62.10, the Rules Committee must have accepted, as the starting point for the hearing of arbitration applications, a more limited approach to publicity. I regard the phrase 'in private' in both CPR 39.2 and 62.10 as referring to situations in which a hearing would formerly have been described as being in camera or in secret (not simply in chambers). That corresponds with the last sentence of para [66] in *Clibbery v Allan*. It also corresponds with the explanation of the significance of public and private hearings in CPR PD 39, paras 1.9–1.13; and with Buxton LJ's approach to the issues in *R (on the application of Pelling) v Bow County Court* [2001] UKHRR 165. Buxton LJ's conclusion, that CPR 39.2 was consistent with the principles in *Scott v Scott* and

art 6, was based on the judge's power and duty in any particular case to consider whether it was appropriate to sit other than in public. a

[29] No challenge has been made before us to the vires of CPR 62.10, although it introduces a starting point of privacy for many arbitration claims which is the contrary to that which, as Buxton LJ noted in *Pelling*'s case, applies under CPR 39.2(1). That such a starting point can be appropriate is clear (cf [25] and [27](iii), above for statements both by the European Court of Human b Rights and by the President of the Family Division). Mr Dunning QC for Moscow accepts CPR 62.10 as an appropriate scheme which enables the court to consider in private the material before it, in order to decide whether to continue in public. However, he submits that, whatever decision the court might reach regarding the hearing, it should, barring truly exceptional circumstances, deliver judgment in public. We have therefore to consider the c weight and significance of the arguments in favour of privacy, in the light of the impetus given to them by CPR 62.10.

[30] The rule changes in 1997 and 2002 rest clearly on the philosophy of party autonomy in modern arbitration law, combined with the assumption that parties value English arbitration for its privacy and confidentiality. Party d autonomy requires the court so far as possible to respect the parties' choice of arbitration. Their choice of private arbitration constitutes an election for an alternative system of dispute resolution to that provided by the public courts. The same philosophy limits court intervention to the minimum necessary in the public interest, which must include the public interest in ensuring not that arbitrators necessarily decide cases in a way which a court would regard as e correct, but that they at least decide them in a fundamentally fair way: see s 1 of the 1996 Act. The object of modern arbitration legislation, starting from at least the 1979 Act, has been to offer the international community an attractive framework within which to arbitrate in England. Previous legislation and practice were regarded as offering too much scope for court intervention, f although the objection was, I think, rooted more in the consequent lack of finality and the exposure to further delay and cost than in any consequent publicity.

[31] *Scott v Scott* was dealing with sensitive personal information about a marriage in the context of ordinary court proceedings. Even so, its immediate g subject matter has been affected by later legislation (see [15], above) and might anyway have to be reviewed today in the light of the convention (see [27](ix), above). However that may be, *Scott v Scott* was not dealing with a situation where Parliament has set out, [as] in the 1996 Act, to encourage and facilitate a reformed and more independent, as well as private and confidential, system of consensual dispute resolution, with only limited possibilities of court h involvement where necessary in the interests of the public and of basic fairness.

[32] The rule makers clearly deduced from the principles of the 1996 Act that any court hearing should take place, so far as possible, without undermining the reasons of inter alia privacy and confidentiality for which parties choose to arbitrate in England. Their conclusion in this regard has not j been challenged. It may be justified on the simple basis that arbitration represents a special case, in relation to which there has been very considerable development during recent years. An alternative and overlapping consideration is that parties may be deterred from arbitrating or at any rate from invoking the court's supervisory role in relation to arbitration if their

understanding regarding arbitral confidentiality and privacy is ignored. I would personally doubt whether it can be said without any positive evidence that the publication that has in the past frequently followed applications to set aside arbitration awards, e g for misconduct, has itself been likely to be detrimental to parties' keenness or otherwise to agree to arbitrate in London. But I find it easier to accept that, having arbitrated unsuccessfully here, a party could well be deterred from making an arbitration claim in court if there was a risk that by doing so really confidential matters might be disclosed.

[33] I would find difficulty in accepting Buxton LJ's suggestion in *Pelling*'s case that the Rules Committee could without more have power to reverse or replace the fundamental principles in *Scott v Scott*. But I do see attraction in the further suggestion that it may 'at least put another aspect' on the principles in *Scott v Scott*, bearing in mind that its mandate from Parliament was to facilitate access to justice. What would render the administration of justice impracticable or would reasonably deter parties entitled to justice from seeking it at the hands of the court (to take two phrases from Earl Loreburn's speech) are to some extent matters of judgment and may develop to meet new contexts as well as over time, as social perceptions of the need to protect personal privacy and confidential information change. The Rules Committee was well-placed to identify appropriate starting points in the context of situations such as those identified in CPR 39.2 and, following the 1996 Act, CPR 62.10. Both Lord Shaw in *Scott v Scott* and Lord Woolf MR in *Ex p Kaim Todner* warned that rule makers and judges should be careful not to erode fundamental principles. But the 1996 Act and CPR 62.10 present a special situation, where there was scope for the Rules Committee to evaluate and give effect to its perception of the requirements to ensure access to justice.

[34] The consideration that parties have elected to arbitrate confidentially and privately cannot dictate the position in respect of arbitration claims brought to court under CPR 62.10. CPR 62.10 therefore only represents a starting point. Such proceedings are no longer consensual. The possibility of pursuing them exists in the public interest. The courts, when called upon to exercise the supervisory role assigned to them under the 1996 Act, are acting as a branch of the state, not as a mere extension of the consensual arbitral process. Nevertheless, they are acting in the public interest to facilitate the fairness and well-being of a consensual method of dispute resolution, and both the Rules Committee and the courts can still take into account the parties' expectations regarding privacy and confidentiality when agreeing to arbitrate.

[35] We were referred by Mr Dunning to *Television New Zealand Ltd v Langley Productions Ltd* [2000] 2 NZLR 250. The dispute centred on a contract for the provision by Langley of television news presentation services by a Mr Hawkesby. In court proceedings, he had insisted on the need for resolution of the dispute in court, to preserve his reputation and Television New Zealand Ltd (TVNZ) strongly resisted this. But all three parties then agreed arbitration under an agreement confirming its strict confidentiality, something for which s 14 of the New Zealand arbitration law would, absent contrary agreement, anyway have implied. There was however no New Zealand equivalent of CPR 62.10. After an award in Langley's favour, TVNZ applied to appeal and Langley to enforce the award. TVNZ applied for the court proceedings to be public, and Mr Hawkesby now resisted this. The judge rejected any suggestion that the agreed confidentiality 'automatically' or 'necessarily' extended to

subsequent High Court proceedings. The question was whether in the particular circumstances the proceedings should be subject to 'normal open process'. He concluded (at 256) that they should, because of the 'serious and public interest' in the nature of the contract, because it is 'in the long run the public's money which is at stake and one can understand a real interest in knowing the remuneration received by those that read the news' and because '[the] parties have adopted a view about the right of others to know which changes with the seasons'. He went on:

> 'There may be some cases where the Court, in having to exercise a discretion as to whether to order suppression of some material in a particular case, might have regard to the fact that the proceeding in the Court had its genesis in an arbitral process in which confidentiality was an essential ingredient. Considering the way in which the parties have blown "hot and cold" from time to time no such concern arises in this case.'

The last passage is relevant to the issue on this appeal, although delivered in a context lacking the added impetus of CPR 62.10. In contrast, in *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 All ER (Comm) 253, [2003] 1 WLR 1041, the Privy Council mentioned Bermudan arbitration legislation which expressly empowers courts to hear proceedings under such legislation in private, and to restrict reporting or publication of the proceedings, and commented ([2003] 1 All ER (Comm) 253 at 259, [2003] 1 WLR 1041 at 1047) that this enabled 'the rights of privacy of the parties' to be protected, 'notwithstanding the court proceedings'. There is no such legislation in England, but CPR 62.10 represents a step in that direction.

[36] Under CPR 62.10, the Rules Committee considered that, in cases where permission to appeal is appropriate (e g because an award raises some point of general legal importance or is clearly wrong), the starting point was to treat the public interest in a public hearing as outweighing any wish on the parties' part for continuing privacy and confidentiality. In the case of other arbitration claims, the Committee saw the starting point as reversed. As required by art 6(1) of the convention (cf [27](iii), above) and as stressed in *R (on the application of Pelling) v Bow County Court* [2001] UKHRR 165, *Clibbery v Allan* [2002] 1 All ER 865 and *P v BW* [2003] 4 All ER 1074 in the family context, the matter remained under the court's control in any particular case.

[37] More fundamentally, the Rules Committee was in CPR 62.10 dealing in terms with a hearing. Whatever the starting point or actual position during a hearing, it is, although clearly relevant, not determinative of the correct approach to publication of the resulting judgment. The authorities, both domestic (cf *Scott v Scott* and *Clibbery v Allan*) and European (cf e g *B v UK*), underline the distinction between the considerations governing a hearing and the resulting judgment and order.

[38] The range of arbitration claims within the definition in CPR 62.10 is very wide. Adapting words of the President, there 'cannot properly be a blanket protection of non-publication in all cases' which fall initially to be heard in private under CPR 62.10. It may be possible to some extent to group cases arising out of the same type of circumstances. I find it difficult, as at present advised, to see why a judgment determining that there was no valid or

applicable arbitration agreement or (probably) that arbitrators issued an award without jurisdiction, or dismissing an application for a stay of current proceedings in favour of arbitration should be private. There are arbitrations about factual circumstances and issues which appear unlikely to involve any significant confidential information at all. The main motive to arbitrate may be different considerations, such as the expertise or informality of the arbitrators—many shipping and commodity arbitrations must fall into this category. In arbitration claims relating to such arbitrations, the starting point may easily give way to a public hearing. In every case, while it will be appropriate to start the hearing in private as contemplated by CPR 62.10, the court should be ready to hear representations from one or other party that the hearing should be continued in public, and should anyway if appropriate raise this possibility with the parties, as Lord Woolf MR stressed in *Ex p Kaim Todner*.

[39] Further, even though the hearing may have been in private, the court should, when preparing and giving judgment, bear in mind that any judgment should be given in public, where this can be done without disclosing significant confidential information. The public interest in ensuring appropriate standards of fairness in the conduct of arbitrations militates in favour of a public judgment in respect of judgments given on applications under s 68. The desirability of public scrutiny as a means by which confidence in the courts can be maintained and the administration of justice made transparent applies here as in other areas of court activity under the principles of *Scott v Scott* and art 6 of the convention. Arbitration is an important feature of international, commercial and financial life, and there is legitimate interest in its operation and practice. The desirability of a public judgment is particularly present in any case where a judgment involves points of law or practice which may offer future guidance to lawyers or practitioners. It is no surprise that there have been since the introduction of CPR 62.10 a number of reported judgments on arbitration claims where the starting point of the hearing was privacy: see eg *Hussman (Europe) Ltd v Pharaon (formerly t/a Al Ameen Development and Trade Establishment)* [2003] EWCA Civ 266, [2003] 1 All ER (Comm) 879, *Electrosteel Castings Ltd v Scan-Trans Shipping and Chartering Snd Bhd* [2002] EWHC 1993 (Comm), [2002] 2 All ER (Comm) 1064, *Agrimex Ltd v Tradigrain SA* [2003] EWHC 1656 (Comm), [2003] 2 Lloyd's Rep 537, *Lesotho Highlands Development Authority v Impregilo SpA* [2003] EWCA Civ 1159, [2004] 1 All ER (Comm) 481, *Nisshin Shipping Co Ltd v Cleaves & Co Ltd* [2003] EWHC 2602 (Comm), [2004] 1 Lloyd's Rep 38, *Equatorial Traders Ltd v Louis Dreyfus Trading Ltd* [2003] EWHC 2023 (Comm), [2002] 2 Lloyd's Rep 638 and *Guardcliffe Properties Ltd v City & St James* [2003] EWHC 215 (Ch), [2003] 2 EGLR 16. In each case, there appears to have been nothing about the subject matter that could justify a private judgment, even if the parties had wished it. Some of these decisions (eg the last two) also appear of slight legal or general interest.

[40] The factors militating in favour of publicity have to be weighed together with the desirability of preserving the confidentiality of the original arbitration and its subject matter. There is a spectrum. At one end is the arbitration itself, and at the other an order following a reasoned judgment under s 68. In between is the hearing under s 68. An order will normally give very limited information, disclosure of which has not been controversial before us. Even a s 68 hearing is likely to cover only limited aspects of the subject matter of the original arbitration, although the present s 68 hearing took as long

as five days. A reasoned judgment under s 68 will in likelihood disclose very much less about the subject matter of the arbitration than will have been covered during the s 68 hearing itself. Moreover, judges framing judgments are accustomed to concentrate on essentials, to avoid where possible unnecessary disclosure of sensitive material and in some cases to anonymise. There could sometimes be advantage in discussing the position in this regard in advance with counsel.

[41] When weighing the factors, a judge has to consider primarily the interests of the parties in the litigation before him or in other pending or imminent proceedings. That was the prime focus of attention of *Scott v Scott*, and, I would add, also of s 4(2) of the Contempt of Court Act 1981. The concerns or fears of other parties cannot be a dominant consideration. Nor can there be any serious risk of their being deterred from arbitrating in England, if the court weighs the relevant factors appropriately. If (in the absence of other good reason for publication) the court withholds publication where a party before it would suffer some real prejudice from publication or where the publication would disclose matters by the confidentiality of which one or both parties have set significant store, but publishes its judgments in other cases, businessmen can be confident that their privacy and confidentiality in arbitration will, where appropriate, be preserved. The limited but necessary interface between arbitration and the public court system means that more cannot be expected. There can be no question of withholding publication of reasoned judgments on a blanket basis out of a generalised (and in my view unfounded concern) that their publication would upset the confidence of the business community in English arbitration.

[42] In his carefully formulated judgment in this case, Cooke J covered many of these points, and acknowledged the distinction which exists between the hearing of an arbitration claim and the order and judgment following it. I differ from him perhaps only in emphasis on two aspects. First, the tenor of his judgment might, I think, be read as giving greater and more generalised weight to the starting point established by CPR 62.10 than I would. It is, I think, better to describe CPR 62.10 and indeed CPR 39.2 as establishing starting points, rather than as presumptions. If neither the parties nor the judge of his or her own motion raises any question about the appropriateness of a private hearing, where that is the starting position, then the hearing will remain private. But, once the question of publication is raised, the judge's task is to weigh all relevant circumstances; and, even where it is not raised by the parties, he or she may if appropriate raise it of his own motion.

[43] Second, although the judge said at one point that 'self-evidently' it did not follow that, because the hearing had been in private, the judgment should not be available for publication, I would lay greater stress on the importance and factors militating in favour of giving a public judgment on arbitration claims. A reasoned judgment following the hearing in private of an arbitration claim stands at a different point on the spectrum to the hearing itself, and so raises distinctly different considerations.

THE JUDGE'S DECISIONS

[44] I turn to the judge's decisions in the instant case. The judge was after a five-day hearing under s 68 very well-placed to assess the factual sensitivity of the situation, and the extent to which his judgment included truly confidential

subject matter by the confidentiality of which the parties had set store. His assessment was that its text covers 'sensitive matters of greatest confidentiality'. He said at [27]):

> 'It was repeatedly emphasised to me during the course of the hearing that the arbitration itself raised highly sensitive political issues so far as Moscow itself was concerned, and highly sensitive commercial issues so far as both the other parties were concerned, which were inevitably, in the circumstances which obtained, referred to in the judgment.'

[45] We have been given and have read in private a copy of his judgment under s 68. Having read its text, I see no reason at all to disagree with the judge's assessment. It is true that the judgment also discusses and applies a considerable volume of case law, in a way which, although not representing any great development of legal principle, would be likely to interest legal and arbitral practitioners as a clear and useful discussion of the relevant principles. Indeed, the judge concluded, in the light of such authority, that the approach of IIB and Bankers Trust to the arbitrator's approach to his decision-making role 'was essentially misconceived' and the award sufficiently reasoned. These conclusions were highlighted and explained (without reference to the underlying facts) in the Lawtel summary to which I shall come. The judge indicated that he might, perhaps, have been able to formulate his own judgment in less explicit factual terms, had he received notice, prior to its delivery, of any wish that it should be delivered in public. But no request for any form of publication was made until after the judgment had been supplied to the parties in draft and, hence, after Moscow knew that it had won. The judge was not at this or any point asked to and did not consider revising or summarising his judgment to produce a factually neutral formulation of such part of it as might be of general legal interest.

[46] The judge took into account the fact that IIB and Bankers Trust 'could provide little evidence of actual detriment should the judgment be published'. But I do not consider that a party inviting the court to protect evidently confidential information about a dispute must necessarily prove positive detriment, beyond the undermining of its expectation that the subject-matter would be confidential. Further, the judge was entitled (as he did) to balance the absence of any substantial evidence of actual detriment to IIB and Bankers Trust against Moscow's failure, in his view, to provide any 'good reason for requiring publication either, since it can freely state the end result of the arbitration and the end result of the litigation'. Mr Dunning submitted that Moscow should be entitled to a public judgment under s 68 in order to be able to demonstrate to its financiers and the financial world at large that the arbitration award in its favour had been upheld by a clear-cut and convincing judgment of the English court. But the award remains private, and the judgment under s 68 necessarily only deals with certain aspects of its subject matter and the arbitrator's approach in it. The picture would not be a full one, and the judge was entitled to conclude that Moscow had, objectively, no good reason for insisting on publication of the judgment.

[47] Before us, Mr Dunning submitted that it was relevant that it was Bankers Trust and IIB who had invoked the court's jurisdiction, and so opened the possibility of a public hearing and/or a public judgment. They had even

sought unsuccessfully to appeal Cooke J's judgment of 21 March 2003. Mr Dunning suggested that Bankers Trust and IIB had thereby breached UNCITRAL r 32.2, and he also relied on Lord Woolf MR's remarks in *R v Legal Aid Board, ex p Kaim Todner (a firm)* [1998] 3 All ER 541, [1999] QB 966 about the potential relevance attaching to the fact that it was the plaintiff there who was claiming anonymity. But I do not see these as significant factors in this case. In *Ex p Kaim Todner* the courts were the appellants' only means of recourse and the appellants were the only persons whose confidentiality was at stake. Here the parties agreed contractually on a confidential alternative to litigation. The 1996 Act and the CPR allow access to the court in the public interest, in order to support fundamental principles of fairness governing arbitration. It cannot be a breach of UNCITRAL rules to invoke the court's supervisory jurisdiction. It could serve as an inappropriate deterrent to such access, if the making of such an application were to dispose a court to order, at the instance of the other party, a public hearing or judgment, in circumstances when the sensitivity and confidentiality of the subject matter would otherwise point in an opposite direction. I would also note, that even if that would be relevant, which I am far from accepting, it has not been (and could not, I think, be) suggested that Bankers Trust's and IIB's application was hopeless to the point where it was abusive even to make it. Further, it is not the making of the application that has led to Moscow's wish for publication. It is Moscow's success in defeating the application.

[48] In the circumstances set out in [44]–[47], above I consider that the judge's conclusion that his judgment under s 68 should remain private was justified. This is so despite such difference in emphasis as I would adopt in formulating the principles which should govern a decision whether to proceed in public or in private (a) when hearing and (b) when giving judgment on an application under s 68. I do not consider that this difference would have affected or should now affect the decision which he reached that the judgment should remain private.

[49] The Lawtel summary raises different considerations. It offers a brief and factually neutral insight into the legal issues which the judge addressed and states his resulting decision. It does not disclose any sensitive or confidential information at all. Mr Bloch QC for Bankers Trust in these circumstances ultimately raised very little objection to its publication. The judge took the view that it could not be said to have entered the public domain, and that its more general release ought to be prohibited for reasons similar to those leading to the conclusion that his judgment under s 68 should remain private. I have difficulty in agreeing with him on the first point. We are told that Lawtel has some 15,000 subscribers, mostly no doubt English lawyers, practititioners or academics. Moscow has a not insignificant connection with the London financial market, and so do at least some of the sub-participants in Credit Agreement No 750, to whom Moscow wishes to send the summary. At present, there is no sensible means of preventing further publication by subscribers to Lawtel of the summary, or of knowing who may have seen or who may in future be shown the summary. The summary exists. It was created by Lawtel in good faith. It is in entirely neutral terms, and although its brevity reduces its worth in legal terms, it is not without some interest to lawyers and others interested in understanding the respective roles of an arbitrator and the court. I add that it has been exhibited in evidence to a fourth

witness statement by Jean Staudt Moore and included in the bundles before us (and presumably the judge) as an exhibit accordingly. Since there is no reason of arbitral sensitivity or confidentiality militating against its publication, I see no basis for any court order precluding its publication by Moscow, for any purpose. To that extent I would allow the appeal against Cooke J's judgment, and discharge and vary his order, so as to permit publication by Moscow of the Lawtel summary. Nothing I say affects any copyright or other right which Lawtel may have.

CONCLUSIONS

[50] I would therefore dismiss Moscow's appeal in relation to para 1 of the order made by Cooke J (publication of the judgment generally), but allow the appeal in respect of para 2 of the order so as to permit publication generally of the Lawtel summary.

CARNWATH LJ.

[51] I agree.

SIR ANDREW MORRITT V-C.

[52] The hearing of the application under s 68 of the Arbitration Act 1996 was, in accordance with CPR 62.10, held in private. The order thereon made by Cooke J on 21 March 2003 dismissing the application, whether or not so given, appears to have been treated as made in public for the purpose of CPR 5.4(2)(b) and is readily available. The issue with which we are concerned relates to the judge's judgment ([2003] EWHC 1377 (Comm), [2003] 1 WLR 2885), that is to say his reasons for making that order and the Lawtel summary of it.

[53] With regard to the Lawtel summary of the judge's judgment I agree with the reasoning and conclusion of Mance LJ for allowing the appeal from para 2 of the order of Cooke J made on 5 June 2003. The summary is inherently unobjectionable and, for all practicable purposes, in the public domain.

[54] The position with regard to the judge's judgment is not so clear. The fact that the hearing was held in private is no doubt a necessary precondition to the judgment being withheld from the public. But it is not a sufficient justification. It is not uncommon for all or part of a hearing to be held in private on one or more of the grounds recognised in *Scott v Scott* [1913] AC 417, [1911–13] All ER Rep 1 but for the judgment to be given in public. The necessary confidentiality may be achieved by judicial and judicious selection of what facts need to be recounted, the use of initials or pseudonyms to describe the parties or the relegation of the relevant information to a separate and confidential appendix to the judgment.

[55] That there is a distinction between the hearing and the judgment is recognised by the terms of art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998), quoted by Mance LJ in para [27] of his judgment. The apparently absolute requirement to pronounce the judgment publicly has been recognised by the European Court of Human Rights to be subject to some qualification to be assessed in the light of the special features of the proceedings in question: see *B v UK* (2002) 34 EHRR 529. But, as Judge Bratza recognised (at

545 (para O-17)), stricter standards have to be imposed in relation to the public pronouncement of the judgment than to the public hearing of the underlying proceedings. (See also *Re Trusts of X Charity* [2003] EWHC 1462 (Ch) at [11], [2003] 3 All ER 860 at [11], [2003] 1 WLR 2751.)

[56] In para [40] of his judgment Mance LJ has used the analogy of a spectrum. In relation to the strictness of the test for confidentiality it runs from the hearing at one end to the order as finally drawn up at the other. A greater need must be shown for imposing a requirement for confidentiality on the latter than on the former. There is also a spectrum in relation to the nature of the proceedings. Plainly not all the arbitration claims referred to in CPR 62.10(3)(b) need to be treated as confidential. And those that do will vary in the extent to which they should be so treated and the method by which to do so.

[57] I have added these comments by way of emphasis to, not difference from, the comprehensive judgment of Mance LJ. I too consider that the judge may not have fully appreciated the weight of the onus resting on those who seek to keep from the public the judge's reasons for the order he made. Nevertheless, for the reasons given in paras [45]–[48] of his judgment, I agree with Mance LJ that this court is not entitled to interfere with the conclusion of Cooke J, as expressed in para 1 of his order, that the full text of his judgment delivered on 21 March 2003 should not be published. In that respect I too would dismiss this appeal.

Appeal allowed in part.

Celia Fox Barrister.

South Bucks District Council and another v Porter

[2004] UKHL 33

HOUSE OF LORDS

LORD STEYN, LORD SCOTT OF FOSCOTE, LORD RODGER OF EARLSFERRY, LORD CARSWELL AND LORD BROWN OF EATON-UNDER-HEYWOOD

24 MAY, 1 JULY 2004

Town and country planning – Appeal to minister against refusal of permission for development – Notification of decision – Reasons for decision – Special circumstances for inappropriate development – Whether reasons for decision adequate – Whether prior unlawful development material.

The second defendant was a 62-year-old Romany gipsy who had bought land within the Green Belt in 1985 and had lived there ever since in a mobile home, in breach of planning control. Various enforcement notices in respect of her residential use of part of the land had been upheld, and in 1998 she had been refused retrospective planning permission for retention of her mobile home and various outbuildings. She made another unsuccessful application to the planning authority for planning permission. On her appeal against that refusal, the main issue before the Secretary of State's inspector was, it being accepted that the development applied for constituted inappropriate development in terms of the Green Belt, whether there were any very special circumstances as to why the development should nevertheless be permitted. The inspector found that there was no alternative council based gipsy site available and that there was unlikely to be one for some considerable time, that the second defendant suffered from serious ill-health and that displacing her from her home would make it difficult for her to continue with the medical treatment she was undergoing, and that the stress involved would probably make her condition worse. He therefore held that her status as a gipsy, the lack of an alternative site and her chronic ill-health constituted very special circumstances sufficient to override policies as to the Green Belt, and allowed the appeal subject to, inter alia, a condition making the planning permission personal to the second defendant. The authority's appeal against the inspector's decision failed, but that decision was overturned by the Court of Appeal, which held (i) that the inspector had not given adequate reasons for his decision; and (ii) that he had failed to have regard to the unlawfulness of the second defendant's occupation of her land in persistent breach of planning control as a material consideration in the case. The defendants appealed to the House of Lords, contending, inter alia, that the unlawful occupation of the site was not material.

Held – (1) The inspector had fully explained in the decision letter that the second defendant was a woman aged 62 in serious ill-health with a rooted fear of being put into permanent housing, with no alternative site to go to, whose displacement would imperil her continuing medical treatment and probably worsen her condition. He had thought that the second defendant should be

granted a limited personal planning permission, taking the view that her very special circumstances clearly outweighed the environmental harm involved. While not everyone would have reached the same decision, the inspector's reasoning had been clear and ample (see [1]–[4], [41], [42], below).

(2) The unlawfulness of development could militate against the retrospective grant of planning permission. Wherever an occupier sought to rely upon the very fact of his continuing use of land it had to be material to recognise the unlawfulness (if such it had been) of that use as a consideration operating to weaken his claim. In circumstances such as those in the instant case it would be impossible to say that the unlawfulness of the second defendant's prior occupation of the site was incapable of being a material consideration. However, none of the factors summarised by the inspector as very special circumstances in her case owed anything to the length of her residence, and accordingly, the unlawfulness of her prior occupation of the site had been of little if any materiality. The appeal would, therefore, be allowed (see [1]–[4], [52], [54]–[60], below).

Notes

For the duty to give reasons, and for planning permission for development already carried out, see, respectively, 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) paras 112, 113, and 46 *Halsbury's Laws* (4th edn reissue) para 458.

Cases referred to in opinions

Associtated Provincial Picture Houses Ltd v Wednesbury Corp [1947] 2 All ER 680, [1948] 1 KB 223, CA.

Bolton Metropolitan DC v Secretary of State for the Environment (1995) 71 P &CR 309, HL; *rvsg* (1994) 69 P & CR 324, CA.

Bradley (Edwin H) & Sons Ltd v Secretary of State for the Environment [1982] JPL 43.

Chapman v UK (2001) 10 BHRC 48, Ect HR.

Clarke Homes Ltd v Secretary of State for the Environment (1993) 66 P & CR 263, CA.

Doncaster Metropolitan BC v Secretary of State for Environment, Transport and the Regions [2002] EWHC 808 (Admin), [2002] JPL 1509.

Hope v Secretary of State for the Environment (1975) 31 P&CR 120.

Poyser and Mills' Arbitration, Re [1963] 1 All ER 612, [1964] 2 QB 467, [1963] 2 WLR 1309.

R v Leominster DC, ex p Pothecary (1997) 76 P&CR 346, CA.

R v Secretary of State for Trade and Industry, ex p Lonrho plc [1989] 2 All ER 609, [1989] 1 WLR 525, HL.

Save Britain's Heritage v Secretary of State for the Environment [1991] 2 All ER 10, [1991] 1 WLR 153, HL; *rvsg* (1990) 60 P & CR 539, CA.

Seddon Properties Ltd v Secretary of State for the Environment (1978) 42 P & CR 26.

South Bucks DC v Porter, Chichester DC v Searle, Wrexham County BC v Berry [2003] UKHL 26, [2003] 3 All ER 1, [2003] 2 AC 558, [2003] 2 WLR 1547; *affg* [2001] EWCA Civ 1549, [2002] 1 All ER 425, [2002] 1 WLR 1359.

South Somerset DC v Secretary of State for the Environment [1993] 1 PLR 80, CA.

Westminster City Council v Great Portland Estates plc [1984] 3 All ER 744, [1985] AC 661, [1984] 3 WLR 1035, HL.

Cases referred to in list of authorities

Ayres v Secretary of State for the Environment (1997) 74 P & CR 246.

Basildon DC v Secretary of State for the Environment, Transport and the Regions [2001] JPL 1184.
Chelmsford BC v First Secretary of State [2003] EWHC 2978 (Admin).
Edinburgh Council (City of) v Secretary of State for Scotland [1998] 1 All ER 174, [1997] 1 WLR 1447, HL.
Elliott v London Borough of Southwark [1976] 2 All ER 781, [1976] 1 WLR 499, CA.
Securities (MJT) Ltd v Secretary of State of for the Environment [1997] 3 PLR 43, CA.
Tesco Stores Ltd v Secretary of State for the Environment [1995] 2 All ER 636, [1995] 1 WLR 759, HL.

Appeal

Linda Porter appealed with permission of the Appeal Committee of the House of Lords given on 31 July 2003 from the decision of the Court of Appeal (Pill, Mance and Longmore LJJ) on 19 May 2003 ([2003] EWCA Civ 687, [2003] All ER (D) 250 (May)) allowing the appeal of South Bucks District Council from the decision of Judge Rich QC on 17 September 2002 dismissing the council's application under s 288 of the Town and Country Planning Act 1990 seeking to quash a decision of the Secretary of State for Transport, Local Government and the Regions given by letter dated 19 February 2002. By a duly appointed inspector the Secretary of State had allowed Mrs Porter's appeal against a decision of the council on 5 September 2000 to refuse planning permission for the retention of a residential mobile home at Willow Tree Farm, Love Lane, Iver, Bucks, for Mrs Porter's lifetime. The Secretary of State did not appear in the courts below but appeared in the House of Lords in support of Mrs Porter's case. The facts are set out in the opinion of Lord Brown of Eaton-under-Heywood.

Charles George QC and *Stephen Cottle* (instructed by *The Community Law Partnership*) for Mrs Porter.
Nathalie Lieven (instructed by the *Treasury Solicitor*) for the Secretary of State.
Timothy Straker QC and *Ian Albutt* (instructed by *Sharpe Pritchard* as agents for *Lynne Reardon*, Denham) for the council.

Their Lordships took time for consideration.

1 July 2004. The following judgments were delivered.

LORD STEYN.

[1] My Lords, I have read the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in complete agreement with it. I would also make the order which he proposes.

LORD SCOTT OF FOSCOTE.

[2] My Lords, I have had the advantage of reading a draft of the opinion of my noble and learned friend Lord Brown of Eaton-under-Heywood and am in full agreement with the reasons he has given for allowing this appeal.

LORD RODGER OF EARLSFERRY.

[3] My Lords, I have read the speech of my noble and learned friend Lord Brown of Eaton-under-Heywood. I am in complete agreement with it. I too would make the order which he proposes.

LORD CARSWELL.

[4] My Lords, I have had the advantage of reading in draft the opinion prepared by my noble and learned friend Lord Brown of Eaton-under-Heywood. I agree with his reasons and conclusion and I would allow the appeal and make the order which he proposes.

LORD BROWN OF EATON-UNDER-HEYWOOD.

INTRODUCTION

[5] My Lords, this is the fourth appeal before the House in recent years in which your Lordships have had to consider the adequacy of reasons given in decisions made under the Town and Country Planning legislation. The three previous decisions were *Westminster City Council v Great Portland Estates plc* [1984] 3 All ER 744, [1985] AC 661 concerning an aspect of the council's adopted district plan, *Save Britain's Heritage v Secretary of State for the Environment* [1991] 2 All ER 10, [1991] 1 WLR 153 concerning the Secretary of State's grant of planning permission on appeal from the local planning authority's refusal of permission, and *Bolton Metropolitan DC v Secretary of State for the Environment* (1995) 71 P &CR 309 concerning the Secretary of State's grant of planning permission on a called-in application. In each of those three cases the reasons challenge failed before the judge at first instance, succeeded before the Court of Appeal (*Save Britain's Heritage* case (1990) 60 P & CR 539, *Bolton Metropolitan DC* case (1994) 69 P & CR 324)), but failed again before your Lordships. In the present case too your Lordships are asked to overturn a decision of the Court of Appeal ([2003] EWCA Civ 687, [2004] JPL 207), in this case allowing a local planning authority's appeal from the judge's dismissal of a statutory challenge and quashing an inspector's grant of planning permission, principally on the ground that he gave inadequate reasons for his decision. A further ground of the Court of Appeal's decision was that the inspector failed to have regard to the unlawfulness of the appellant's occupation of the land.

[6] The second respondent, the Secretary of State for Transport, Local Government and the Regions (the Secretary of State), chose not to appear in either court below. Concerned, however, at the Court of Appeal's decision and regarding both issues as of general importance, he appears before your Lordships in support of the appellant's case.

THE APPEAL

[7] The appeal is brought against a decision of the Court of Appeal (Pill, Mance and Longmore LJJ) on 19 May 2003, allowing an appeal by South Bucks DC (the council) against the order of Judge Rich QC sitting in the Administrative Court on 17 September 2002 ([2002] EWHC 2136 (Admin), [2002] All ER (D) 341 (Oct)) dismissing the council's application under s 288 of the Town and Country Planning Act 1990 seeking to quash a decision of the Secretary of State given by his duly appointed inspector by letter dated 19 February 2002. The inspector had allowed an appeal by the appellant (Mrs Porter) against a decision of the council on 5 September 2000 refusing planning permission for the retention of a residential mobile home at Willow Tree Farm, Love Lane, Iver, Bucks (the site). The permission granted by the inspector was subject to conditions including a condition that it was personal to Mrs Porter.

HISTORY

[8] The appeal has something of a history. This is, indeed, the second time within just over a year that your Lordships have had to consider the circumstances of Mrs Porter's occupation of the site (see *South Bucks DC v Porter, Chichester DC v Searle, Wrexham County BC v Berry* [2003] UKHL 26, [2003] 3 All ER 1, [2003] 2 AC 558).

[9] Mrs Porter is a 62-year-old Romany gipsy who bought the site in 1985 and has ever since lived there with her husband in breach of planning control. The site lies within the South Bucks Green Belt, very close to its eastern boundary with the village of Iver and within the Colne Valley Park. As described in the inspector's decision letter:

> '[The] mobile home provid[es] a kitchen, living room, bedroom and bathroom. It has the appearance of a permanent dwelling with a pitched roof and chimney. It forms part of a cluster of buildings made up of stables, tack room and a barn; there is a yard area with some touring caravans on it and, to the west, is a field also owned by [Mrs Porter] and her husband.'

[10] The detailed planning history of Mrs Porter's occupation of the site is set out in the *South Bucks DC* case [2003] 3 All ER 1 at [7], [2003] 2 AC 558 at [7] per Lord Bingham of Cornhill. For present purposes it is sufficient to record, as the inspector did, two previous planning decisions of relevance. The first, in 1994, concerned Mrs Porter's appeal against six enforcement notices relating variously to her residential use of part of the site, the erection of some buildings and the construction of hardstanding. All the enforcement notices were upheld save for that directed to the hardstanding. The second decision was the dismissal of Mrs Porter's appeal in 1998 against the refusal of planning permission for the retention of her mobile home and associated outbuildings.

[11] It was following the 1998 refusal of planning permission that the council in December 1999 applied to the court for an injunction under s 187B of the 1990 Act requiring her to cease her residential use of the land, an application granted by Burton J on 27 January 2000 to take effect a year later. Burton J's order was made just two days after Mrs Porter's application for planning permission (the application refused by the council on 5 September 2000) which began the history of the present appeal. On 12 October 2001 the Court of Appeal (myself, Peter Gibson and Tuckey LJJ ([2001] EWCA Civ 1549, [2002] 1 All ER 425, [2002] 1 WLR 1359)) allowed Mrs Porter's appeal against Burton J's order—that being the decision unsuccessfully appealed by the council to your Lordships' House in the *South Bucks* case. The speeches in the *South Bucks* case were delivered on 22 May 2003, just three days after a differently-constituted Court of Appeal had allowed the council's appeal in the present proceedings.

THE INSPECTOR'S DECISION

[12] In determining the appeal the inspector (just as the council on the original application) was required (a) by s 70(2) of the 1990 Act to 'have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations', and (b) by s 54A of the 1990 Act, as inserted by s 26 of the Planning and Compensation Act 1991, to decide the matter 'in accordance with the plan unless material considerations indicate otherwise'.

[13] The statutory development plan consisted of the county structure plan and the council's local plan. Put shortly, both provide for a general presumption

against allowing inappropriate development in the Green Belt, reiterating national guidance in Planning Policy Guidance 2 (PPG 2) which states:

> '3.1 The general policies controlling development in the countryside apply with equal force in Green Belts but there is, in addition, a general presumption against inappropriate development within them. Such development should not be approved, except in very special circumstances ...
>
> 3.2 Inappropriate development is, by definition, harmful to the Green Belt. It is for the applicant to show why permission should be granted. Very special circumstances to justify inappropriate development will not exist unless the harm by reason of inappropriateness, and any other harm, is clearly outweighed by other considerations.'

[14] Having summarised those provisions the inspector continued:

> '*Main Issue*
>
> 6. For the appellant it was accepted that the appeal development constituted inappropriate development in Green Belt terms. The main issue in this case, therefore, is whether there are any very special circumstances why the appeal development should be permitted despite this.'

[15] The inspector then turned to state his reasons for allowing Mrs Porter's appeal subject to conditions. The most material reasons for present purposes were these:

> '7. The appellant has occupied the appeal site as a home for a considerable period of time purchasing the land in 1985. However, the council does not dispute the gipsy status of the appellant or her family either in the ethnic or statutory sense and I have, accordingly, given this some weight in my considerations ...
>
> 9. ... I consider that, bearing in mind the difficulties involved, the council has made reasonable provision for gipsy sites. Nevertheless, the appellant has only just recently made an application for one of these, there are no vacancies at present and waiting lists are long. On this basis I conclude that there is no alternative location available to the appellant at present and unlikely to be one for a considerable time.
>
> 10. It is also apparent from the evidence that the appellant suffers from serious ill-health. The written evidence from those treating her medically is that she suffers from chronic asthma, severe generalised arthritis and chronic urinary tract infection: she also has diabetes and high blood pressure. I accept also that displacing her and her husband from their home on the appeal site would make it difficult for her to continue with the medical treatment she is currently undergoing and the stress involved would probably make her condition worse.
>
> 11. [The inspector here summarised the two previous appeal decisions of 1994 and 1998 to which I have referred above.]
>
> 12. I have considered whether there has been any material change in circumstances since these decisions, particularly that in 1998, that would lead me to a contrary view and I have concluded that there has been in two major respects. First, on the basis of the evidence before me, no alternative council based sites are available at present whereas, at the time of the 1998 case there was some, albeit limited, spare capacity. Second, the evidence suggests that

the appellant's state of ill-health has worsened considerably since the last appeal.

13. These changes in the situation since 1998 are sufficient for me to take a contrary view to that of the previous inspector. The status of the appellant as a gipsy, the lack of an alternative site for her to go to in the area and her chronic ill-health constitute very special circumstances which are, in this case, sufficient to override national and statutory development [Green Belt] policies.

14. I have taken account of all the other matters raised but none of these has been of sufficient weight to override my conclusions on the main issue ... [B]ecause of the very special circumstances which I consider apply, I shall allow the appeal subject to conditions to which I now turn.'

[16] The inspector then imposed two conditions, the first making the planning permission personal to the appellant, the second concerning the landscaping of the site. The inspector expressly stated that a personal condition would be justified 'because of the very special circumstances which centre to some extent on the appellant herself'. The condition imposed was that—

'When the residential mobile home the subject of this appeal is no longer required by [Mrs Porter] for living purposes it shall be removed, together with all fixtures and fittings, from the site and all service connections stopped off.'

THE STATUTORY CHALLENGE

[17] The council challenged the inspector's grant of planning permission pursuant to s 288(1) of the 1990 Act, contending both that the decision was not within the powers of the Act (s 288(1)(b)(i)) and (5)(b)), and also that a relevant requirement had not been complied with—namely the requirement under r 19(1) of the Town and Country Planning Appeals (Determination by Inspectors) (Inquiries Procedure) (England) Rules 2000, SI 2000/1625 to 'notify his decision ... and his reasons for it, in writing'—(s 288(1)(b)(ii)), such failure having substantially prejudiced their interests (s 288(5)(b)). It is convenient to refer to these grounds of application respectively as 'the vires challenge' and 'the reasons challenge'.

[18] Before Judge Rich the reasons challenge was put on the narrow ground that the inspector 'fails to give any reasons as to why he has concluded in law that the issue of the status of [Mrs Porter] as a gipsy amounts to a very special circumstance', a challenge unsurprisingly rejected by the judge on the basis that it was not Mrs Porter's gipsy status *alone* which the inspector regarded as a very special circumstance but rather that status in combination with her chronic ill-health and the unavailability of an alternative site. Her status was clearly of some significance: as recorded in the judgment, the council accepted that Mrs Porter, as a gipsy, 'has a rooted fear of and objection to being put in permanent housing where she feared she would be unable to cope'.

[19] Although a number of grounds were advanced both to the judge and the Court of Appeal in support of the vires challenge the only one accepted by the Court of Appeal and still live before your Lordships is that already referred to: the inspector's alleged failure to have regard to the unlawfulness of Mrs Porter's occupation of her land as a material consideration in the case. In rejecting this ground of challenge the judge accepted (at [7]) that 'it must be material whether [a person's occupation of premises] was at all times in breach of planning control' because it 'goes to the weight to be attached to this long period of occupation',

but concluded that the inspector plainly had it in mind since he had expressly referred to the past planning history of the site and in any event recognised that the application was for *retrospective* planning permission.

THE COURT OF APPEAL'S DECISION

[20] The reasons challenge in the form advanced to the judge was not pursued before the Court of Appeal ([2004] JPL 207). Indeed we are told that no reasons challenge whatever was pursued in the grounds of appeal and that it was the Court of Appeal itself which took the point.

[21] In a reserved judgment helpfully rehearsing the substance of the inspector's decision, the planning policies in play, the rival submissions on the appeal, the basis of the European Court of Human Rights' decision in *Chapman v UK* (2001) 10 BHRC 48, and the planning considerations in the case, Pill LJ—who gave the only reasoned judgment of the court—stated his conclusions as follows:

> '[31] The very special circumstances found by the Inspector to be present are the personal hardships to Mrs Porter, if permission is refused. It is those which, in the language of para. 3.2 of PPG2, are held "clearly to outweigh" the terms of inappropriate development. The hardship is that she is a very unwell gypsy without another pitch to occupy. I do not seek to diminish the hardship involved but, if a planning authority is to decide that such hardship constitutes not merely special, but very special, circumstances so as to override planning policies, a much fuller analysis, in the planning context, is in my judgment required ... [I]f what the Inspector recognised to be established planning policies are to be overridden, on grounds of the personal hardship to the applicant, a more comprehensive approach to the issue is required, as recognised in [*Chapman*'s case] and [the *Westminster City Council* case], than was followed in this case. As Sullivan J. stated in [*Doncaster Metropolitan BC v Secretary of State for Environment, Transport and the Regions* [2002] EWHC 808 (Admin), [2002] JPL 1509], it is important that the need to establish very special circumstances is not watered down. Clear and cogent analysis is required.
>
> [32] Conspicuously absent from the decision letter is a consideration of the unlawfulness of the applicant's occupation, which has been in persistent breach of planning control. That of itself requires the decision to be quashed. I would venture to mention other considerations. One is that the applicant has not, until recently, applied for an alternative site though sites have, in the recent past, been available. This is not a case where, on the inspector's findings, a lack of reasonable provision in the District of gypsy sites, can be relied on to justify a grant, nor is it relied on; current hardship is the only factor present. The relevance to the application of the applicant's status as a gypsy, as compared with a similar application by a non-gypsy, is also material, especially when the development concerned has the "appearance of a permanent dwelling with pitched roof and chimney". The Council were entitled to have the case for hardship considered in a broader context and with fuller reasoning. Merely to set out a list of hardships was not a sufficient way to deal with what was essentially a land use question. Even the personal circumstances, in themselves, are insufficiently dealt with by that listing.'

[22] Later in his judgment (at [35]), in the course of rejecting other grounds of the appeal, Pill LJ reiterated his earlier view as to the inadequacy of the inspector's reasoning:

> 'If very special circumstances can be established simply by relying on a catalogue of hardship, the concept would be devalued and the planning system tend to be undermined. For reasons already given, a more comprehensive approach is required.'

[23] Before your Lordships both Mrs Porter and the Secretary of State take issue with those conclusions. They dispute both the suggested inadequacy of the inspector's reasons and that the inspector failed to consider 'the unlawfulness of [Mrs Porter's] occupation ... in persistent breach of planning control' which 'of itself requires the decision to be quashed'.

I—THE REASONS CHALLENGE

[24] As already noted, three previous decisions of this House have considered the reasons requirement in a planning context. In this, the fourth, it is I hope convenient to start by assembling a number of the more authoritative and useful dicta from the many cases in the field. I begin with Megaw J's oft-cited judgment in *Re Poyser and Mills' Arbitration* [1963] 1 All ER 612 at 616, [1964] 2 QB 467 at 478:

> '... Parliament having provided that reasons shall be given, in my view that must clearly be read as meaning that proper, adequate, reasons must be given; the reasons that are set out ... must be reasons which not only will be intelligible, but ... deal with the substantial points that have been raised ...'

[25] In the *Westminster City Council* case [1984] 3 All ER 744 at 752, [1985] AC 661 at 673, Lord Scarman set out the above passage and continued:

> '[Megaw J] added that there must be something "substantially wrong or inadequate" in the reasons given. In *Edwin H Bradley & Sons Ltd v Secretary of State for the Environment* [1982] JPL 43 Glidewell J added a rider to what Megaw J had said, namely that reasons can be briefly stated. I accept gladly the guidance given in these two cases.'

[26] In *South Somerset DC v Secretary of State for the Environment* [1993] 1 PLR 80 at 83, Hoffmann LJ, giving the only reasoned judgment in the Court of Appeal, quoted from Forbes J's judgment in *Seddon Properties Ltd v Secretary of State for the Environment* (1978) 42 P & CR 26 at 28: 'Because the letter is addressed to the parties who are well aware of all the issues involved and of the arguments deployed at the inquiry it is not necessary to rehearse every argument ...'—and continued:

> 'The inspector is not writing an examination paper ... One must look at what the inspector thought the important planning issues were and decide whether it appears from the way he dealt with them that he must have misunderstood a relevant policy ...'

[27] Turning next to Lord Bridge of Harwich's leading speech in the *Save Britain's Heritage* case [1991] 2 All ER 10, [1991] 1 WLR 153, one notes first his citation ([1991] 2 All ER 10 at 22, [1991] 1 WLR 153 at 165) of Phillips J's judgment in *Hope v Secretary of State for the Environment* (1975) 31 P&CR 120 at 123 as providing a 'very similar indication of the scope of the duty' to that given in

Re Poyser and Mills' Arbitration [1963] 1 All ER 612, [1964] 2 QB 467 and as being 'particularly well expressed': *a*

> 'It seems to me that the decision must be such that it enables the appellant to understand on what grounds the appeal has been decided and be in sufficient detail to enable him to know what conclusions the inspector has reached on the principal important controversial issues.' *b*

[28] Lord Bridge—

> 'emphatically reject[ed] the proposition that in planning decisions the "standard", "threshold" or "quality" of the reasons required to satisfy the statutory requirement ... depends upon the degree of importance which attaches to the matter falling to be decided.' (See [1991] 2 All ER 10 at 23, [1991] 1 WLR 153 at 166.) *c*

He held, in short, that a consistent standard of reasoning is required in all planning decisions, adding ([1991] 2 All ER 10 at 23, [1991] 1 WLR 153 at 167): '... the degree of particularity required will depend entirely on the nature of the issues falling for decision.' *d*

[29] Lord Bridge then turned to consider how the court should approach a reasons challenge advanced under s 245 of the Town and Country Planning Act 1971 (now s 288 of the 1990 Act):

> 'There are in truth not two separate questions: (1) were the reasons adequate? (2) If not, were the interests of the applicant substantially prejudiced thereby? The single indivisible question, in my opinion, which the court must ask itself whenever a planning decision is challenged on the ground of a failure to give reasons is whether the interests of the applicant have been substantially prejudiced by the deficiency of the reasons given.' (See [1991] 2 All ER 10 at 24, [1991] 1 WLR 153 at 167.) *e* *f*

The burden of proof, Lord Bridge pointed ([1991] 2 All ER 10 at 24, [1991] 1 WLR 153 at 168), lies on the applicant 'to satisfy the court that he has been substantially prejudiced by the failure to give reasons'.

[30] As to the circumstances in which a deficiency of reasons would cause substantial prejudice, Lord Bridge said: *g*

> '... I should expect that normally such prejudice will arise from one of three causes. First, there would be substantial prejudice to a developer whose application for permission has been refused or to an opponent of development when permission has been granted where the reasons for the decision are so inadequately or obscurely expressed as to raise a substantial doubt whether the decision was taken within the powers of the Act. Secondly, a developer whose application for permission is refused may be substantially prejudiced where the planning considerations on which the decision is based are not explained sufficiently clearly to enable him reasonably to assess the prospects of succeeding in an application for some alternative form of development. Thirdly, an opponent of development, whether the local planning authority or some unofficial body like [Save], may be substantially prejudiced by a decision to grant permission in which the planning considerations on which the decision is based, particularly if they relate to planning policy, are not explained sufficiently clearly to *h* *j*

indicate what, if any, impact they may have in relation to the decision of future applications.' (See [1991] 2 All ER 10 at 24, [1991] 1 WLR 153 at 167.)

[31] The first of those three possible causes of substantial prejudice—the developer's (or, as the case may be, his opponent's) uncertainty, through the inadequacy of the reasons, whether or not the decision is properly open to a vires challenge—Lord Bridge elaborated as follows:

> 'If it was necessary to the decision to resolve an issue of law and the reasons do not disclose how the issue was resolved, that will suffice. If the decision depended on a disputed issue of fact and the reasons do not show how that issue was decided, that may suffice. But in the absence of any such defined issue of law or fact left unresolved and when the decision was essentially an exercise of discretion, I think that it is for the applicant to satisfy the court that the lacuna in the stated reasons is such as to raise a substantial doubt as to whether the decision was based on relevant grounds and was otherwise free from any flaw in the decision-making process which would afford a ground for quashing the decision.' (See [1991] 2 All ER 10 at 24–25, [1991] 1 WLR 153 at 168.)

[32] Lord Bridge's final words on the subject ([1991] 2 All ER 10 at 27, [1991] 1 WLR 153 at 170–171), were that the requirement 'is a salutary safeguard to enable interested parties to know that the decision has been taken on relevant and rational grounds and that any applicable statutory criteria have been observed', adding:

> 'But I should be sorry to see excessive legalism turn this requirement into a hazard for decision-makers in which it is their skill in draftsmanship rather than the substance of their reasoning which is put to the test.'

[33] The *Save Britain's Heritage* case was followed by the decision of the Court of Appeal in *Clarke Homes Ltd v Secretary of State for the Environment* (1993) 66 P & CR 263 where, on another reasons challenge, Sir Thomas Bingham MR felicitously observed (at 271–272):

> 'I hope I am not over-simplifying unduly by suggesting that the central issue in this case is whether the decision of the Secretary of State leaves room for genuine as opposed to forensic doubt as to what he has decided and why. This is an issue to be resolved as the parties agree on a straightforward down-to-earth reading of his decision letter without excessive legalism or exegetical sophistication.'

[34] Passing finally to the *Bolton Metropolitan DC* case (1995) 71 P &CR 309, the last of the three earlier cases before the House concerned with the scope of the reasons requirement in the planning context, I need refer only to a short passage in Lord Lloyd of Berwick's speech (at 314–315):

> '[I]n so far as [the Court of Appeal in that case] was saying that a decision letter must refer to "each material consideration" I must respectfully disagree. This seems to go well beyond Phillips J.'s formulation in *Hope v Secretary of State for the Environment* ((1975) 31 P. & C.R. 120 at 123). What the Secretary of State must do is to state his reasons in sufficient detail to enable the reader to know what conclusion he has reached on the "principal important controversial issues". To require him to refer to every material consideration, however insignificant, and to deal with every argument,

however peripheral, would be to impose an unjustifiable burden ... Since there is no obligation to refer to every material consideration, but only the main issues in dispute, the scope for drawing any inference [the inference suggested being "that the decision-maker has not fully understood the materiality of the matter to the decision;] will necessarily be limited to the main issues, and then only, as Lord Keith pointed out [in *R v Secretary of State for Trade and Industry, ex p Lonrho plc* [1989] 2 All ER 609 at 620, [1989] 1 WLR 525 at 540], when "all other known facts and circumstances appear to point overwhelmingly" to a different decision.'

THE LAW SUMMARISED

[35] It may perhaps help at this point to attempt some broad summary of the authorities governing the proper approach to a reasons challenge in the planning context. Clearly what follows cannot be regarded as definitive or exhaustive nor, I fear, will it avoid all need for future citation of authority. It should, however, serve to focus the reader's attention on the main considerations to have in mind when contemplating a reasons challenge and if generally its tendency is to discourage such challenges I for one would count that a benefit.

[36] The reasons for a decision must be intelligible and they must be adequate. They must enable the reader to understand why the matter was decided as it was and what conclusions were reached on the 'principal important controversial issues', disclosing how any issue of law or fact was resolved. Reasons can be briefly stated, the degree of particularity required depending entirely on the nature of the issues falling for decision. The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law, for example by misunderstanding some relevant policy or some other important matter or by failing to reach a rational decision on relevant grounds. But such adverse inference will not readily be drawn. The reasons need refer only to the main issues in the dispute, not to every material consideration. They should enable disappointed developers to assess their prospects of obtaining some alternative development permission, or, as the case may be, their unsuccessful opponents to understand how the policy or approach underlying the grant of permission may impact upon future such applications. Decision letters must be read in a straightforward manner, recognising that they are addressed to parties well aware of the issues involved and the arguments advanced. A reasons challenge will only succeed if the party aggrieved can satisfy the court that he has genuinely been substantially prejudiced by the failure to provide an adequately reasoned decision.

THE LAW APPLIED

[37] Having identified Mrs Porter's hardship as consisting of being 'a very unwell gipsy without another pitch to occupy', the Court of Appeal decided that if this was to constitute 'very special circumstances' which 'clearly outweighed' this 'inappropriate development', then the inspector had to provide what was variously described as 'a much fuller analysis', 'a more comprehensive approach to the issue', 'clear and cogent analysis', 'the case for hardship considered in a broader context and with fuller reasoning' and 'a more comprehensive approach' (see [21], [22], above).

[38] Mr George QC for Mrs Porter and Miss Lieven for the Secretary of State submit that this was substantially to overstate the reasons requirement upon the

inspector. The main issue before him, really the only issue, was whether Mrs Porter's hardship constituted 'very special circumstances' for granting her the personal planning permission she sought. There was no issue of law in the case; no issue of fact (certainly none once the inspector had concluded that an alternative site was 'unlikely' to be available to Mrs Porter 'for a considerable time'); and no *Wednesbury* challenge, ie no suggestion that the inspector could not reasonably have reached his conclusion on the facts (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). What was required of him was above all a value judgment whether the hardship which would result from dispossessing Mrs Porter from her land was sufficiently extreme and unusual to justify the environmental harm occasioned by her remaining there as long as she needed.

[39] That personal circumstances are themselves capable of being a material consideration in a planning case is well established (see *Westminster City Council v Great Portland Estates plc* [1984] 3 All ER 744 at 750, [1985] AC 661 at 670 ('The human factor ... can ... and sometimes should, be given direct effect as an exceptional or special circumstance'—per Lord Scarman), and *South Bucks DC v Porter* [2003] 3 All ER 1 at [31], [2003] 2 AC 558 at [31] ('The Secretary of State was entitled to have regard to the personal circumstances of the gipsies'—per Lord Bingham of Cornhill)). Indeed Lord Clyde in the *South Bucks DC* case [2003] 3 All ER 1 at [75], [2003] 2 AC 558 at [75] described Mrs Porter's (and Mr Berry's) circumstances as 'quite special': in part because they owned the land in question and in part because, although the land lies within the Green Belt, 'it is not suggested that there is any urgent environmental problem'.

[40] Whilst, however, acknowledging that personal hardship can give rise to very special circumstances, Mr Straker QC for the council argues that more explanation was required than the inspector gave as to why he reached that particular judgment on the facts of this case. The Court of Appeal, he submits, was right to demand 'a much fuller analysis'.

[41] I cannot accept that submission. To my mind the inspector's reasoning was both clear and ample. Here was a woman of 62 in serious ill-health with a rooted fear of being put into permanent housing, with no alternative site to go to, whose displacement would imperil her continuing medical treatment and probably worsen her condition. All of this was fully explained in the decision letter (and, of course, described more fully still in the reports produced in evidence at the public inquiry). Should she be dispossessed from the site onto the roadside or should she be granted a limited personal planning permission? The inspector thought the latter, taking the view that Mrs Porter's 'very special circumstances' 'clearly outweighed' the environmental harm involved. Not everyone would have reached the same decision but there is no mystery as to what moved the inspector.

[42] Quite why the Court of Appeal thought that some fuller explanation was demanded is unclear. It may be that they focused so closely on the importance of maintaining the Green Belt that they inflated the reasons requirement in this particular case. But this would be to offend against the principle established in the *Save Britain's Heritage* case [1991] 2 All ER 10, [1991] 1 WLR 153 that the standard of reasoning required is not dependent upon the importance of the issues involved (see [28], above). In any event the test to be satisfied under the policy guidance in PPG2—whether there exist very special circumstances which clearly outweigh the environmental harm resulting—of itself provides the Green Belt with its necessary protection. Or it may be that the Court of Appeal relied more

heavily upon *Doncaster Metropolitan BC v Secretary of State for Environment, Transport and the Regions* [2002] EWHC 808 (Admin), [2002] JPL 1509 (referred to in para [31] of its decision—see [21], above) than was appropriate here. The decision letter in the *Doncaster Metropolitan BC* case [2002] JPL 1509 at [73], it should be noted, 'left [Sullivan J] in real doubt as to whether, in striking the Green Belt policy balance, the inspector applied the correct policy, as set out in PPG 2'. He added (at [74]):

> 'Even if it cannot be categorised as perverse, this decision is so perplexing on its face that it is of particular importance that the Inspector should be seen to have applied the correct test in Green Belt policy terms.'

The personal circumstances in question there, one notes, consisted of no more than the gipsy's concern that his two children's education should not be disrupted by a move. Small wonder that the inspector's grant of planning permission was regarded as perplexing to the point of perversity, and the decision letter as leaving real doubt whether the inspector had erred in law. In the present case, by contrast, no rationality challenge was ever advanced and nor was there any basis in the inspector's reasoning for inferring a material misdirection whether of fact, law, policy, or anything else. This inspector was, I may point out, highly experienced and qualified both as a planner and a surveyor.

II – THE VIRES CHALLENGE

[43] The Court of Appeal found that the inspector had failed to have regard to a material consideration, namely 'the unlawfulness of the applicant's occupation ... in persistent breach of planning control'.

[44] It is, of course, plain that Mrs Porter's occupation of the site has been unlawful from the outset. What arises for decision under this head of challenge is, first, whether that was a material consideration, and secondly, if so, whether the inspector failed to have regard to it. As already indicated, the judge at first instance thought it material (going to 'the weight to be attached to this long period of occupation'), but held that the inspector took account of it. Before your Lordships, however, both the Secretary of State and Mrs Porter question even the materiality of the unlawful occupation of the site. I shall therefore consider this question first.

THE MATERIALITY OF UNLAWFUL USE

[45] Miss Lieven for the Secretary of State points out that s 73A of the 1990 Act, as inserted by s 32 of and Sch 7 to the Planning and Compensation Act 1991, expressly provides for the grant of retrospective planning permission for development carried out without permission prior to the date of the application. Nothing in the 1990 Act (or the predecessor legislation making like provision) suggests that a retrospective application should be treated any differently from an application for future development. True it is that by s 57(1) of the 1990 Act 'planning permission is required for the carrying out of any development of land'. But a breach of planning control is not itself a criminal offence and indeed, although unlawful, cannot be enforced against after (in most cases) four years. Even within the four-year period, the Secretary of State's guidance on enforcement (contained in para 6 of PPG 18) provides:

> 'In assessing the need for enforcement action, LPAs [local planning authorities] should bear in mind that it is not an offence to carry out development without first obtaining any planning permission required for it

> ... Accordingly, where the LPA's assessment indicates it is likely that unconditional planning permission would be granted for development which has already taken place, the correct approach is to suggest to the person responsible for the development that he should at once submit a retrospective planning application (together with the appropriate application fee).'

[46] The mere fact, therefore, that the development was in breach of planning permission and the application for permission was made retrospectively cannot of itself, submits Miss Lieven, be a material consideration militating against the grant of permission. Rather the question for the LPA (and, on appeal, the Secretary of State) is simply whether the development as carried out is acceptable in planning terms.

[47] Miss Lieven's argument goes further. She points to the Court of Appeal's decision in *R v Leominster DC, ex p Pothecary* (1997) 76 P&CR 346 holding that the fact that a building has already been constructed before planning permission is sought can, in certain circumstances, lawfully be regarded as a consideration *in favour of* a permission which would not otherwise have been granted. Following the building's erection there, the LPA had chosen not to serve an enforcement notice but rather had invited an application for retrospective planning permission. Schiemann LJ, giving the leading judgment, said (at 357):

> 'The authority are only empowered by section 172(1) to issue an enforcement notice if it appears to them that it is expedient to issue the notice, having regard to the provisions of the development plan and to other material considerations. I therefore reject the submission that a planning authority is never entitled to consider the likelihood of enforcement action at the time when the application for retrospective planning permission for a building erected without planning permission is before them. It is not rare that buildings are put up without the appropriate planning permission. Sometimes there is no planning objection at all. Sometimes there is an insuperable objection. There are many situations between the two ends of what is a continuum. There are situations where the authority would not have given permission for the development if asked for permission for precisely that which has been built, but the development is not so objectionable that it is reasonable to require it to be pulled down. To require this would be a disproportionate sanction for the breach of the law concerned. That is why Parliament has imposed the requirement of expediency. What weight the authority gives to the existence of the building is a matter for the authority. There are policy reasons ... for not giving much weight to the existence of a building put up without the necessary planning permission, but these will not prevail in every case ... [T]here can ... be cases where the authority can say that, while it would not have granted the permission for that precise building there, it is not expedient to require it to be pulled down. Circumstances vary infinitely.'

[48] Robert Walker LJ (at 359) agreed with that approach:

> 'I agree that the planning authority was not merely entitled, but in practice bound, to take account of the existence of the [building] which had been constructed without planning permission having been granted. It was a

relevant fact that had to be taken into account. The weight to be attached to the fait accompli was another matter.' a

[49] I too agreed (at 361):

'Reluctant though inevitably one is to allow a developer to be advantaged by having broken the law, that advantage must by definition accrue in certain cases—notably whenever the local planning authority do not think it b "expedient" to enforce against a breach of planning control—and yet it will be a rash developer who builds in expectation of such benefit: he is at risk of being ordered to pull down his development and thus stands to lose everything.'

[50] The Court of Appeal's view on this issue appears to have rested c principally upon the European Court of Human Rights' judgment in *Chapman v UK* (2001) 10 BHRC 48 at 72 (para 102):

'Where a dwelling has been established without the planning permission which is needed under the national law, there is a conflict of interest between the right of the individual under art 8 of the convention to respect for his or d her home and the right of others in the community to environmental protection. When considering whether a requirement that the individual leave his or her home is proportionate to the legitimate aim pursued, it is highly relevant whether or not the home was established unlawfully. If the home was lawfully established, this factor would self-evidently be something e which would weigh against the legitimacy of requiring the individual to move. Conversely, if the establishment of a home in a particular place was unlawful, the position of the individual objecting to an order to move is less strong. The court will be slow to grant protection to those who, in conscious defiance of the prohibitions of the law, establish a home on an environmentally protected site. For the court to do otherwise would be to f encourage illegal action to the detriment of the protection of the environmental rights of other people in the community.'

[51] But reliance upon that authority, submits Miss Lieven, was inappropriate: *Chapman*'s case was concerned with an art 8 claim to respect for the individual's home and not, as here, with whether the individual has established very special g circumstances outweighing the public interest in preserving the Green Belt.

[52] In my judgment Miss Lieven's argument goes too far. I do not accept that the unlawfulness of development can never properly militate against the retrospective grant of planning permission (but only, as in *Ex p Pothecary* (1997) 76 P&CR 346, in its favour). Rather it seems to me that wherever the occupier h seeks to rely upon the very fact of his continuing use of land it must be material to recognise the unlawfulness (if such it was) of that use as a consideration operating to weaken his claim. Take this very case and assume that Mrs Porter had been relying on her long period of residence to assert that her removal from the site now would cause her particular hardship beyond that resulting from j removal after a substantially shorter period of occupation; hardship, for example, by breaking a number of local ties and friendships. Such a claim would seem to me to raise issues closely analogous to those arising on an art 8 claim and to require substantially the same approach to the lawfulness or otherwise of the period of occupation as the European Court of Human Rights adopted in *Chapman*'s case.

[53] A further point should be made. A development without planning permission is one thing: it is unlawful merely in the sense of being in breach of planning control. Where, however, as here, it has been persisted in for many years despite being enforced against, that is a rather different matter: it is then properly to be characterised as criminal.

[54] I would find it impossible to say in such circumstances that the unlawfulness of Mrs Porter's prior occupation of the site was incapable of being of material consideration in the case. Whether in fact it was material, however, would depend on the way her hardship claim was advanced. If she was seeking actually to pray in aid her long period of occupation, then to my mind Judge Rich was clearly right to say that the unlawfulness of that occupation would diminish the weight of the case. As it seems to me, however, that really was not the nature or strength of Mrs Porter's hardship claim. The inspector's only mention of her occupation of the site 'for a considerable period of time' appears in para 7 of his decision (see [15], above) and its consideration there was not as a possible point in Mrs Porter's favour but rather as a possible point against her on the basis that it might have cost her her status as a gipsy (although in the event no such contention was advanced).

[55] When the inspector came in para 13 of his decision to summarise the very special circumstances of Mrs Porter's case—her status as a gipsy, the lack of an alternative site in the area, and her chronic ill-health—none of these factors appears to have owed anything to the length of her residence on the site; her case would have been no different even had she occupied the site for an altogether shorter period.

[56] Certainly the inspector found her case for a retrospective planning permission strengthened since its last consideration in 1998 by two subsequent changes of circumstance which, obviously, would not have occurred but for the passage of time whilst she remained in unlawful occupation of her mobile home. That is not to say, however, that she was relying on her continuing unlawful occupation in itself as constituting part of her hardship claim.

[57] I therefore conclude that the unlawfulness of Mrs Porter's prior occupation of the site was of little if any materiality in the particular circumstances of this case.

WAS REGARD HAD TO THIS CONSIDERATION?

[58] Assuming, however, in the council's favour that the unlawfulness (including, on the facts here, the actual criminality) of Mrs Porter's occupation of the site was a material consideration to which regard was required to be had under s 70(2) of the 1990 Act (see [12], above) was the Court of Appeal correct in concluding that it was overlooked?

[59] This conclusion too I find unsustainable. The nature and extent of the unlawful use here was never in doubt. Even assuming it was a material consideration it did not give rise to a 'main issue in dispute'. Clearly, therefore, the inspector had no need to refer to it in terms (see Lord Lloyd of Berwick's speech in the *Bolton Metropolitan DC* case [1996] 1 All ER 184, [1995] 1 WLR 1176 cited at [34], above). How, then, can it properly be inferred that the inspector overlooked the point for what it was worth? He knew, indeed recorded, that the application was for the 'retention' of the mobile home and that 'retrospective planning permission is sought'. He knew, and indeed summarised, the planning history of the site including Mrs Porter's unsuccessful appeal against the council's enforcement action. That is no basis upon which to infer that the inspector

wrongly ignored this consideration. Of course Mrs Porter could gain no credit from her long period of unlawful occupation. But nor was her claim for a retrospective planning permission necessarily to be defeated by it. This element of the case required no detailed discussion in the decision letter. Again, therefore, I conclude that there was no substance in this ground of challenge. a

[60] It follows from all this that I would allow Mrs Porter's appeal and restore Judge Rich's order dismissing the council's statutory application with costs. The council should also pay Mrs Porter's costs both here and below. There will be no order as to the Secretary of State's costs. b

Appeal allowed.

Kate O'Hanlon Barrister.

Raja v van Hoogstraten

[2004] EWCA Civ 968

COURT OF APPEAL, CIVIL DIVISION

PILL, CHADWICK AND MAY LJJ

10–13 MAY, 21 JULY 2004

Contempt of court – Party in contempt – Right to be heard – Whether hearing of contemnor by court serving interests of justice.

Contempt of court – Committal – Breach of court order – Defendant wishing to be present at hearing but prevented from so being committed for breach of court order – Whether breach of right to a fair trial – Human Rights Act 1998, Sch 1, Pt I, art 6(3).

The claimant was killed after he had begun proceedings against the defendant alleging fraud and fraudulent conspiracy. The defendant was convicted of his manslaughter. The claimant's estate obtained a freezing order against the defendant, which also required him to disclose information about his assets. The defendant applied to set the freezing order aside, but his application, although received, was not heard and appeared to have been lost. He did not comply with the disclosure obligations. The claimant's estate applied for the defendant's committal for contempt. By an administrative error, the prison service did not produce the defendant for the hearing of that application. The judge found the defendant to be in contempt. The claimant's estate subsequently successfully applied to strike out the defendant's defence and counterclaim, to debar him from defending the action on liability, to enter judgment for the claimant's estate, and to issue a writ of sequestration. The defendant appealed against those orders. The Court of Appeal gave permission to appeal without prejudice to any contention that the defendant ought not to be heard in circumstances where he was making no attempt to purge his contempt, and heard argument on that issue. On the substance of the appeals the defendant contended, inter alia, (i) that, as someone charged with a criminal offence, it had been a breach of his rights to defend himself and examine witnesses under art 6(3)[a] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) for the judge to have found him to be in contempt without having given him an opportunity to be heard, when the judge knew that he wished to be heard but had been prevented from being present by matters beyond his control; and (ii) that the judge had been wrong to strike out his defence and counterclaim as, inter alia, he had not addressed a problem as to the extent of the disclosure required. By the time of the hearing of the appeals the defendant's manslaughter conviction had been quashed, and it was accepted that the claimant's estate could no longer rely on the second of the grounds on which the judge had made his order, being conduct on the defendant's part which had put the fairness of any trial in jeopardy, as evidenced by his criminal conviction.

a Article 6, so far as material, is set out at [40], below

Held – (1) There was no general rule that a court would not hear an application for his own benefit by a person in contempt unless and until he had first purged his contempt. The approach which the court should adopt was to ask whether, in the circumstances of an individual case, the interests of justice would be best served by hearing the party in contempt or by refusing to do so. Adopting that approach in the instant case, where the defendant had been found to be in contempt without having been heard, and without having had a proper opportunity to be heard, either on the question whether the obligations should have been imposed in the first place or on the question whether he had been in contumacious default in failing to comply with them, it was reasonably plain that the interests of justice were best served by hearing the defendant's appeals (see [81]–[83], [119], [120], below); *Arab Monetary Fund v Hashim* (21 March 1997, unreported) applied.

(2) It could not be right (save in wholly exceptional circumstances), nor consistent with art 6(3) of the convention, for a judge to proceed with an effective hearing of an application to commit, in circumstances where he knew that the alleged contemnor wished to be heard in person but was prevented from being present by matters over which he had no control, on the ground that, if the alleged contemnor were present, there would be nothing that he could say that would alter the judge's view that the contempt had been established. That approach could not be thought to be compatible with the proper discharge of the judicial function. Accordingly, in the instant case, the finding of contempt should not have been made (see [91], [94], [106], [107], [119], [120], below).

(3) The judge had not been entitled to strike out the defendant's defence and counterclaim on the basis of a continuing failure to comply with the disclosure obligations. Even if it had been clear what the defendant had to do in order to comply, there had been no risk that failure to make disclosure would put in jeopardy the fairness of a trial of the issues in the action. Accordingly, the appeals would be allowed (see [110]–[114], [119], [120], below); *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256 applied.

Notes

For the position of a party in contempt, see 9(1) *Halsbury's Laws* (4th edn reissue) para 511.

For what constitutes a fair trial, see 8(2) *Halsbury's Laws* (4th edn reissue) paras 137–145.

For the Human Rights Act 1998, Sch 1, Pt I, art 6, see 7 *Halsbury's Statutes* (4th edn) (2002 reissue) 554.

Cases referred to in judgments

Arab Monetary Fund v Hashim (21 March 1997, unreported), CA.

Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167, CA.

Astro Exito Navegacion SA v Southland Enterprise Co Ltd, The Messiniaki Tolmi [1981] 2 Lloyd's Rep 595, CA.

Douglas v Hello! Ltd [2003] EWHC 55 (Ch), [2003] 1 All ER 1087n.

Federal Bank of the Middle East Ltd v Hadkinson [2000] 2 All ER 395, [2000] 1 WLR 1695, CA.

Grupo Torras SA v Al-Sabah [1994] CA Transcript 159.

Hadkinson v Hadkinson [1952] 2 All ER 567, [1952] P 285, CA.

Hamilton v Al Fayed [2000] CA Transcript 2280, (2000) Independent, 21 December.

Logicrose Ltd v Southend United Football Club Ltd [1988] 1 WLR 1256.
Motorola Credit Corp v Uzan [2002] EWCA Civ 989, [2002] 2 All ER (Comm) 945.
Stovall Associates Inc v van Hoogstraten [1998] CA Transcript 689.
Terry v Hoyer (UK) Ltd [2001] EWCA Civ 678.
X Ltd v Morgan-Grampian (Publishers) Ltd [1990] 2 All ER 1, [1991] 1 AC 1, [1990] 2 WLR 1000, HL.

Appeals

Nicholas van Hoogstraten appealed with permission of the Court of Appeal (Chadwick LJ and Cresswell J) given on 13 June 2003 from certain orders made by Peter Smith J in proceedings brought by the late Mohammed Sabir Raja (the interest of his estate in the proceedings being represented by Asgar Sabir Raja (the claimant)) including (i) an order made on 11 October 2002 ([2002] All ER (D) 155 (Oct)) on a finding that Mr van Hoogstraten was in contempt of court in failing to comply with a freezing order made on 27 August 2002 by Rimer J; and (ii) an order made on 12 December 2002 ([2002] EWHC 2729 (Ch), [2002] All ER (D) 188 (Dec)) striking out Mr van Hoogstraten's defence and counterclaim, debarring him from defending the action on liability, directing that judgment be entered for the claimant, and giving leave to issue a writ of sequestration. The facts are set out in the judgment of Chadwick LJ.

Geoffrey Cox QC, Richard Davidson and *Laura Collignon* (instructed by *Janes Solicitors*) for Mr van Hoogstraten.
Peter Irvin and *Andrew Thomas* (instructed by *Healys*) for the claimant.
Alastair Walton (instructed by *Byrne & Partners*) for the sequestrators.

Cur adv vult

21 July 2004. The following judgments were delivered.

CHADWICK LJ (giving the first judgment at the invitation of Pill LJ).

[1] These are appeals from orders made by Peter Smith J in proceedings brought by the late Mr Mohammed Sabir Raja against Mr Nicholas van Hoogstraten and others. The orders under appeal include (i) an order made on 11 October 2002 ([2002] EWHC 2233 (Ch), [2002] All ER (D) 155 (Oct)) on a finding that Mr van Hoogstraten was in contempt of court in failing to comply with an earlier freezing order, made on 27 August 2002 by Rimer J, and (ii) an order made on 12 December 2002 ([2002] EWHC 2729 (Ch), [2002] All ER (D) 188 (Dec)) striking out Mr van Hoogstraten's defence and counterclaim in the action, debarring him from defending the action on liability, directing that judgment be entered for the claimant and giving leave to the claimant to issue a writ of sequestration. The writ of sequestration was issued on 13 December 2002. The relief sought on the appeals includes an order setting aside that writ and bringing the sequestration to an end.

[2] Each of those orders was made at a time when Mr van Hoogstraten was confined in HM Prison Belmarsh, following his conviction for the manslaughter of Mr Mohammed Raja. That conviction, on an indictment for murder and conspiracy to murder, was quashed in July 2003 ([2003] EWCA Crim 2280, [2003] All ER (D) 390 (Jul)). Mr van Hoogstraten was re-indicted. In December 2003 the re-indictment was itself quashed at the Central Criminal Court. The Court of Appeal (Criminal Division) held that it had no jurisdiction

to entertain an appeal from that decision. Mr van Hoogstraten does not, now, face further criminal proceedings in connection with the death of Mr Mohammed Raja.

EVENTS LEADING TO THE FREEZING ORDER MADE ON 27 AUGUST 2002

[3] These proceedings were commenced by writ issued by Mr Mohammed Raja as long ago as 1993. The claims arose out of dealings between Mr Raja and Mr van Hoogstraten in the period from July 1988, or thereabouts, to June 1993. Put shortly, it was said on behalf of Mr Raja that Mr van Hoogstraten, or companies under his control, had made loans to enable Mr Raja to purchase properties for investment on terms that the loans would be secured by the deposit of land certificates. In order that the security should be more readily enforceable—in case, for example, Mr Raja were to die—blank land registry transfers were provided. Mr Raja's complaint, as originally pleaded, was that, without authority, Mr van Hoogstraten had caused certain of the properties to be transferred into his name, or into the names of associates or of companies which he controlled. The claim against Mr van Hoogstraten, at that stage, was for breach of contract.

[4] For some years little progress appears to have been made in those proceedings. On 2 April 1999, Mr Raja obtained permission to amend his particulars of claim so as to allege fraud and fraudulent conspiracy against Mr van Hoogstraten and three named companies. That amended plea provided a basis for allegations of constructive trusteeship, and upon which to seek accounts, restitutionary relief and tracing remedies.

[5] Mr Raja was murdered on 2 July 1999. By an order made on 8 November 1999 his eldest son, Mr Asgar Sabir Raja, was appointed to represent the interests of his estate in these proceedings. Hereafter it will be convenient to refer to Mr Asgar Raja as the claimant.

[6] In September 2001 Mr van Hoogstraten and two others were charged with murder and conspiracy to murder. The criminal trial on that indictment commenced in April 2002. It was part of the Crown's case against Mr van Hoogstraten that he had conspired in, or arranged, the murder of Mr Mohammed Raja in order to stifle the civil proceedings; and, specifically, to avoid the allegations of fraud, introduced in April 1999, from being tried.

[7] On 4 July 2002, following a case management conference some two weeks earlier, Peter Smith J gave extensive case management directions with a view to bringing these proceedings to a trial in the early months of 2003. Those directions included permission to reamend the particulars of claim and an order that Mr van Hoogstraten file and serve a reamended defence and counterclaim by 30 August 2002.

[8] On 19 and 22 July 2002 the jury brought in their verdicts in the criminal trial. Mr van Hoogstraten's two co-accused were convicted of murder. Mr van Hoogstraten was acquitted of murder and conspiracy to murder, but was convicted of the manslaughter of Mr Mohammed Raja.

[9] By application notice dated 8 August 2002 the claimant sought an order that Mr van Hoogstraten's defence and counterclaim be struck out pursuant to CPR 3.4(2)(b) on the grounds that his conduct was such that to allow him to continue to defend the action would amount to an abuse of process; alternatively, under the inherent jurisdiction of the court on the grounds that he had been guilty of conduct which put the fairness of any trial in jeopardy or which was such as to render further proceedings unsatisfactory and prevent the court from doing

justice. The basis of that application appears from a proposed further reamendment to the particulars of claim, for which permission was sought by the same application notice:

> '1A Mr Raja was murdered on 2 July 1999 by two accomplices of the first defendant. Those accomplices acted on the first defendant's instructions for the purpose and/or with the intention of either killing Mr Raja or at the very least causing him very serious harm and/or intimidating him through a threat of serious violence. The aim and/or intent was to prevent or discourage him from giving evidence in this action and/or continuing this action.
>
> 1B The claimant will refer to and rely upon the conviction at the Central Criminal Court on 19 July 2002 of the first defendant's two accomplices of the murder of Mr Raja and of the first defendant himself on 22 July 2002 of the manslaughter of Mr Raja.
>
> 1C The remainder of this pleading is without prejudice to the claimant's contention that by reason of the above the first defendant is guilty of abuse of process and/or perverting the course of justice by: (a) seeking to prevent or discourage Mr Raja pursuing this claim and/or (b) causing the death of Mr Raja and depriving the claimant of the opportunity of [sic] properly prepare for and present the claim at trial (c) putting the fairness of the trial in jeopardy by preventing or discouraging Mr Raja giving evidence and/or (d) seeking to obstruct the just disposal of the proceedings and/or (e) considerably increasing the cost of pursuing complex litigation without the benefit of Mr Raja's [sic] and/or placing a disproportionate and prejudicial financial burden on the claimant's estate (f) in all the circumstances rendering further conduct of the defence unsatisfactory and/or (g) in all circumstances [sic] seeking to prevent the court doing justice so that under the inherent [jurisdiction] of the court and/or as a matter of public policy and/or in accordance with CPR 3.4(2)(b), the first defendant's defence and counterclaim should be struck out and judgment on liability and for an assessment of damages and/or all necessary accounts inquiries [sic] should be given against the first defendant and/or the first defendant should be disallowed in any event from taking any further part in the proceedings.'

The application to strike out was to be heard by Peter Smith J in November 2002.

[10] In the meantime, the claimant applied for an order freezing Mr van Hoogstraten's assets, whether within the jurisdiction or in a number of jurisdictions overseas. That application was supported by a lengthy affidavit sworn on 22 August 2002 by Mr James Lightfoot, a solicitor having conduct of the proceedings on behalf of the claimant. The affidavit described the charges against Mr van Hoogstraten in the criminal proceedings and the outcome of those proceedings. It referred to the application to strike out; asserting that to strike out the defence and counterclaim was the only appropriate response to Mr van Hoogstraten's conduct 'in ordering two men to commit an unlawful act against Mr Raja in an effort to discourage, dissuade or prevent him from pursuing the proceedings'. The need for a freezing order was said to rest on three main grounds (summarised in para 57): (i) Mr van Hoogstraten's 'apparent intention to dissipate assets and place them beyond the reach of his potential creditors', (ii) the way in which Mr van Hoogstraten 'structures his affairs so as to make recovery

of any final award extremely difficult and/or give rise to a clear risk that recovery will be frustrated', and (iii) the difficulty of identifying assets against which recovery could be pursued and 'concerns about the first defendant's ability to meet any judgment'. The flavour of the allegations made in the affidavit can be seen from the last three paragraphs:

> '319. Furthermore because of the manner in which Mr van Hoogstraten structures his affairs, and in particular the use of aliases and the apparent admission that he controls a number of limited companies incorporated in foreign jurisdictions, the claimants [sic] believe the defendant has a clear and unambiguous ability to transfer large sums of money and/or those assets that can be identified around the world and/or hide assets behind companies or in countries where they are unlikely to be found.
>
> 320. Added to these concerns are the fact that Mr van Hoogstraten is clearly someone who cannot be trusted. He has been accused of dishonesty within the action i e he has been accused of conspiracy and/or fraud. He has been accused of fraud in at least one other action [*Stovall Associates Inc v Van Hoogstraten* [1998] CA Transcript 689]. He is known to have lied concerning his relationship with Mr Raja and in particular his responsibility for Mr Raja's death. He has previous convictions for dishonesty outside of the allegations made in this action. He has had his assets sequestrated due to unpaid tax, has been held in contempt of court twice and almost jailed for breaching an earlier Mareva. A number of his companies appear to have been involved in past incidents of debt default.
>
> 321. In all the circumstances the claimants submit that it is more than reasonable to grant a freezing order over all known assets pending a return date and a proper assessment of Mr van Hoogstraten's financial position. Thereafter the claimants submit that the freezing order should be imposed over sufficient assets to meet a potential judgment of £5m.'

[11] The application for a freezing order was made without notice. It is, of course, not unusual to apply for such an order without giving notice to the party against whom it is sought. The justification for that course is that, if given notice of the application, the party will take steps to frustrate the order before it is made. But, as it seems to me, some thought might have been given as to whether that was an appropriate course in the present case and in the circumstances as they were in August 2002. Mr van Hoogstraten was reputed to be a very wealthy man, or (at least) a man in control of great wealth—see para 52 of the affidavit where it is said that 'estimates of his wealth vary wildly from £500m to £40m'. He was said to own, or control, substantial properties in the United Kingdom (many of which were in the Brighton and Hove area). He was in prison and likely to remain there for months (until his appeal against conviction was heard) if not for years (if his appeal failed). He had been defending the civil proceedings for some nine years and had been facing charges of murder and conspiracy to murder since September 2001. He had been convicted of manslaughter more than a month before the application for a freezing order was made. For my part I doubt whether Mr van Hoogstraten would challenge the description of himself as a person with—

> 'a clear and unambiguous ability to transfer large sums of money and/or those assets that can be identified around the world and/or hide

> assets behind companies or in countries where they are unlikely to be found.'

I suspect that he would regard the ability to transfer and hide assets as a necessary and valuable attribute in the world in which he does business. But, be that as it may, if he is indeed such a person as Mr Lightfoot described, I would find it remarkable if he had not already (long before the third week in August 2002) put those assets which he wished to protect beyond the reach of creditors. He had had ample opportunity to do so, if that were his intention. I find it difficult to think that Mr van Hoogstraten would have been prompted to take steps which he had not already taken in relation to assets under his control by the threat of a freezing order in proceedings to recover an amount of no more than £5m. It seems that counsel for the claimant took much the same view when he told Rimer J, at the hearing of the application, that it might be said that the order was not really going to make any difference: 'Mr van Hoogstraten's already done just about everything he can do to make sure that people do not get their hands on his assets ...'

THE FREEZING ORDER MADE ON 27 AUGUST 2002

[12] The application for a freezing order came before Rimer J on 27 August 2002. He made an order restraining Mr van Hoogstraten, until the return date (10 September 2002) or further order in the meantime, from removing from England and Wales any of his assets which were in England and Wales up to the value of £5m 'or in any way disposing, dealing with or diminishing the value of his assets whether within or outside England and Wales up to the same value'. That restraint is imposed by para 5 of the order. Paragraph 6 is in these terms:

> 'Paragraph 5 applies to all the respondent's assets whether or not they are in his own name and whether they are solely or jointly owned. For the purpose of this order the respondent's assets include any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own. The respondent is to be regarded as having such power if a third party holds or controls the asset in accordance with his direct or indirect instructions.'

[13] Paragraph 7 of the order of 27 August 2002 identified specific assets which were to be included in the restraint imposed by paras 5 and 6. Those were, first, the properties listed in Sch E to the order; and second, the properties and assets 'of those businesses and enterprises listed in Sch F'. Schedule E listed a total of 60 properties, of which 47 were identified by the Land Registry title number. Twenty-five of those properties were registered in the name of Tombstone Ltd (Tombstone) and were included in the Schedule on the basis that they were properties in which Mr van Hoogstraten was believed to have a beneficial interest. Schedule F contained a list of 18 companies or other businesses (including Tombstone) which were said to be 'businesses and enterprises owned or controlled by Mr van Hoogstraten or in which he has a beneficial interest'.

[14] Paragraphs 5, 6 and 7 are in that section of the order headed 'Freezing Injunction'. A later section, headed 'Provision of Information' contains paras 9 and 10:

'9.(a) Unless para 9(b) applies, the respondent must within one week of service of this order and to the best of his ability inform the applicant's solicitors of all his assets worldwide exceeding £10,000 in value whether in his own name or not and whether solely or jointly owned, giving the value, location and details of all such assets.

(b) If the provision of any of this information is likely to incriminate the respondent, he may be entitled to refuse to provide it, but is recommended to take legal advice before refusing to provide the information. Wrongful refusal to provide the information is contempt of court and may render the respondent liable to be imprisoned, fined or have his assets seized.

10. Within 14 days after being served with this order, the respondent must swear and serve on the applicant's solicitors an affidavit setting out the above information.'

[15] Paragraphs 6 and 9 of the order were in the standard form of freezing injunction annexed to the practice direction which supplements CPR Pt 25—see the form now at 25 PD.13 in *Civil Procedure*, which was issued in July 2002. Paragraph 6 may be seen as a response to the decision of this court in *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 2 All ER 395, [2000] 1 WLR 1695—see, in particular, the observation of Mummery LJ ([2000] 2 All ER 395 at 409, [2000] 1 WLR 1695 at 1709) that 'in everyday usage the expression "his assets" refers to assets belonging to that person, not to assets belonging to another person'. One point taken on behalf of Mr van Hoogstraten on these appeals has been that an order in that form lacks the clarity which is essential if non-compliance is to be the subject of contempt proceedings. It is said that it is unclear whether the extended meaning given to the expression 'the respondent's assets' in para 6—in the context of the freezing injunction imposed by para 5—is imported into the obligation to inform the applicant's solicitors 'of all his assets' which is imposed by para 9. That is a question to which I shall need to return later in this judgment.

[16] CPR 23.9(2) requires that, where a court has made an order disposing of an application which it permitted to be made without service of a copy of the application notice, a copy of the application notice and any evidence in support must, unless the court otherwise orders, be served on any person against whom the order was made. That requirement is reinforced by the provisions in Sch 1 to the CPR which relate to the enforcement of judgments and orders (formerly contained in RSC Ord 45). RSC Ord 45, r 5 provides for the enforcement of orders to do or abstain from doing an act by sequestration or committal; but Ord 45, r 7 provides that (subject to paras (6) and (7) of that rule) an order shall not be enforced under r 5 unless a copy of the order has been served personally on the person required to do or abstain from doing the act in question and (in the case of an order requiring a person to do an act) so served before the expiration of the time within which he was required to do the act. Paragraph (6) is not in point in the present case. Paragraph (7) enables the court to dispense with service of a copy of an order under r 7 if it thinks it just to do so.

[17] The order of 27 August 2002 contains no provision dispensing with service of copies of the application notice and evidence in support or with personal service of a copy of the order. Nor does it contain an order, under CPR 6.8, for service of a copy of the order by some method other than personal

service. Indeed, it is difficult to see how it could have done: an application for an order permitting service by an alternative method must be supported by evidence (CPR 6.8(2)). And such an order must specify the method of service and the date when the document will be deemed to be served (CPR 6.8(3)). Nevertheless, the question of service on Mr van Hoogstraten was addressed at the hearing on 27 August 2002. The draft order had contained, at para 3 of Sch B ('Undertakings given to the Court by the Applicant') the usual undertaking by the claimant substantially in the terms set out in para (5) of Sch B in the model form at 25 PD. 13. Paragraph 3 of Sch B to the order as made was in these terms:

> 'The applicant will serve this order on the respondent (*by leaving the same with the governor of HM Prison Belmarsh for onward delivery to the respondent*) as soon as practicable together with: (i) copies of the affidavits and exhibits containing the evidence relied upon by the applicant, and any other documents provided to the court on the making of the application; (iii) [sic] an application notice for the continuation of the order.' (My emphasis.)

The words which I have emphasised do not, of course, appear in the model form. They were added following discussion between counsel for the claimant and the judge at the hearing on 27 August 2002. It is, I think, clear from the transcript that the judge did not intend to make an order for substituted service.

SERVICE OF THE ORDER OF 27 AUGUST 2002

[18] On 29 August 2002 a representative of the claimant's solicitors delivered copies of the order of 27 August 2002 and the supporting documentation to a prison officer at HM Prison Belmarsh. The documents were delivered with a covering letter of the same date, receipt of which was acknowledged by the officer's signature on a copy retained by the solicitor. The solicitors' representative was assured by the deputy governor (Mr Watt) that the documents would be given to Mr van Hoogstraten that afternoon. In those circumstances Mr Lightfoot felt able to say, in an affidavit (his fourth) sworn on 1 October 2002, that 'Substituted service was therefore effected on 29 August 2002'.

[19] Mr van Hoogstraten was required to comply with paras 9(a) and 10 of the order of 27 August 2002 within 7 and 14 days (respectively) of service upon him. If the order is read with the relevant procedural rules 'service', in that context, means personal service. Not only does the order itself contain no provision for substituted service; it specifies no 'date when the document will be deemed to be served': see CPR 6.8(3). Mr Lightfoot's fourth affidavit of 1 October 2002 suggests that the claimant's solicitors were aware, by 4 September 2002, that there were grounds for thinking that, as at that date, the Prison Service had not passed on to Mr van Hoogstraten the documents which had been delivered on 29 August 2002. Paragraph 12 of that affidavit is in these terms:

> 'On 4 September I received a call from Sandra of the governor's office at HM Prison Belmarsh querying what the governor's office were to do with the order. I advised her that it was to be served on Mr van Hoogstraten and advised her that Mr Watt had told my colleague Mr Pabla that this would be done on 29 August. She advised me that she

would make sure that the order and the documents had been passed on to Mr Hoogstraten.' a

The telephone conversation referred to in that paragraph was followed up by a letter dated 5 (or 6) September 2002 from Mr Lightfoot to the governor. After referring to the delivery of documents to the prison on 29 August 2002 and to the telephone conversation on 4 September 2002, he wrote:

b

'We would be extremely grateful if you would contact us by return to confirm:

1. The documents were received and
2. That they were passed to Mr Van Hoogstraten.
3. The date and time of when they were passed to Mr Van Hoogstraten. c

The Freezing Order requires Mr Van Hoogstraten to provide information as to the whereabouts of his assets. That information was due to be provided within 7 days of service of the Order.

Furthermore Mr Van Hoogstraten is obliged under the Order to swear and file an Affidavit confirming his financial position. That Affidavit has to be sworn and filed at the Court within 14 days of service of the Order. d

To date he has done neither.

We are concerned that the reason that Mr Van Hoogstraten has not complied with the Order is because he may not have seen it. It is therefore imperative that we clarify when, or if, he has seen the freezing order and the supportive documentation.' e

There is nothing in the affidavit of 1 October 2002—or elsewhere in the evidence—which suggests that the information sought in that letter was ever provided by the governor or by the Prison Service.

[20] Nevertheless, despite the difficulties which the claimant's solicitors were experiencing in proving that the order of 27 August 2002 had been served on Mr van Hoogstraten, it is clear that he did, in fact, receive a copy on or about 29 August 2002. That appears from an affidavit sworn by Mr van Hoogstraten some two-and-a-half months later, on 15 November 2002. At para 1 of that affidavit he deposed: f

'Upon receipt of the freezing order of 27 August I consulted with my solicitor Mr David Englehart who was already pre-booked to see me on 30 August as I was unable to contact my solicitor Mr Marios Minaides who was on record in the action. Prior to his meeting with me, Mr Englehart had discussed the freezing order and taking instructions in respect thereof with Mr Minaides ...' g h

For completeness I should mention that the claimant's solicitors had sent a copy of the order—with copies of the supporting documentation—to Mr Minaides's firm, Minaides Robson, under cover of a letter dated 30 August 2002.

j

THE RENEWAL OF THE FREEZING ORDER ON 10 SEPTEMBER 2002

[21] The order of 27 August 2002 had directed a further hearing on 10 September 2002 (the return date). On 28 August 2002 the claimant issued an application notice seeking the continuation of that order. The application was supported by a further affidavit of Mr Lightfoot (his third) sworn on the same day in which, as required by an undertaking given in the order of 27

August 2002, he set out the substance of what had taken place before Rimer J when that order had been made. Paragraph 8 of that affidavit recorded Mr Lightfoot's understanding of the directions as to service of the order:

> 'The final variation to the draft order was an order for substituted service of the order on the governor of HM Prison Belmarsh rather than service on the respondent personally. It was explained to the court that access to a category A prisoner by the claimant's solicitors would require special clearance through the governor's office and this was likely to take some time. This was likely to delay service of the order. Furthermore the respondent could simply refuse a visit by the claimant's solicitors and refuse to accept service. It was submitted that substituted service via the governor's office would be effective, the documentation would be passed on to the respondent and he would become fully aware of the order. This was likely to take far less time and be less uncertain than arranging for personal service by the claimant's solicitors or their agents. Rimer J accepted this submission and agreed an order for substituted service.'

With the benefit of the transcript of the proceedings before Rimer J it can be seen that the claimant, through counsel, had asked for an order for substituted service. It can also be seen, from the transcript as well as from the order itself, that the judge did not make such an order.

[22] The application notice and Mr Lightfoot's second affidavit were amongst the documents delivered to HM Prison Belmarsh, on 29 August 2002. Whether or not the application notice was served on Mr van Hoogstraten on that or the subsequent day, it is clear from his later affidavit of 15 November 2002, that he came to know of the return date of 10 September 2002. His response was to file a notice of change of solicitor, dated 3 September 2002, removing Minaides Robson from the record and stating his intention to act in person. He explained his reasons for that step in the affidavit of 15 November 2002:

> 'Mr Englehart advised me [at the meeting on 30 August 2002] that at such short notice Mr Minaides could not possibly deal with the matter, more especially so due to the fact that he was on holiday abroad from 3 to 9 September inclusive ... As I could see that there was a return date of 10 September I decided to dismiss Mr Minaides as my solicitor and represent myself in what I regarded and still regard as a simple matter—that of the freezing order ... I did not, at that stage, consider or appreciate that my dismissal of Mr Minaides would also extend to the main action which is considerably more complicated.'

[23] Between 2 and 6 September 2002 there was correspondence between the claimant's solicitors, Mr Minaides and an Italian lawyer, Giovanni Di Stefano, who (it seems) was then expecting to be instructed by Mr van Hoogstraten in these proceedings. The effect of that correspondence, and a telephone call, was that the claimant's solicitors agreed to ask the judge, at the hearing on 10 September 2002, to postpone the return date in the freezing order of 27 August for two weeks, to continue the order in the meantime, and to extend time for compliance with para 9(a) of the order to 17 September 2002 and for compliance with para 10 to 24 September 2002.

[24] An order in those terms was made by Patten J at a short hearing on 10 September 2002. It is clear that the judge must have been satisfied from

the evidence before him—which included Mr Lightfoot's third affidavit—that Mr van Hoogstraten had been served with the order of 27 August 2002. That appears from the fact that, in the order of 10 September 2002, the dates for compliance with paras 9(a) and 10 of the earlier order were fixed (17 and 24 September 2002 respectively); they were no longer to be ascertained by reference to service. The order of 10 September 2002 substituted a revised Sch E for the Schedule to the earlier order, which had the effect of reducing the properties listed to the 47 which could be identified by Land Registry title numbers. The order was indorsed with a penal notice.

[25] Mr van Hoogstraten was neither present nor represented at the hearing before Patten J on 10 September 2002. But it appears that he had intended to be present at that hearing. In his affidavit of 15 November 2002, he explained:

> '... I made arrangements by application to the IDO clerk to be brought to court on 10 September and the details of this are set out in my letter of 10 September to Room TM505 following on from the failure that day of the prison to produce me at court.'

His letter of 10 September 2002, which was received by the court on 17 September 2002, contains the following paragraphs:

> 'Last week I made arrangements to be presented at Court this morning but when the Senior Officer here telephoned your office this morning, and spoke to a Mr Bell, he was told that I was "not required" as the hearing was ex parte.
>
> I am not at all happy about this as I have *not* agreed to any further ex-parte hearing and I wish to *oppose* the interim order granted on 27 August.
>
> This interim order has been obtained by deception on the part of Mr Lightfoot and I wish to cross-examine him on the contents of his First Affidavit. He has produced no credible evidence that would support such an interim order which cannot be based on press reports, lies and suppositions.
>
> Furthermore, he has not provided me with his exhibit JAL 87 pages 16, 17 and 18 or exhibit JAL 73 in its entirety.'

For my part I would accept as probable that Mr van Hoogstraten had expected to be taken to court on 10 September 2002; that the prison authorities had made inquiry of the Chancery Listing Office on that morning and had been told that he did not need to attend (no doubt because the listing office had learnt from the claimant's solicitors that the hearing was not to be effective as they had agreed an adjournment with Mr Di Stefano); and that, as a result, the prison authorities had cancelled the arrangements that Mr van Hoogstraten thought he had made.

[26] The order of 10 September 2002 contains no provision for substituted service; nor does it contain any undertaking, equivalent to that in para 3 of Sch B to the earlier order of 27 August 2002, to serve the order by leaving a copy with the prison governor for onward delivery to Mr van Hoogstraten. Examination of the transcript of the proceedings before Patten J at the hearing on 10 September 2002 shows that no application for substituted service was made to that judge. It may have been thought that the point was already

covered by the earlier order. That, I think, would have been a misconception of the true position.

[27] A copy of the order of 10 September 2002 was sent to the governor at Belmarsh, with a copy letter addressed to Mr van Hoogstraten, under cover of a letter of 11 September 2002 which requested that these 'be passed to Mr Hoogstraten as a matter of urgency'. There is nothing in the material before this court to indicate whether or not that was done. On 12 September 2002 Mr David Englehart, who had been informed of the order of 10 September 2002 by Mr Lightfoot in a telephone call, wrote to the claimant's solicitors a letter which contained this paragraph:

> 'We confirm that we will send when received a copy of the 10 September Order to Mr Van Hoogstraten under Rule 39 [of the Prison Rules 1999, SI 1999/728] but confirm that it is merely a one-off arrangement and that we could not undertake or guarantee that we will forward or copy correspondence to him without his specific instructions. For the purpose of service of documents, this can only be effected directly upon Mr Van Hoogstraten through the Prison at Belmarsh although you may wish to copy us in case Mr Van Hoogstraten wishes to discuss any matters on one of the Writer's regular visits to the Prison ...'

MR VAN HOOGSTRATEN'S APPLICATION TO SET ASIDE THE FREEZING ORDER

[28] Mr van Hoogstraten's letter of 10 September 2002 makes it plain that he wanted to challenge the freezing order of 27 August 2002. Patten J replied to that letter through his clerk. In a letter of 20 September 2002 his clerk wrote:

> '... [the judge] has asked me to advise you that, should you wish to challenge the original order and/or its extension, you will need to make a formal application on notice to the Claimant's solicitors. For this purpose I enclose the required form for your use, which should be returned to the Chancery Listing Office in Room WG4 at the Royal Courts of Justice, together with the appropriate fee of £50.'

That advice was, of course, correct. The proper way to challenge an order made without notice is not to appeal from the order: it is to apply, on notice, to set the order aside. An appeal (if any) is from a refusal to set the order aside.

[29] Mr van Hoogstraten followed the advice that he had been given in the letter of 20 September 2002. On 25 September 2002 he issued an application to set aside the order of 27 August 2002. He referred to that application in a letter to Peter Smith J dated 17 October 2002:

> '... I applied on 10 September to oppose the interim order dated 27 August. That letter was acknowledged by the Clerk to Mr Justice Patten on 20th September and on 25 September I sent my formal application to the Court together with a cheque for the £50 fee) to set aside/vary the Order of 27th August and other matters. As at today I have had no response to that application.'

The judge replied by a letter of 22 October 2002:

> 'I have investigated the question of your application further and can confirm that it has been received but has not yet been fully processed and

returned to you. I can only apologise to you for that on behalf of the Court ...' a

There seems to be no doubt, therefore, that an application to set aside the order of 27 August 2002 was properly made; and was received by the court with the appropriate fee. There is no doubt, also, that that application has never been heard—as appears from the subsequent events set out in this judgment. The application cannot now be found on the court's files. We were told by counsel for the claimant that, in response to inquiries of the Chancery Listing Office, the claimant's solicitors had been told that the application notice had been lost. b

THE APPLICATION FOR COMMITTAL

[30] On 2 October 2002 the claimant issued an application notice for the committal of Mr van Hoogstraten. The grounds stated in the application notice were that Mr van Hoogstraten was in contempt of court in that he had failed: (i) in breach of para 9(a) of the order of 27 August 2002 (as varied by the order of 10 September 2002) to inform the claimant's solicitors by 17 September 2002 to the best of his ability— c

'of all his assets worldwide exceeding £10,000 in value whether in his own name or not on [sic] whether solely or jointly owned, giving the value, location details of all such assets ...'; d

and (ii) in breach of para 10 of those orders by 24 September 2002 to swear and serve on the claimant's solicitors an affidavit 'setting out the [information referred to]'. e

[31] That application was supported by Mr Lightfoot's fourth affidavit of 1 October 2002, to which I have already referred. That affidavit had set out Mr Lightfoot's concerns as to the efficacy of service through the office of the prison governor. In a later paragraph of that affidavit Mr Lightfoot deposed: f

'In view of the difficulties in personally serving court orders, which I have outlined in para 6 of this affidavit, the order of 10 September 2001 [sic] was again served via the governor's office of HM Prison Belmarsh ...'

Copies of the covering letters dated 11 September 2002 (to which I have referred earlier in this judgment) were exhibited to the affidavit. Mr Lightfoot went on to say this: g

'Since that date I have heard nothing from Mr van Hoogstraten in respect of the freezing order and specifically his obligations to provide the information required under paras 9(a) and 10 of the order. He is however, in my belief, fully aware of the order and its provisions. That belief is based on a telephone call I had with a solicitor called David Englehart on 12 September 2002 ... During my conversation with Mr Englehart, it became clear that Mr van Hoogstraten was aware of the freezing order and his obligations thereunder. In particular Mr Englehart told me that he had been in contact with "Nick" and that he had tentatively suggested to Mr van Hoogstraten that he might want to put up sufficient security to satisfy the sum of £5m secured by the order. He told me that the suggestion "went down like a lead balloon".' h j

[32] The application notice, with a draft of the committal order sought, and the affidavit in support were sent to the prison governor under cover of

a letter dated 3 October 2002; and were handed to Mr van Hoogstraten by a prison officer on 5 October 2002—as the indorsement on the letter confirms. Personal service of an application to commit is required (RSC Ord 52, r 4(2)) and must, unless the court otherwise directs, be effected not less than 14 days before the hearing (para 4.2 of the Practice Direction—Committal Applications which supplements RSC Ord 52 in Sch 1 to the CPR). There was nothing in the application notice, or in the covering letter, which suggested that the claimant had obtained, or intended to seek, an order abridging the time between service and the hearing.

[33] The application for committal came before Peter Smith J for hearing on 11 October 2002 ([2002] All ER (D) 155 (Oct)). Mr van Hoogstraten—who, as I have said, had given notice on 3 September 2002 of his intention to act in person—was not present. It appears, from his letter of 17 October 2002 to Peter Smith J (to which I have already referred, that he had sought to make the necessary arrangements to attend; but that that had not led to his production by the Prison Service. He wrote:

> 'I had made arrangements to be brought to Court for the hearing of 11th October and this was confirmed to me on 8th October by Senior Officer Holt. On the morning of 11th October I reminded Officer Caller of the fact and he passed it to Officer Gladman. At just before 10 a.m. Officer Gladman came to tell me that he had checked with Healys Solicitors who told "security" that I was not required at Court ...'

[34] The transcript of the proceedings before Peter Smith J on 11 October 2002 shows that the judge was told that Mr van Hoogstraten had asked to be produced at that hearing. He was told that by counsel (Miss Dorrell) who acted for Mr van Hoogstraten in the criminal proceedings and who, as she said, had been in the Royal Courts of Justice on that day (in another matter) and had noticed that the committal proceedings were listed. The following interchange between the judge and counsel is of importance:

> '*Peter Smith J.* Have you any authority to be here?
>
> *Miss Dorrell.* No I have no instructions, I have come out of courtesy to your Lordship to explain that he [Mr van Hoogstraten] is not here and it strikes [me] that, because he acts in person, your Lordship will want him here.
>
> *Peter Smith J.* Not necessarily.
>
> *Miss Dorrell.* What I understand has gone wrong ...
>
> *Peter Smith J.* You would for committals because normally sanction [inaudible] but that is not a sanction which is going to be applied if there is a contest to the case.
>
> ...
>
> *Peter Smith J.* It is a simple enough issue. In August he was ordered to provide some information about his financial affairs by 10 September; he failed to do that. He was given further time; and he is in breach of a second order.
>
> ...
>
> *Peter Smith J.* Only Mr van Hoogstraten can answer the questions. He knows what he has to answer. It is very good of you to come, but I am not sure whether you can help me at all, really.

Miss Dorrell. No. [several inaudible words] phoned the prison this morning and they said that Mr van Hoogstraten had requested to be produced. [inaudible] I think out of courtesy since they do not act, have faxed the prison and asked for his productions [sic], and when Belmarsh telephoned this court yesterday afternoon, they were told he was not required. In other words he has asked [to be produced], and I think an administrative error has meant he is not here.

Peter Smith J. Who told him that? Have you any idea who told him that?

Miss Dorrell. I can telephone the prison ... But these administrative errors do occur.

Peter Smith J. Yes, I know, because they lost all his papers at one time.

...

Peter Smith J. The claimant's solicitors left them with the governor and then they could not find them.

Miss Dorrell. I see. There have been one or two difficulties but they have said, I understand, that they will bring him if your Lordship requires it, or they will bring him on another day.

Peter Smith J. Right. That is very helpful. Thank you very much indeed.'

[35] It was in those circumstances that the judge decided to proceed to hear the committal application in the absence of Mr van Hoogstraten, against whom a finding of contempt was sought; and to abridge the time which, under the rules, should have elapsed between service of the applications and the hearing, in order to enable the hearing to proceed. It is pertinent, also, to have in mind that the application to commit proceeded notwithstanding that Mr van Hoogstraten had challenged the orders of 27 August and 10 September 2002 upon which the alleged contempt was based; and that his application to set aside those orders had not been heard. The judge was not aware of that at the time. But, had he adopted Miss Dorrell's suggestion and adjourned the hearing to enable Mr van Hoogstraten to be produced by the Prison Service, he would have become aware that the application to set aside the earlier orders was outstanding.

[36] The judge expressed his reasons in the following paragraphs of the short judgment which he gave on 11 October 2002 ([2002] All ER (D) 155 (Oct)):

'[5] [Mr van Hoogstraten] is in custody in HM Prison Belmarsh. He was made aware of the order. He has had other people corresponding with the claimants' solicitors informally on his behalf. He was aware that an extension of the time for compliance was made to Patten J on 10 September until 24 September. The only communication the claimants have had from him is the notification that he intends to act in person.

[6] The claimants take the view that Mr van Hoogstraten is simply carrying on a policy that he has exhibited in other cases of wilfully disobeying court orders. I agree. It seems to me [that] there is no reason why, if he wished either to challenge the order, or explain to the court why he was not in a position to comply within the time limits, he could not have done so.

a [7] The present application is served short, in that the rules require, ordinarily, an application like the present one to be served on 14 days' clear notice. I will abridge time for the hearing of the application and hear it today. Having seen the fourth affidavit of Mr Lightfoot and the exhibits, I am satisfied that Mr van Hoogstraten is in breach of Rimer J's order as varied by Patten J on 10 September. He is accordingly, in my view, in contempt of b court and I so find.'

[37] The judge then turned to consider what he should do about the contempt which he had just found. He expressed the view that a sentence of imprisonment would be 'of utter indifference' to Mr van Hoogstraten in the circumstances that he was awaiting sentence for manslaughter. He held that c the appropriate way to mark the contempt was by a fine of £200,000, to be suspended for 28 days—that is to say, until 8 November 2002. He went to say this:

'[9] ... If the fine has not been paid by that date then it will become operative.

d [10] I also intend to encourage Mr van Hoogstraten to comply [with] the order by directing and ordering that as long as he fails to comply with Rimer J's order, he will be fined £220,000 the next week, that is to say 15 November and the same amount every week, increased by 10% from the previous week's amount until he complies with the order. The 28 days suspension will give Mr van Hoogstraten an opportunity to apply e to the court and make such representations as are appropriate in his mind.'

[38] The order of 11 October 2002 incorporates the findings of contempt in failing to provide information by 17 September 2002 and to verify that f information in an affidavit by 24 September 2002; and it imposed the sanction of successive, and escalating, fines in respect of that contempt. It continued the freezing orders, made without notice, until trial or further order. And it directed that Mr van Hoogstraten should pay the costs of the committal application.

g THE ORDER OF 24 OCTOBER 2002

[39] A copy of the order of 11 October 2002 was provided to Mr van Hoogstraten on 17 October 2002 by the assistant prison governor. Upon receipt of the copy order Mr van Hoogstraten wrote to the judge. I have already referred to parts of that letter. It referred to the application to h set aside the order of 27 August 2002, made by notice dated 25 September 2002; to the fact that that application had not been heard; and to the circumstances in which Mr van Hoogstraten had not been produced at court on 11 October 2002. The letter continued:

'It is an outrageous situation that I am being denied my legal right to j defend this action. I believe that the way I am being treated is also in breach of article 6 of the HRA 1998 because, although that section appears to relate to criminal proceedings, in this matter, I see that a penal order has been endorsed on those orders of 10 September and 11 October. Also, this case is getting shifted around from one judge to another and no one, it seems, knows what is the true position—to my detriment. Surely it is not beyond the power of a High Court Judge to

Order my production at Court so that this nonsense can be properly addressed.' a

[40] The reference in that letter to 'article 6 of the HRA 1998' is plainly intended as a reference to art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, incorporated within Sch 1 to the Human Rights Act 1998. So far as material, the article is in these terms: b

'1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law ...

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law. c

3. Everyone charged with a criminal offence has the following minimum rights: (a) ... (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing ... (d) to examine or have examined witnesses against him ... (e) ...' d

It was accepted on behalf of the claimant on this appeal—although after some hesitation—that the whole of art 6 is engaged in relation to committal proceedings: that is to say, that committal proceedings are of a criminal nature. In my view, an argument to the contrary could not have been sustained. e

[41] The judge, himself, replied to Mr van Hoogstraten's letter. On 22 October 2002 he wrote:

'I was of course, as you well know concerned with the failure to comply with the Orders. Whether or not you have applied to discharge the Orders they have to be complied with. Mr Justice Patten had extended time and that had expired. Apparently Healeys had received nothing from you save a notification that you were now acting in person. I cannot comment on what you say Healeys have alleged to have said. If that is a matter that you wish to raise you should do so. Equally if you wish to challenge my Order made in your absence you should do so. However, until the Order is set aside or varied it too remains in force ... I have investigated the question of your application further and can confirm that it has been received but has not yet been fully processed and returned to you ... However even if it had been processed it would still have been necessary for you to comply with the Orders. I have also investigated my powers. I have made arrangements for you to be produced as soon as possible from HMP Belmarsh so that I can consider the matter further.' f g h

In a postscript to that letter the judge noted that a hearing had been arranged for 24 October 2002. j

[42] Mr van Hoogstraten did not attend a hearing on 24 October 2002. The reason appears from his affidavit of 15 November 2002, to which I have already referred. He deposed:

'I did not receive the letter dated 22 October from Peter Smith J until 26 October when I immediately responded ... due to the fact that I was

prevented from attending court on 24 October due to the fact that no appropriate security van was available. The full details of the incident are set out in my letter dated 26 October.'

It is not, I think, necessary to extend this judgment with details of the reasons why Mr van Hoogstraten was unwilling to travel to court in the vehicle provided by the Prison Service. It is accepted that it was not unreasonable for him to refuse to do so. The judge, himself, was subsequently willing to accept that Mr van Hoogstraten 'had a reasonable explanation for not attending on 24 October 2002': see his judgment of 12 December 2002 ([2002] All ER (D) 188 (Dec) at [15]).

[43] But the judge did not know that at the time. He thought that Mr van Hoogstraten had chosen not to attend. He wrote to Mr van Hoogstraten on 24 October 2002 in these terms:

> 'Having asked me to make an order for your production at Court it is unfortunate that you chose not to attend the Court hearing set up for your benefit.
>
> This has resulted in a waste of time and I determined that it was right that you should pay these wasted costs on an indemnity basis ...
>
> I am writing to tell you what I would have said if you had attended. The position is that you are in breach of the Costs Order, which led to my imposition of the fines and continue to be in breach. I regard this as serious. You have not explained why you have not complied with the Orders despite the first one having been made nearly 2 months ago.
>
> In these circumstances I am not prepared to entertain any application to discharge the Orders until you comply with the Order of Mr Justice Rimer as extended by the Order of Mr Justice Patten. Further the fines will similarly continue.
>
> If you wish to make representations as to whether it is correct for me to refuse to entertain your application you are of course at liberty to do so. In that eventuality I will make arrangements for you to be brought to Court again.'

The reference, in the third paragraph of that letter, to Mr van Hoogstraten being 'in breach of the Costs Order' is difficult to understand. The judge must, I think, have intended to refer to the breach of the orders of 27 August and 10 September 2002 which he had found established on 11 October 2002. The references to 'any application to discharge the Orders' and to 'your application' must be to the application of 25 September 2002 which remained not 'fully processed'.

[44] By the order which he made on 24 October 2002 the judge directed that the claimant's costs of that hearing be paid by Mr van Hoogstraten on an indemnity basis; he assessed those costs summarily and ordered that they be paid forthwith.

THE HEARING ON 31 OCTOBER 2002

[45] On 31 October 2002 the proceedings were before Peter Smith J on the claimant's application for directions made by notice dated 22 October 2002. Mr van Hoogstraten was present in person. He raised with the judge the question whether (and if so when) his application of 25 September 2002 might

be heard. The judge's response appears from the following passage in the transcript:

> '*Mr van Hoogstraten.* I made an application and I am wondering what has happened to it.
>
> *Peter Smith J.* The application in September?
>
> *Mr van Hoogstraten.* Yes, my Lord.
>
> *Peter Smith J.* That was an application to set aside Rimer J's order, which as I explained to you in my letter to you, the courts appear to have lost at the moment or it is going through the system. I appreciate that is not satisfactory from your point of view but, as I said to you in my letter, I am not going to entertain that application until you comply with the order.
>
> *Mr van Hoogstraten.* Is that not putting the cart before the horse?
>
> *Peter Smith J.* No it is not. Because the authorities are that I am of a discretion whether or not I am going to entertain somebody who is in breach of an order. Now, as I said to you in my letter, if you want to challenge that decision which I made last week and communicated to you, then you must set out in evidence why I should not require you to comply before I entertain the application.'

[46] The passage which I have just set out is of importance, because it encapsulates an issue which, as it seems to me, required careful and informed consideration—with the benefit of legal argument—at an early stage after Mr van Hoogstraten had made his application on 25 September 2002. It will be in mind that Mr van Hoogstraten had indicated his intention to make that application by a letter to the court of 10 September 2002; that is to say before the time for complying with Rimer J's order as varied by Patten J's order had expired. The issue is whether a party who is required to make disclosure under a freezing order made in his absence, and who has indicated to the court at an early opportunity (and, in particular, before the time for complying with the order has passed) that he wishes to challenge the basis upon which the freezing order was made, is, nevertheless, required to comply with the obligation to make disclosure before his application to set aside the order has been heard; so that, on his failure or refusal to comply with the obligation to make disclosure under the challenged order, the court is entitled to refuse to entertain his application.

[47] The judge, without hearing argument but on the basis of authorities to the existence of which he referred (without identifying them), decided that issue against Mr van Hoogstraten. If he were correct in his understanding of the law, the likely result is that either the party against whom the order was made complies with the obligation to disclose, in which case there is little or no purpose thereafter in a challenge to that part of the order because the information which he was concerned to protect from disclosure has already been disclosed; or he continues to refuse to comply with that obligation, in which case the question whether or not the order made in his absence was properly made is never resolved at a hearing at which he is able to advance his arguments. A rule of law which requires a party who has challenged timeously an obligation to disclose to comply with that obligation before his challenge is heard—in circumstances that, having complied with the order, the information will not be retrievable even if his challenge is successful—may, not unfairly, be described as 'putting the cart before the horse'.

[48] It is probable that, amongst the authorities which the judge had in mind when deciding that issue as he did, was the decision of this court in *Motorola Credit Corp v Uzan* [2002] EWCA Civ 989, [2002] 2 All ER (Comm) 945. It will be necessary, later in this judgment, to consider whether the judgments of the majority in that appeal go as far as the judge seems to have thought.

[49] Notwithstanding the views which the judge had expressed at the hearing on 31 October 2002, Mr van Hoogstraten issued a further application notice, dated 11 November 2002, seeking to set aside the order of 27 August 2002 'and all subsequent orders relating to the freezing order'. As he stated in the application notice: 'This application was originally submitted [to] the court on 25 September 2002 following on from my letter to the court of 10 September 2002.' The application notice included the following paragraphs:

> 'I wish to cross-examine Mr Lightfoot, Mr A S Raja and Mr A J Browne in relation to their lies mentioned or referred to in the first affidavit of James Lightfoot sworn 22 August 2002 in order to support my application.
>
> I wish to adduce evidence from members of my criminal legal team to support the advice they gave me in early September concerning this matter and prejudice.'

The second of those paragraphs is plainly directed to para 9(b) of the order of 27 August 2002—which had been included in the order for the purpose of protecting Mr van Hoogstraten's privilege against self-incrimination. There was annexed to the application notice a statement of the matters on which Mr van Hoogstraten wished to rely. These included the assertions that:

> '4. I have never, at any stage in my life, failed to honour any personal or financial obligation ...
>
> 5. At no stage since April of this year have I or any of "my" companies taken any steps to dissipate, transfer or deal in any way with assets nor is there any intention to do so.'

Whether or not those assertions could be made good, they deserved consideration in the context of an application to discharge a freezing order made without notice.

THE ORDERS OF 13, 20 AND 27 NOVEMBER 2002

[50] The judge's order of 31 October 2002 had provided that unless Mr van Hoogstraten served, by 11 November 2002, an amended defence pleading to the reamendments to the particulars of claim for which permission had been given on 4 July 2002, he should be debarred from challenging anything alleged by those reamendments; and had directed that he serve, by 8 November 2002, any evidence on which he wished to rely in opposition to the claimant's strike-out application of 8 August 2002. The remainder of the claimant's application for directions, under the notice of 22 October 2002, was stood over to a case management conference to be held between 11 and 13 November 2002.

[51] On 13 November 2002 the strike-out application of 8 August 2002 was adjourned to 27 November 2002 and time for the service of evidence on that application was extended to 20 November 2002. Time for complying with

para 9(a) of the order of 27 August 2002 was also extended to 20 November 2002; and it was directed that, in default— *a*

> 'the defence and counterclaim be struck out and the defendant will be debarred from defending and the claimant will be entitled to seek judgment in the from [sic] considered appropriate by the court on the relief sought.'

b

It was directed, also, that Mr van Hoogstraten should not be entitled to avoid compliance with para 9(a) of the order of 27 August 2002 'by reason of anything contained in para 9(b)'. That had the effect of removing the protection against self-incrimination. Further, the defence and counterclaim were to be struck out, Mr van Hoogstraten was to be debarred from defending and the claimant was to be entitled to judgment unless the outstanding costs orders made on 11 and 24 October 2002 were paid by 20 November 2002. Time for payment of the fines imposed on 11 October 2002 was extended to 27 November 2002 'when the question of those fines shall be further considered'. And the claimant was given permission to issue an application for leave to sequestrate Mr van Hoogstraten's assets, also returnable on 27 November 2002. *c* *d*

[52] On 15 November 2002 the claimant amended the application notice of 8 August 2002 so as to include as additional grounds for striking out the defence and counterclaim:

> 'that ... (b) the first defendant is in contempt of court due to his continuing failure without lawful or reasonable excuse to comply with the freezing order dated 27 August as varied by the further order of 10 September 2002 and 11 October 2002 and/or *e*
>
> (c) the first defendant is in contempt of court due to the fact that it was admitted to the court on 13 November 2002 that the first defendant has discharged legal costs and expenses without informing the claimant where the money was to come from pursuant to para 11(a) of the freezing order of 27 August 2002 and/or *f*
>
> (d) that the first defendant is in contempt of court due to his continuing failure to comply with the order for costs of 11 October 2002 and the costs order of 24 October 2002 *g*
>
> (e) that the first defendant remains in breach of paras 7, 8, 10, 12 and 16 of the order of 4 July 2002 ...'

On the same date, 15 November 2002, the claimant issued an application notice seeking permission to issue a writ of sequestration. *h*

[53] Also on that date, 15 November 2002, Mr van Hoogstraten signed a statement, described as an affidavit, in purported compliance with para 9(a) of the order of 27 August 2002 and para 2 of the order of 13 November 2002. In that statement he set out a list of what, as he said, were his worldwide assets exceeding £10,000 in value. The total value of the assets disclosed is £960,000, although the value of some of the assets is said to be an approximation. Mr van Hoogstraten did not include in that list the properties and businesses listed in Schs D and E of the order of 27 August 2002. *j*

[54] A few days later, on 19 November 2002, Mr van Hoogstraten swore a second affidavit disclosing that he owned a number of properties in Cannes with a value of over £2m, and had a bank account with a French bank.

[55] The matter was back before Peter Smith J on 20 November 2002 on the hearing of Mr van Hoogstraten's applications to extend time for evidence and to adjourn the hearing of the application to strike out. At that hearing Mr van Hoogstraten was represented by counsel. The judge refused to adjourn the hearing of the application to strike out. Accordingly that application was before him on 27 November 2002; but, at that hearing, he did agree to adjourn it to 9 December 2002. He also extended the time for payment of the fines imposed by the order of 11 October 2002 to 9 December 2002 with, again, the indication that, at that hearing, 'the question of those fines shall be further considered'. He made a summary assessment of the costs of the hearing on 20 November 2002; directed that those costs be paid by 4 December 2002; and ordered that, in default of payment, Mr van Hoogstraten should be debarred from defending and the claimant be entitled to seek judgment.

[56] Mr van Hoogstraten was represented by counsel (Mr Reza) at the hearing on 27 November 2002. He was also present himself for most of that hearing, although the arrangements which had been made for his production (at the direction of the judge) did not enable him to be in court until some time after the hearing had commenced. The judge explained how he was intending to approach the matter:

> 'Mr Lightfoot's fifth affidavit sets out a whole series of assets which no longer feature in the compliance affidavit [of 15 November 2002]. It seems to me that Mr van Hoogstraten should be given an early opportunity [to] answer if he can the various questions on assets that were raised. It might be that he accepts what was said in [Mr Lightfoot's] affidavit. I do not know. He might have an explanation as to why he said things about his wealth over the years and his real wealth now. He would not be the first person who exaggerated his wealth. It is really a matter for Mr Reza as to how he wants to go ahead. That is why I required Mr van Hoogstraten to come here today, not because there was ever going to be a long and detailed cross-examination, because that would take many days, and I made that clear at the last hearing, but so that he would have an opportunity to answer today any matters concerning his affidavit of means, which seems to me a very important part of the application to strike out, because it does seem to me that if Mr van Hoogstraten has not been properly frank in relation to his affidavit of means, it makes matters even more complicated for him. That was what I was proposing to do, Mr Reza.'

In the event the judge was persuaded that it would not be fair to expect Mr van Hoogstraten to give evidence on 27 November 2002—because he had not had a proper opportunity to consider Mr Lightfoot's fifth affidavit—and so the matter was adjourned until the second week in December.

THE ORDER OF 12 DECEMBER 2002

[57] The adjourned hearing of the application to strike out took place on 9 and 10 December 2002. Mr van Hoogstraten was, again, represented by counsel, Mr Reza, and was, himself, present. It appears that no transcript of the proceedings on those days is available. But it is clear that Mr van Hoogstraten did not give oral evidence, as had been canvassed at the hearing on 27 November 2002 (see [2002] All ER (D) 188 (Dec) at [74]).

[58] On 10 December 2002, pursuant (I think) to permission granted on the previous day, the claimant added a further ground to the application to strike out: '... that the first defendant had failed to comply with the unless order in para 3 of the order dated 13 November 2002.' That paragraph had required Mr van Hoogstraten to file an affidavit by 20 November 2002 complying with para 9(a) of the order of 27 August 2002.

[59] On 12 December 2002 the judge handed down a written judgment, setting out the reasons for his decision on the claimant's application to strike out Mr van Hoogstraten's defence and counterclaim; and on the application for leave to issue a writ of sequestration. The order which he made that day contained the following provisions, so far as material in the context of the present appeals. Paragraph 1 ordered that Mr van Hoogstraten's defence and counterclaim be struck out and that he be debarred from defending the action on liability. Paragraph 2 directed that judgment be entered for the claimant (a) for all necessary accounts and inquiries to establish quantum (including damages for conspiracy), (b) for payment of all sums due on taking that account, and (c) for the delivery up of land certificates and the execution of transfers in respect of five properties. Paragraph 5 ordered an interim payment on account in the sum of £400,000. Paragraph 6 gave leave to issue a writ of sequestration; and para 7 refused a stay. Paragraph 12 was in these terms:

> 'The cumulative total as at 12 December 2002 of the fines imposed on the first defendant for his contempt of court pursuant to the order dated 11 October 2002 shall be varied to an all inclusive sum of £100,000. Thereafter until the first defendant has purged his contempt for the continued failure to comply with the disclosure obligations in the order dated 27 August 2002 a revised weekly fine of £50,000 shall apply.'

But for that paragraph the aggregate of the fines imposed by the order of 11 October 2002, as at 12 December 2002, would have been in excess of £1·2m, rising by approximately £300,000 per week.

THE JUDGE'S REASONS

[60] The judgment of 12 December 2002 contains a full account of the procedural background which had led to the hearing of the application to strike out. In setting out that history, the judge took the opportunity to explain further the reasons which had led him to make earlier orders; in particular, the order of 11 October 2002 in which he had found Mr van Hoogstraten to be in contempt. In that context the following passages are material.

(1) The judge (at [17]–[27]) considered the extent of the disclosure obligations imposed by the order of 27 August 2002; and, in particular, the effect of para 6 of that order—which contains the extended definition of 'the respondent's assets'. It is clear that the judge regarded it as beyond argument that para 6 coloured the meaning of 'all his assets worldwide' in para 9 as well as the meaning of 'his assets' in para 5. It may well be that the contrary was not suggested to him. He recorded (at [20]) that Mr van Hoogstraten had told him that he had not appreciated that the disclosure obligation required him 'to provide full details of all of the assets in respect of the disputed properties and businesses'; and expressed disbelief at that suggestion. He said (at [24]):

> 'Thus Mr van Hoogstraten was by virtue of the extended definition given to the meaning of the words "respondent's assets" obliged to

provide details of all of the assets of the various entities and businesses extending to those which he disputed he was the beneficial owner of ...'

The judge gave Tombstone, a company listed in Sch E to the order of 27 August 2002, as an example of an entity or business, details of the assets of which ought to have been disclosed by Mr van Hoogstraten. He said (at [26]):

'The conclusion I draw ... is that ... he ultimately is the beneficial owner of Tombstone. Now of course Mr van Hoogstraten disputes that but that is not a basis for refusing or not providing the information required by the freezing order ...'

(2) The judge (at [28]–[40]) considered whether the orders of 27 August and 10 September 2002 had been properly served on Mr van Hoogstraten. It is clear that he took the view that both orders authorised substituted service under CPR 6.8. He referred (at [28]) to the undertaking in para 3 of Sch B to the order of 27 August 2002. He observed (at [34]) that it was 'self-evident that the undertaking given in Sch B to the freezing order as regards service' applied to service of the order of 10 September 2002, also—notwithstanding that (as the judge recognised) the later order contained no express provision as to service. He said (at [35]):

'In this context it seems to me Rimer J was applying CPR 6.8 and providing an alternative [method] of service. That seems to me to be obvious as there would be no method of serving Mr van Hoogstraten personally. I reject Mr Reza's submission that sending the documents to the governor and asking him to give them to Mr van Hoogstraten is personal service for the purpose of CPR 6.4 ...'

As the judge recognised (at [37]) the significance of the point lay in the requirements of RSC Ord 45, r 7—which required personal service of the order as a condition precedent to enforcement by committal proceedings.

(3) The judge (at [41]–[49]) addressed the question whether it was open to him to make a finding of contempt on 11 October 2002, at a time when Mr van Hoogstraten had made an application to discharge the order of 27 August 2002 which had not been heard. He rejected (at [42]) a submission that he should not have continued the freezing order in the absence of Mr van Hoogstraten. He said:

'The freezing order was continued by me [on 11 October 2002] until trial or further order to obviate any further unnecessary applications to court arising out of a fixed return date. That does not cause Mr van Hoogstraten any difficulty because he can always apply to vary or discharge the order on making the appropriate application. I was not aware of course of the application that he sent to the court because its existence was not on the court file as it was still being processed. As regards the freezing order whether or not Mr van Hoogstraten was there would have made no difference whatever he might have said. The freezing order would have continued if only to fix a date for hearing his application to discharge which would take a considerable time as he had indicated in his letter of 10 September 2002 that he wished to cross-examine Mr Lightfoot on his extensive affidavit. I doubt whether the court would have acceded to that but nevertheless, responding to that affidavit would take some considerable time. In the meantime of course, it is equally the case that I

cannot conceive of any court would [sic] have suspended the operation of the compliance obligations in paras 9 and 10. So Mr van Hoogstraten's absence did not affect the decision as regards the freezing order.'

He explained why he had proceeded, on 11 October 2002, to make a finding of contempt in the absence of Mr van Hoogstraten, abridging time for that purpose:

'[45] Mr Reza complains that the order was issued with a return date of 11 October 2002 and was served on 5 October 2002 when the documents were handed to him. Messrs Healys letter wrongly tell[s] the governor that documents have to be served before 8 October 2002. I suspect this is an erroneous assumption on the part of Mr Lightfoot that the application needed only to be served with two clear days notice. It is clear that under [the Practice Direction—Committal Applications which supplements RSC Ord 52, para 4.2 (Sch 1 to the CPR)] the hearing date should be not less than 14 days after service of the claim form. That did not take place. Mr Reza dealing with the preamble "unless the court otherwise orders" submits that the applicants must obtain an abridgement of time before the application is issued. I do not accept that. It seem[s] to me that that provision enables the court to direct a hearing date to be at a shorter period if it operates under that provision. I do not see why that cannot be made retrospectively. Whether or not the court would do that and thus abridge time under CPR 3.1(2)(a) or (b) is a matter for the court to consider on each occasion. In the case of an application for enforcement of committal a court will consider quite seriously whether a defendant will suffer a disadvantage by a shortening of time. The court must consider whether or not that is the appropriate case. Although the claimants in Mr Irvin's skeleton argument sought permission to serve short that is not the correct way to approach it and I did not so consider it. I made an order abridging time. It is true that that is not reflected in the order but Healys note accurately shows I intended to make such an order and did so.

[46] Mr Reza also submitted that all that could be done was to fix a date for a hearing of the committal application in the future. I do not agree. The [Practice Direction to RSC Ord 52, para 4.4] provides for the application to be proceeded with immediately if it is ready to be heard. That does not mean to my mind that the respondent has to be there. In this context one has to bear in mind a number of factors. First, Mr van Hoogstraten was already in prison having been found guilty. It was never suggested that prison was a sensible or appropriate sanction and I did not consider that to be the case. Second, the breach was relatively straightforward. He was ordered to provide details of assets verified with an affidavit and he had not complied. He had not communicated with the claimants' solicitors in the intervening period (and his later evidence shows that this was deliberately done by him). He was therefore plainly in breach of the order and had had a considerable time to comply. Accordingly it was appropriate in my opinion (and I remain of that opinion) to abridge time to enable the application to be disposed of that day, hear the evidence and in finding him in breach of the order apply the appropriate sanctions. That is precisely what happened. There is to my mind no procedural irregularity correctly identified by Mr Reza.'

And (at [47]) he explained why (although he was unaware on 11 October 2002 that Mr van Hoogstraten had made an application to discharge the order of 27 August 2002) the fact that that application was outstanding at the time made no difference:

> 'Mr van Hoogstraten ... [was] well aware of what the order [of 27 August 2002] said and the time of it. He had made a decision not to comply with it. That is what his later evidence to which I shall make reference below clearly shows. Had he come on 11 October he would not have said anything other than he was not going to comply because he had applied to set aside the freezing order ... the fact that he had sent the application for setting aside does not obviate the need to comply: see *Motorola Credit Corp v Uzan* [2002] EWCA Civ 989, [2002] 2 All ER (Comm) 945. It seems to me that whilst matters have to be proceeded with carefully to ensure that no injustice is done to a respondent to an application there was not injustice in this case ...'

[61] The judge then went on to consider whether, following the order of 11 October 2002, Mr van Hoogstraten had complied with the disclosure obligations imposed by the orders of 27 August and 10 September 2002. In particular, he considered whether the two affidavits of 15 and 19 November 2002 were a sufficient compliance with those obligations. He held that they were not. After referring to Mr Lightfoot's fifth affidavit, sworn on 25 November 2002, the judge said (at [76]):

> 'He [Mr Lightfoot] made the point (with which I agree) that the freezing order by virtue of the definition of 'respondent's assets' required Mr van Hoogstraten to deal with more than his own personal assets. For that reason alone as I have already said the affidavits and information do not comply.'

[62] Time for compliance with the disclosure obligations had been extended, by the order of 13 November 2002, to 20 November 2002. As I have said, that order provided that, in default of compliance, the defence and counterclaim should be struck out. Notwithstanding his conclusion (in para [76]) that Mr van Hoogstraten was in default by reason of his failure to deal with more than his own personal assets, the judge thought it necessary (or, at least, appropriate) to consider whether the affidavits of 15 and 19 November 2002, taken with a further affidavit which Mr van Hoogstraten had sworn in response to Mr Lightfoot's fifth affidavit, made true and complete disclosure of what might be regarded as personal assets. He said:

> '[77] It is not appropriate at this stage to attempt to deal with the many matters, which Mr Lightfoot raises in his affidavit. There are however a number of clear matters which notwithstanding a further affidavit of Mr van Hoogstraten to which I shall make reference below lead me to the conclusion that Mr van Hoogstraten has assets which he has not disclosed in the two affidavits. I am satisfied beyond reasonable doubt that that is the position ...
>
> [79] I am satisfied that Mr van Hoogstraten has wilfully concealed his interest in significant other assets ...'

[63] The judge reached that conclusion on the basis of his review (at [81]–[96]) of evidence relating to Hamilton Palace, Tombstone and an antique collection.

It is unnecessary to examine the judge's findings on those matters at any length in this judgment because counsel for Mr van Hoogstraten explained that he was not in a position, on the hearing of these appeals, to challenge those findings by any detailed analysis of the underlying material. He sought to reserve a detailed challenge to a subsequent hearing, should it become necessary to pursue it. It is enough, therefore to note that the judge said:

> '[97] My conclusion is that Mr van Hoogstraten has only told the truth when it was necessary for him to do so and that was when he was on trial for murder. His evidence there corroborates what Mr Lightfoot has said in his first affidavit. Mr van Hoogstraten now chooses to be portrayed as a man of considerably less worth because it suits him to do so. I reject his affidavit evidence. To my mind it is completely untrue and incredible ...
>
> [99] I am not in a position to determine fully what his assets are and that is not the point of the exercise in any event. I am satisfied to the standards that I have set out above that his affidavits are not true affidavits and that he has failed to comply with the freezing order as extended by 10 September 2002. I am satisfied therefore that he was also in contempt on 11 October 2002 and that he has failed to purge that contempt because his affidavits are not true.'

[64] In the light of those findings, the judge held that Mr van Hoogstraten's defence and counterclaim should be struck out, and that he should be debarred from defending the action: His conclusion, on that point, is found at [100] and [101]:

> '[100] This breach is a serious and continuing breach. It has now gone on since the freezing order was made on 27 August 2002. Mr van Hoogstraten has put up a whole series of reasons as to why he initially should not comply and his purported compliance is a charade. Such conduct to my mind shows that he is plainly holding the court in contempt and abusing its processes. For that reason alone that is sufficient justification for him to be debarred from defending and prosecuting his counterclaim further and I accept the claimants' submission that he is and remains in contempt of court.
>
> [101] It also means that he is in breach of para 3 of my order of 13 November 2002 which provided that if he did not serve the affidavits in compliance his defence and counterclaim should be struck out and the claimants would be entitled to such relief as is appropriate.'

[65] The judge then considered the further ground relied on in the application notice of 8 August 2002:

> '[102] That is not the sole matter however. The claimants [sic] initial application was based on Mr Van Hoogstraten's conviction for manslaughter. The application is based upon a series of authorities starting with *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167, *Hamilton v Al Fayed* [2000] CA Transcript 2280, (2000) Independent, 21 December and *Terry v Hoyer (UK) Ltd* [2001] EWCA Civ 678.
>
> [103] The claimants submit the conduct of Mr Van Hoogstraten has caused severe injustice as it has deprived the claimant of the opportunity of properly preparing for and presenting the claim for trial, put the fairness of the trial in jeopardy by preventing or discouraging Mr Raja from giving

a evidence and has led to an obstruction of the just disposal of the proceedings with a considerable increase of the cost of pursuing complex litigation without the benefit of Mr Raja's evidence.'

[66] The judge accepted that it was necessary for the claimant to show that the conduct of which he complained was motivated by an intention, on the part of Mr van Hoogstraten, to hinder or obstruct the trial. But he was satisfied that that b motive had been made out. He said:

'[107] I have particularly read the direction in relation to manslaughter ... The conviction based on that direction can only take place on the basis that Mr van Hoogstraten counselled the other defendants to frighten Mr Raja by threatening him with force assaulting him or kidnapping him c or doing damage to his home but without any intent to order any serious bodily harm. It may be (and I am expressing no view about this) that Mr van Hoogstraten can successfully challenge the conviction for manslaughter, but that is not the end of the matter to my mind. Even if Mr Raja had not been killed if the connection between d Mr van Hoogstraten and the other defendants is established merely to frighten him that is a sufficient abuse of the process of the court to my mind to disentitle a party from participating further in litigation ... If a party indulges in such act of intimidation he cannot expect in any civilised society simultaneously to reap the benefits of the other members of that e society and be permitted to participate in litigation. He is abusing the processes ...

[109] I am quite satisfied having seen the transcript of the summing up that the only motivation was in relation to the dispute in this action with Mr Raja.'

f The judge held that for that reason, also, the claimant was entitled to succeed on the application to strike out.

[67] The application notice of 8 August 2002, as amended and reamended, advanced other grounds for striking out the defence and counterclaim, in addition to those which attracted the judge and to which I have just referred—continuing failure to comply with the obligation to disclose g information and conduct which had put the fairness of any trial in jeopardy. Those other grounds were: (i) the discharge of legal expenses without identifying the source of funding, (ii) failure to discharge costs orders in respect of the hearings on 11 and 24 October 2002 and (iii) failure to comply with case management directions given on 4 July 2002. The judge said nothing, in his h judgment of 12 December 2002, as to the second and third of those additional grounds. He made it clear (at [115]) that he was not persuaded that the breach of the obligation not to discharge legal expenses without disclosing the source of funding would justify striking out. He was prepared to accept, on the evidence which was before him, that there might be an innocent explanation for that j failure. But he required the lawyers advising Mr van Hoogstraten at the time, Mr Di Stefano and Mr Englehart, to make affidavits setting out in full the advice that they had given to Mr van Hoogstraten as to the need to comply with that obligation.

[68] In the event, therefore, the judge's decision to strike out Mr van Hoogstraten's defence and counterclaim—and to enter judgment against him on liability—was founded on two grounds: (i) continuing failure to

comply with the obligations to disclose information imposed by the order of 27 August 2002 (as varied by the orders of 10 September and 11 October 2002) and made the subject of an 'unless order' on 13 November 2002 and (ii) conduct in relation to Mr Mohammed Raja which had put the fairness of any trial in jeopardy.

[69] The judge had directed, in the orders which he had made on 13 and 27 November 2002, that 'the question of those fines [imposed on 11 October 2002]' would be considered further. He addressed that question in paras [121]–[123] of the judgment which he handed down on 12 December 2002:

> '[121] In addition, Mr van Hoogstraten in my judgment was in contempt and continues to be in contempt. The fines I imposed were considerable. In imposing large fines I hope[d] to "encourage" him to come clean. It was for that reason that the operation of the fines was suspended. None of this has worked. Accordingly the only way in which this can be addressed is to appoint a sequestrator over Mr van Hoogstraten's assets so that his assets can be identified collected and realised for the purposes of paying fines, [and] any sums due to the claimant's both as to damages and costs. I will appoint the sequestrator suggested by the claimants.
>
> [122] The fines already total in excess of £1,000,000 (one million pounds) and a further sum in excess of £200,000 (two hundred thousand pounds) falls due by 4 pm Friday, 13 December 2002.
>
> [123] I accept Mr Reza's submission that the fines at that level are in danger of becoming disproportionate and oppressive. To my mind this is a serious contempt and normally would attract a sentence of imprisonment. Sentencing Mr van Hoogstraten to a sentence of imprisonment will not achieve very much unless I make it consecutive to the current prison sentence that he is serving. It seems to me that a financial penalty is a matter, which ought to concentrate his mind more carefully. I will reduce the fines for the existing contempt as set out in my order of 11 October 2002 to £100,000 (one hundred thousand pounds). In addition I shall impose a weekly fine of £50,000 (fifty thousand pounds) to commence on 13 December 2002 until Mr van Hoogstraten purges his contempt.'

He indicated that a further reason 'behind that order'—by which, I think, he meant the appointment of a sequestrator rather than the reduction of the escalating fines—was his intention to make an order for a substantial interim payment on account of the claimant's damages and costs. He directed that the freezing order of 27 August 2002 should continue 'as an aid to execution'.

[70] The judge was, of course, aware that there was an outstanding application, filed by Mr van Hoogstraten, for an order that the order of 27 August 2002 (as varied by the order of 10 September 2002) be set aside or discharged. That application had been made by notice dated 25 September 2002; and, again, by notice dated 11 November 2002. The judge was not prepared to entertain those applications. In his 12 December 2002 judgment (at [39]) he said this:

> 'Mr van Hoogstraten wrote to Patten J as I have said and his clerk replied on 20 September 2002. Mr van Hoogstraten himself sent an application to the court seeking to discharge the freezing order. Regrettably, the court has mislaid that application although it is accepted that [it] was received as the

cheque has been processed. Healys have received a copy of it. However, it has not been proceeded with because I have already determined Mr van Hoogstraten is in contempt of court in that he failed to comply with paras 9 and 10 of the freezing order as extended by Patten J and I indicated to him in my letter of 24 October 2002 that I was not prepared to entertain any applications to discharge the orders until he complied with them. That remains the position …'

THE APPOINTMENT OF SEQUESTRATORS

[71] The order made on 12 December 2002 gave the claimant leave to issue a writ of sequestration. The writ was issued on that day and amended on the following day, 13 December 2002. As amended, it authorised the sequestrators (who were partners or employees of BDO Stoy Hayward) (i) to enter upon and take possession of all the real and personal estate of Mr van Hoogstraten, (ii) to collect, receive and take into their hands the rents and profits of his real estate and all his personal estate and (iii) to keep the same under sequestration in their hands until Mr van Hoogstraten—

> 'shall comply with the order dated 27 August 2002 has purged his contempt and/or the sums identified in para (b)(i)–(iii) above have been recovered and/or the court makes other order to the contrary.'

In that context the 'sums identified in para (b)(i)–(iii)' of the writ were: (i) the fines, as varied on 12 December 2002, (ii) 'any sums found due to the claimants both as to damages and costs' including, but not limited to, the sum of £400,000 to be paid on account of damages and the sum of £200,000 to be paid on account of the claimant's costs and (iii) 'such other sums as the court shall direct'.

[72] Paragraph (c) in the recitals to the writ of sequestration was in these terms:

> 'The court has expressly declared in para 26 of the said judgment [of 12 December 2002] that the first defendant is the beneficial owner of Tombstone Ltd *and its assets* and accordingly for the purposes of this writ of sequestration the assets held by Tombstone Ltd are to be treated as part of the real and personal estate of the first defendant.' (My emphasis.)

That, as it seems to me, is to read into para [26] of the judgment a finding which is not expressed by the judge. What he said in that paragraph, so far as material in the present context, was this:

> 'Mr van Hoogstraten self-evidently as the sole director controls Tombstone. It seems to me the assets of Tombstone ought to have been dealt with in any compliance affidavit. He has failed to provide any [information as to] assets of Tombstone. Significantly, Tombstone apparently lent him £600,000 … in April 2002 to enable him to defend himself on the criminal charges and to prosecute the appeal against the conviction. That is a flagrant breach of s 330 of the Companies Act 1985 … The conclusion I draw on the evidence before me is that Mr van Hoogstraten controls Tombstone to such an extent that despite his apparent modest shareholding no other shareholder complained about the apparent removal of a sum in excess of £600,000 … The conclusion I draw from that absent any other explanation is that no one else complains because … he ultimately is the beneficial owner of Tombstone …'

That, clearly, is a finding that Mr van Hoogstraten is the beneficial owner of Tombstone. But there is no express finding by the judge, in that paragraph, that Mr van Hoogstraten is the beneficial owner of the assets held in Tombstone's name—that is to say, that Tombstone holds its assets as trustee for Mr van Hoogstraten. It may be that the judge intended to make such a finding; but, as it seems to me, he has not done so in terms. And, at the risk of stating the obvious, a finding that Mr van Hoogstraten is the beneficial owner of the company is a finding that he owns all the shares in the company; it is not a finding that he owns the assets of the company.

APPLICATIONS IN RELATION TO THE SEQUESTRATION

[73] The inclusion of para (c) in the recitals to the writ of sequestration has led the sequestrators to take the view, correctly as it seems to me, that the assets subject to the sequestration include all the assets held in the name of Tombstone. That, in turn, led to applications by the registered holders of the majority of the shares in Tombstone (Willoughbys Consolidated plc and Ms Rosemary Hamilton)—and, eventually, by Tombstone itself—to intervene so as to challenge the finding (if there were a finding) that Tombstone holds its assets as trustee for Mr van Hoogstraten. Those various applications came before Peter Smith J in the first six months of 2003. He refused leave to intervene. For present purposes it is necessary only to refer to his order of 27 June 2003, refusing to allow an intervention by Tombstone.

[74] The inclusion of para (c) led, also, to applications by the sequestrators for directions in relation to the realisation of Tombstone properties. Directions were given by Peter Smith J in an order made on 10 February 2003. Those directions enlarged the powers of the sequestrators under the writ of sequestration; and required Mr van Hoogstraten to answer requests for information contained in a letter from the sequestrators dated 23 December 2002 and to provide full details of the extent and location of the art and antiques collection which he was said to own. Payment to Mr van Hoogstraten's solicitors, Minaides Robson, of moneys out of the sequestrated assets on account of outstanding or future legal costs was made conditional upon compliance with those requirements.

THESE APPEALS

[75] The judge refused permission to appeal from his orders of 12 December 2002 and 10 February 2003. On 12 March 2003 Mr van Hoogstraten filed two appellant's notices. The first, under reference 2003/0537, sought to appeal from the orders of 27 November and 12 December 2002 'and (if necessary) 10 September 2002 and 11 October 2002'. The second, under reference 2003/0538, sought to appeal from the order of 10 February 2003. On 16 April 2003 he filed three further notices, under references 2003/0579, 2003/0580 and 2003/0581. By those further notices Mr van Hoogstraten sought to appeal from, respectively, the orders of 10 September, 11 October and 27 November 2002. Those notices may be seen as supplementary to that under reference 2003/0537; and they add nothing of substance to that earlier notice.

[76] Permission to appeal from the order of 12 December 2002 and from 'all the orders on which that order was based such orders to include those made on 10 September 2002, 11 October 2002, and 27 November 2002' was granted by this court (Cresswell J and myself) on 13 June 2003. Permission was granted—

'without prejudice to any argument that the claimant may wish to advance on the hearing of the appeals that the first defendant ought not to be heard on his appeals against any of the said orders because the first defendant is alleged to be in contempt and making no attempt to purge that contempt.'

At the same hearing we granted permission to appeal from the order of 10 February 2003.

[77] The judge refused permission, also, to appeal from his order of 27 June 2003—by which he had refused Tombstone leave to intervene in the proceedings. Permission to appeal from that order was granted by this court on the same day; but on terms that that appeal was to be heard with the substantive appeals for which permission had been granted on 13 June 2003 and that (if that appeal were successful) Tombstone would take part in the substantive appeals—in order to assert its own beneficial interest in properties subject to the sequestration order—without seeking any adjournment. That appeal is brought under reference 2003/1704.

[78] It is common ground that, if on the hearing of Mr van Hoogstraten's appeal from the order of 12 December 2002 the writ of sequestration is set aside, the basis upon which Tombstone seeks to intervene in these proceedings—and the need for Tombstone to intervene in order to protect its interests—will fall away. It is also, I think, common ground that, if the writ of sequestration is set aside, there is little (if anything) left in the appeal from the order of 10 February 2003. The sequestrators will no longer require information from Mr van Hoogstraten, as they will no longer have a continuing function to perform.

[79] In the course of the applications for permission to appeal made to this court on 13 June 2003 the court was urged to fix an early date for the hearing of the appeals (if permission were granted) on the basis that the sequestrators were incurring substantial costs which, prima facie at least, would fall on the sequestrated properties even if the appeals were to be successful. The court accepted the need for an early fixture of what was estimated to be a five-day hearing. Arrangements were made for the appeals to be heard in November 2003. That hearing was adjourned, on the application of Mr van Hoogstraten and Tombstone, for the reasons set out in the judgment of the court (Pill LJ and myself) delivered on 12 November 2003. The hearing was refixed for the week commencing 29 March 2004.

[80] One effect of the adjournment was that, when the matter came back before the court at the end of March 2004, Mr van Hoogstraten was no longer in prison; and was no longer facing criminal proceedings arising out of the death of Mr Mohammed Raja. On 29 March 2004 he sought a further adjournment to enable him to instruct solicitors and counsel to represent him at the hearing of these appeals. For the reasons given in the judgment delivered on 30 March 2004, we were persuaded that, in the very exceptional circumstances of this case, it was right to grant a second adjournment. The appeals were heard in the week commencing 10 May 2004. But, notwithstanding what I would accept as real efforts to instruct counsel in time to enable them to prepare a full argument, the position at the hearing was, as I have said, that counsel for Mr van Hoogstraten had not found it possible, in the time available, to mount a challenge to the judge's findings as to beneficial ownership by the detailed analysis of the underlying material which such a

challenge would have required; and so sought to reserve a detailed challenge to a subsequent hearing, should it become necessary to pursue it. The appeals were heard on that basis; it being clear that there were a number of points of principle which could and should be addressed before considering the judge's findings as to beneficial ownership.

SHOULD MR VAN HOOGSTRATEN BE HEARD IN THIS COURT?

[81] As I have said, permission to appeal was granted by this court on 13 June 2003 without prejudice to any contention that Mr van Hoogstraten ought not to be heard on his appeals in circumstances that he was making no attempt to purge the contempt which Peter Smith J had found established. That contention was advanced on behalf of the claimant at the outset of the hearing of these appeals. After hearing argument on that threshold issue, we indicated that we would proceed to hear the substantive appeals. It is necessary, now, to set out the reasons which led us to the conclusion that this was not a case in which an alleged contemnor should be denied the opportunity to appeal without first purging his contempt.

[82] That an appellate court may refuse to hear a party who has been found to be in contempt and who has made no attempt to purge that contempt is not in doubt (see *Hadkinson v Hadkinson* [1952] 2 All ER 567, [1952] P 285, *Astro Exito Navegacion SA v Southland Enterprise Co Ltd, The Messiniaki Tolmi* [1981] 2 Lloyd's Rep 595 and *X Ltd v Morgan-Grampian (Publishers) Ltd* [1990] 2 All ER 1, [1991] 1 AC 1). But it is now recognised that there is no general rule that a court will not hear an application for his own benefit by a person in contempt unless and until he has first purged his contempt; so that, in order to avoid the application of that rule the party in contempt must bring himself within some established exception. The approach which the court should adopt is now found in the judgment of Lord Bingham of Cornhill CJ, in *Arab Monetary Fund v Hashim* (21 March 1997, unreported). After referring to the speeches of Lord Bridge of Harwich and Lord Oliver of Aylmerton in the *Morgan-Grampian* case, Lord Bingham CJ said this:

> 'From those speeches it is, I think, clear that it is wrong to take as a starting point the proposition that the court will not hear a party in contempt and then to ask if the instant case falls within an exception to that general rule. It is preferable to ask whether, in the circumstances of an individual case, the interests of justice are best served by hearing a party in contempt or by refusing to do so, always bearing in mind the paramount importance which the court must attach to the prompt and unquestioning observance of court orders.'

[83] Adopting that approach in the present case, I thought it reasonably plain that the interests of justice were best served by hearing Mr van Hoogstraten's appeals, notwithstanding that he had been held to be in contempt and to have made no serious attempt to purge that contempt. In reaching that conclusion I took account of the following matters.

(1) It is a striking feature of this case that the order of 27 August 2002 (as varied by the order of 10 September 2002), which imposed the obligations on which the finding of contempt was founded, and the order of 11 October 2002, by which the finding of contempt was established, were made at hearings at which Mr van Hoogstraten was neither present nor represented.

(2) Further, the order of 11 October 2002 was made at a time when (unknown to the judge who made it) Mr van Hoogstraten had sought, by an application properly and timeously made, to have the earlier orders set aside. Neither that application, made by notice dated 25 September 2002, nor Mr van Hoogstraten's subsequent application, by notice dated 15 November 2002, has yet been heard. The reason why those applications have not been heard is that the judge has held Mr van Hoogstraten to be in contempt of the very orders which (if the applications to set aside were to succeed) ought not to have been made.

(3) The effect has been that Mr van Hoogstraten has been found to be in contempt of court without having been heard—and without having had a proper opportunity to be heard—either on the question whether the obligations should have been imposed in the first place or on the question whether he was in contumaceous default in failing to comply with them.

(4) If these appeals were allowed to proceed, this court would have the opportunity to determine whether, in the particular circumstances of this case, it was right that Mr van Hoogstraten should have been found to be in contempt of court without having had a proper opportunity to be heard on those questions. When giving permission to appeal on 13 June 2003 this court was satisfied that the appeals had a real prospect of success. If this court were to accede to the claimant's contention that Mr van Hoogstraten should not be heard on these appeals, it would be in danger of compounding what would (if there is, indeed, merit in the appeals) be a serious injustice and a breach of Mr van Hoogstraten's convention rights.

(5) It is also striking that the orders of 27 August and 10 September 2002 were not made for the purpose of achieving a fair, just and efficient resolution of the issues in dispute in the action; nor (in contrast to the orders which had given rise to the contempt in the *Arab Monetary Fund* case) for the purpose of giving proper effect to a decision which had been made following the resolution of the issues in dispute in the action. The orders of 27 August and 10 September 2002 were made in anticipation of the result in the action. The purpose of those orders was to ensure that, if the claimant did eventually succeed at trial, he would not be deprived of the fruits of his success by the improper dissipation of Mr van Hoogstraten's assets in the meantime. But, if the order of 12 December 2002 stands, the issues in dispute in the action will not be resolved at a trial. Mr van Hoogstraten's disobedience to orders made in anticipation of the result in the action will have had the effect that those orders, themselves, have pre-empted the trial. Whether or not, in the particular circumstances of this case, that is the just result is a question which this court would have the opportunity to consider and determine if these appeals were allowed to proceed. But, as it seemed to me, the interests of justice would not be served by this court refusing to entertain that question on the ground that, in disobeying those orders, Mr van Hoogstraten has been found to be in contempt.

THE ISSUES FOR DECISION ON THESE APPEALS

[84] The principal issues for decision, each of which arises in the context of the appeal under reference 2003/0537 and the first of which is raised, also, by the appeal under reference 2003/0580, are (i) whether the judge was wrong, on 11 October 2002, to make a finding of contempt against Mr van Hoogstraten and (ii) whether the judge was wrong, on 12 December

2002, to strike out the defence and counterclaim and to enter judgment in the action for the claimant.

[85] Decisions in favour of Mr van Hoogstraten on those principal issues will dispose of most of the other matters raised by the appeals which are before us. As I have said, it is common ground that, if the judge was wrong to make a finding of contempt against Mr van Hoogstraten, the writ of sequestration must be set aside; there being no sufficient basis, in the absence of a finding of contempt, to support a sequestration for the purpose, only, of enforcing orders for the interim payment of damages and costs. And, in that event, the question whether Tombstone should be allowed to intervene, raised by the appeal under reference 2003/1704, falls away and there is little left in the challenge to the directions given to the sequestrators by the order of 10 February 2003, raised by the appeal under reference 2003/0538.

[86] There are two matters which do not turn on the decisions on the principal issues. Those matters are (i) whether Patten J was wrong to make the order of 10 September 2002—raised by the appeals under references 2003/0537 and 2003/0579—and (ii) whether Peter Smith J was wrong to make the costs order which he did on 24 October 2002.

[87] It is convenient to address the first of those matters in the context of the order of 11 October 2002. It is arguable that the second is not formally before this court, in that the costs order of 24 October 2002 is not the subject of a discrete challenge in any appellant's notice. But a challenge to that order was raised in the course of the hearing; there is no answer to it; and, for my part I would dispose of that matter summarily. The costs order of 24 October 2002 cannot stand. The order was made on the basis that Mr van Hoogstraten had chosen not to attend on that date, notwithstanding that the judge had ordered that he be produced; as the judge explained in his letter of 24 October 2002. But that was a false basis, as the judge acknowledged in his judgment of 12 December 2002 (at [15]). The costs order of 24 October 2002 should be set aside.

THE FINDING OF CONTEMPT ON 11 OCTOBER 2002

[88] It is pertinent to have in mind that the order of 27 August 2002 (as varied by the order of 10 September 2002) had required Mr van Hoogstraten to provide information by 17 September 2002 and to confirm that information by affidavit on or before 24 September 2002. When the application to commit Mr van Hoogstraten to prison for breach of those orders came before Peter Smith J on 11 October 2002 Mr van Hoogstraten had provided no information and sworn no affidavit. This was not a case where, on 11 October 2002, the judge was required to decide whether information which had been provided complied with the earlier orders. There was, plainly, a failure to comply with those orders. The judge saw the position in those terms. That appears from the observation which he made in answer to the suggestion (by counsel, Miss Dorrell) that Mr van Hoogstraten ought to be present which I have set out earlier in this judgment:

> 'It is a simple enough issue. In August he was ordered to provide some information about his financial affairs by 10 September; he failed to do that. He was given further time; and he is in breach of a second order.'

The question, therefore, is not whether the judge was entitled to find that there had been a breach of the earlier orders: the question is whether he was wrong to

make a finding of contempt without giving Mr van Hoogstraten an opportunity to be heard.

[89] The judge's answer to that question is found, first in the judgment which he delivered on 11 October 2002 ([2002] All ER (D) 155 (Oct) at [6]):

> 'The claimants take the view that Mr van Hoogstraten is simply carrying on a policy that he has exhibited in other cases of wilfully disobeying court orders. I agree. *It seems to me* [*that*] *there is no reason why, if he wished either to challenge the order*, or explain to the court why he was not in a position to comply within the time limits, *he could not have done so.*' (My emphasis.)

The judge was wrong to think that Mr van Hoogstraten had not sought to challenge the earlier orders. He had sought to challenge those orders, by the application notice filed on 25 September 2002. The judge did not know that at the time. But that was not Mr van Hoogstraten's fault; it was the fault of the court office.

[90] The judge returned to the point in his judgment of 12 December 2002. By that date he did know of the application notice of 25 September 2002. He said ([2002] All ER (D) 188 (Dec) at [42]), in the passage which I have already set out:

> 'Mr van Hoogstraten ... can always apply to vary or discharge the order [of 27 August 2002] on making the appropriate application. I was not aware of course of the application that he sent to the court because its existence was not on the court file as it was still being processed. As regards the freezing order whether or not Mr van Hoogstraten was there would have made no difference whatever he might have said. The freezing order would have continued if only to fix a date for hearing his application to discharge ... In the meantime of course, it is equally the case that I cannot conceive of any court would [sic] have suspended the operation of the compliance obligations in paras 9 and 10.'

He continued (at [47]):

> 'Had he come on 11 October he would not have said anything other than he was not going to comply because he had applied to set aside the freezing order ... the fact that he had sent the application for setting aside does not obviate the need to comply: see *Motorola Credit Corp v Uzan* [2002] EWCA Civ 989, [2002] 2 All ER (Comm) 945. It seems to me that whilst matters have to be proceeded with carefully to ensure that no injustice is done to a respondent to an application there was not injustice in this case.'

The thrust of that reasoning—which may, perhaps, be seen as an attempt to justify what was done on 11 October 2002 ex post facto—is that it was safe to make a finding of contempt on 11 October 2002 in the absence of Mr van Hoogstraten because there was nothing which he could have said on that day which would have led the judge to take any other course.

[91] I find that approach startling. In the first place it gives no recognition to the rights conferred by art 6(3) of the convention—to which Mr van Hoogstraten had, himself, referred in his letter to the judge of 17 October 2002. As I have said, it is accepted on behalf of the claimant that a person facing committal proceedings is entitled, as a minimum, to the protection afforded by that article—in addition to the right to a fair and public hearing conferred by art 6(1). The protection under art 6(3) includes the right to have adequate time and

facilities for the preparation of a defence, the right to defend oneself in person and the right to examine witnesses.

[92] The judge knew, on 11 October 2002, that Mr van Hoogstraten wanted to defend himself in person. He had been told that by Miss Dorrell. He knew that Mr van Hoogstraten was not present because (for whatever reason) the Prison Service had taken the view that he was not required. It is reasonable to suppose that he would have known (if the court office had put the court file or the application notice before him) that Mr van Hoogstraten wished to challenge the claimant's witnesses. Although no copy of the application notice of 25 September 2002 has been made available, Mr van Hoogstraten's intention to expose the 'lies' of those who have testified against him has been a consistent feature of his letters, affidavits and submissions—see, in particular, his letter to the court dated 10 September 2002. And the judge knew that procedural safeguards by which rules of court seek to ensure that a person charged with contempt has an adequate opportunity to prepare an answer to that charge had not been observed.

[93] In that latter context it is pertinent to have in mind that the rules were not observed in the following respects.

(1) There was a failure to serve the order of 27 August 2002 on Mr van Hoogstraten personally, as required by RSC Ord 45, r 7. There was no order for substituted service; and, if there had been, it would have been necessary to specify, in that order, the date upon the order was to be deemed to have been served. Without that—and absent personal service—there was no date from which the time for compliance with the obligations in the order of 27 August 2002 began to run.

(2) Although that defect was cured by the subsequent order of 10 September 2002—which provided fixed dates by which the obligations were to be performed—it is plain that that order was made on the false basis that the time for compliance with the earlier order had already expired. And that order was made at a hearing at which Mr van Hoogstraten was not present, despite his request that he be produced. Further, that order contained no provision for substituted service; and there was no satisfactory evidence that that order (with its penal notice) was served personally on Mr van Hoogstraten—although, plainly, he came to know of it.

(3) There was a failure to serve the application notice of 2 October 2002 not less than 14 days before the hearing on 11 October 2002, as required by para 4.2 of the practice direction. The application notice was, in fact, served on Mr van Hoogstraten on 5 October 2002 (which was a Saturday). He had only four working days to respond to it before the hearing. Neither the application notice, nor the covering letter, indicated to Mr van Hoogstraten either what notice the rules required or that the judge would be asked to give permission to serve short. The judge decided to abridge time. He gave no reason for that decision in his judgment of 11 October 2002. In his judgment of 12 December 2002 he explained (at [46]) that 'the breach was relatively straightforward ... He [Mr van Hoogstraten] was ... plainly in breach of the order and had had a considerable time to comply'. He went on, in a passage which I have already set out earlier in this judgment:

> 'Accordingly it was appropriate in my opinion (and I remain of that opinion) to abridge time to enable the application to be disposed of that day,

hear the evidence and in finding him in breach of the order apply the appropriate sanctions.'

But, with respect to the judge, that is no answer to the point. The period of time allowed by the rules (14 days) is to enable the person charged with contempt to prepare his defence. The assumption underlying the rule is that the alleged contemnor will wish to prepare the arguments on which he wishes to rely in order either to assert that he has complied (not this case) or justify his failure to comply. In that context, the fact that Mr van Hoogstraten may have had ample time to comply with the disclosure obligations, if he intended to do so, is of little or no relevance.

[94] For my part, I find it impossible to accept that it can be right (save, perhaps, in wholly exceptional circumstances the nature of which I cannot envisage), or consistent with the convention rights embodied in art 6(3), for a judge to proceed with an effective hearing of an application to commit—in circumstances where he knows that the alleged contemnor wishes to be heard in person but is prevented from being present by matters over which he has no control—on the grounds that, if he were present, there would be nothing that he could say that would alter the judge's preconceived view that the contempt was established. That approach, as it seems to me, suggests that the judge has already closed his mind to the possibility that there is anything to be said by the alleged contemnor in his own defence. I cannot see how that can be thought compatible with the proper discharge of the judicial function. But, if that is not of itself a sufficient reason to hold that the finding of contempt ought not to have been made on 11 October 2002, there is the secondary point that, as it seems to me, the judge was wrong to take the view that, in this case, there was nothing that could have been said by or on behalf of Mr van Hoogstraten which might or ought to have led to a decision not to make a finding of contempt on that day.

[95] There were a number of points which could have been made on 11 October 2002. First, there is obvious force in a submission that this was a case in which a freezing order should not have been sought without notice—for the reasons canvassed earlier in this judgment. Second, if (as Rimer J was told by the claimant's counsel at the hearing on 27 August 2002) 'Mr van Hoogstraten had already done just about everything he could do to make sure that people do not get their hands on his assets', for what proper purpose was a freezing order required? Third, given the relatively small sums claimed in the proceedings (small, that is, in relation to Mr van Hoogstraten's alleged wealth) and the assets which were identified in Sch E to the order why was it necessary to have an order which extended to worldwide assets? Fourth, given the assets which were identified in Sch E, why was it necessary to require disclosure of worldwide assets? Fifth, if it were necessary to have an order for disclosure in this case, did the requirement, in para 9(a) of the order of 27 August 2002, that Mr van Hoogstraten give information 'of all his assets worldwide ... whether in his own name or not [and] whether solely or jointly owned' extend to 'any asset which he has the power, directly or indirectly, to dispose of or deal with as if it were his own'; and, if so, to assets which 'a third party holds or controls ... in accordance with his direct or indirect instruction'? Sixth, if so, was that sufficiently clear on the face of the order; and was that a sensible and proper requirement to impose in the circumstances of this case?

[96] The last of those points merits some elaboration. As I have said, para 6 of the order of 27 August 2002 is in standard form and may be seen as a response to the decision of this court in *Federal Bank of the Middle East Ltd v Hadkinson* [2000] 2 All ER 395, [2000] 1 WLR 1695. As an adjunct to the restraint imposed by para 5, para 6 seems unobjectionable. The party on whom the restraint is imposed knows that he must not deal with, diminish or dispose of any asset (whether or not held in his name) in respect of which he has the power to dispose or deal with 'as if [they] were his own'; and that he will be regarded as having power to dispose or deal with an asset if the third party who holds the asset acts in accordance with his direct or indirect instructions. But, in relation to the disclosure of information, para 6 presents much more difficulty. It is one thing to know that you must not give an instruction which a third party might act upon (para 5); it is quite another to have to identify all cases in which, if you did give an instruction, a third party would or might act upon it. And does the requirement extend to cases in which the third party who holds or controls the asset may choose whether or not to act in accordance with the instruction; or only to cases in which the third party can be compelled by law to act in accordance with the instruction?

[97] These questions are not fanciful. If Mr van Hoogstraten has chosen to arrange his affairs in the manner suggested by Mr Lightfoot in his various affidavits, then it is probable that he has taken care (with the benefit of skilled advisers) to do so in a way which enables him to assert (correctly as a matter of legal analysis) that assets in the names of corporate bodies, trusts or foundations are not assets which he owns beneficially; and are not assets over which he has a power of control. That is not, of course, to say that those in whose names such assets are held are not likely, in practice, to act in accordance with his instructions: it is simply to recognise that the reasons which lead those who arrange their affairs in the manner to which Mr Lightfoot deposes will often require that those in whose names the assets are held are not under any enforceable obligation to do so.

[98] There are, therefore, good reasons why the extended meaning given to the expression 'the respondent's assets' by para 6 of the order of 27 August 2002 should be confined to the restraint imposed by para 5; and should not enlarge the meaning of the expression 'all of his assets ... whether in his own name or not and whether solely or jointly owned' in para 9(a). And, if that extended meaning is intended to have effect in the context of the obligation to disclose information, there are real questions as to the extent of that disclosure obligation. Is the party on whom the obligation to disclose is imposed required to identify all those individuals, corporate bodies, trusts or foundations who (although they could not be compelled to do so) might be expected to deal with their assets in accordance with his wishes?

[99] The contempt alleged in the application notice for the committal of Mr van Hoogstraten was failure to make disclosure by the dates specified in the order of 10 September 2002. A further point which could have been made on 11 October 2002 was that the order of 10 September 2002 had been made on a false basis; for the reasons which I have already explained. That order was made on the basis that the earlier order of 27 August 2002 had been served on Mr van Hoogstraten. But there was no evidence of personal service; and no order for substituted service. The order was made at a hearing at which Mr van Hoogstraten was neither present nor represented. In those circumstances the appropriate order, on 10 September 2002, would have been an

order extending time for compliance with the disclosure obligations for a period commencing with the service of that order; not to dates which were fixed without reference to service. In my view paras 3 and 4 of the order of 10 September 2002 cannot stand; and ought now to be set aside by orders made in the appeals under references 2003/0537 and 2003/0579.

[100] It may, perhaps, be assumed that the judge's answer to all those points, if Mr van Hoogstraten had been given an opportunity to make them at the hearing on 11 October 2002, would have been that subsequently given in his letter of 24 October 2002:

> '... I am not prepared to entertain any application to discharge the Orders until you comply with the Order of Mr Justice Rimer as extended by the Order of Mr Justice Patten.'

That approach was confirmed in the exchange between the judge and Mr van Hoogstraten at the hearing on 31 October 2002 to which I have already referred:

> '*Peter Smith J.* ... as I said to you in my letter, I am not going to entertain that application [to set aside the earlier orders] until you comply with the order [for disclosure].
>
> *Mr van Hoogstraten.* Is that not putting the cart before the horse?
>
> *Peter Smith J.* No it is not. Because the authorities are that I am of a discretion whether or not I am going to entertain somebody who is in breach of an order.'

[101] The suggestion, earlier in this judgment, that the authorities which the judge then had in mind included the decision of this court in *Motorola Credit Corp v Uzan* [2002] 2 All ER (Comm) 945 is borne out by his reference to that decision in his judgment of 12 December 2002. It is necessary, therefore, to examine in the light of the judgments in that appeal whether and in what circumstances a party is required to comply with obligations to make disclosure imposed by an order of the court which has been made without notice to him before he has had an opportunity to be heard on the question whether the order setting aside those obligations should be set aside. But it is, I think, plain that there is nothing in those judgments which supports the proposition that a party can or should be held in contempt if he has failed to comply with obligations to make disclosure imposed by an order of the court which has been made without notice to him and which he has sought to have set aside before he has, at the least, had an opportunity to be heard on the question whether he is bound to do so while his application to set aside is pending.

[102] The relevant facts which gave rise to the appeal in the *Motorola* case may be stated shortly. The claimant, Motorola, obtained a worldwide freezing order in the High Court, in aid of proceedings between the parties in the United States of America, on 30 May 2002. There had been earlier freezing orders restricted to assets within the jurisdiction of the English court, but those are not material in the present context. The order of 30 May 2002 was made at a hearing without notice. It included a provision requiring the respondents, within ten working days of service of the order, to make disclosure of their worldwide assets—in terms similar to those contained in para 9(a) of the order made on 27 August 2002 in the present case. On 10 June 2002—that is to say, before the time for compliance with the disclosure obligations expired—the first defendant applied to set aside the freezing order and for a stay of the obligation to make disclosure

in the meantime. The application for a stay was treated as urgent. It came before David Steel J on 13 June 2002. He refused to stay the obligation to make disclosure. On 14 June 2002 the fourth defendant made a similar application for a stay, which was refused by Toulson J on 17 June 2002. Appeals against the orders of 13 and 17 June 2002 were heard in this court (Lord Woolf CJ, Waller and Sedley LJJ) on 26 June 2002. The appeals were dismissed, Sedley LJ dissenting.

[103] After referring to the decision of this court in *Grupo Torras SA v Al-Sabah* [1994] CA Transcript 159 Waller LJ said:

> '[28] Steyn LJ also recognised that undoubtedly there would be prejudice to the Sheikh in that case if he was forced to disclose his assets and ultimately managed to set aside the proceedings for want of jurisdiction, but Steyn LJ emphasised that that was not anywhere near as much prejudice as would be suffered if the claimant were unable to police the Mareva injunction for some time. The emphasis in that case, as has been the emphasis in this case by Mr Cran [leading counsel for the claimant], is that whereas at first sight it looks as though the court is dealing with suspending the supply of this information for only a short period of time, that is until the hearing of the summons to set aside the freezing order on 17 July, the reality is that that decision is likely to be appealed to the Court of Appeal, and indeed it may well go to the House of Lords. The reality is that if it were suspended now, it would be suspended for a very great period of time.
>
> [29] In my view, in the light of the above citation from Steyn LJ the attack that David Steel J misdirected himself is unfounded. Furthermore, I do not think that this is a case in which we should interfere with the exercise of the discretion. The factors that weigh with me are these. First, although it is an invasion of privacy to force a party to disclose assets, a freezing order in normal circumstances simply cannot be effective without that disclosure. Once one has the situation which did exist in this case, which was that on 13 June it was accepted that the freezing order should continue, then prima facie David Steel J is right in saying that a disclosure provision would be the normal provision so that the freezing order can be properly policed and be effective.
>
> [30] The second factor that weighs with me is that it may be that the defendants have an arguable case for setting aside the worldwide order, but Motorola clearly have a strong case that a fraud has been committed—a strong case that dissipation is a serious risk. Furthermore, the defendants have done nothing to comply with the United States order to replace the shares or their value. I for my part am quite unimpressed by the reasons for not replacing the shares. Furthermore, if the defendant wished to be free from this injunction he could have arranged for security to be given, but he has offered none. That security of course would be released if the injunction were set aside, but that simply has not happened.'

Lord Woolf CJ took the same view:

> '[40] When dealing with interim applications for stays a broad-brush approach has to be taken, otherwise on the application for a stay the court will be determining the very issues which are to be determined later. It seems to me that that was the approach of David Steel J. Adopting that

approach, it seems to me that, although prejudice could be caused to the defendants in this case, the likelihood is that greater prejudice would be caused to the claimants if we were to interfere with the decision of David Steel J ...'

[104] The problem in cases where an order for disclosure has been made at the same time as, and in order to give teeth to, a freezing order made without notice to the defendant is that the freezing order may be set aside after hearing full argument on both sides. If so, it will then be seen that there was no proper basis for the disclosure order. But, by that time, the defendant may have been irremediably prejudiced by the disclosure of assets which he should not have been required to disclose. On the other hand, if it is held after full argument that the freezing order should stand, then the claimant may be irremediably prejudiced if the order has not been capable of being policed in the meantime. The court is faced with the position (familiar, also, in other contexts) that whichever course it takes on an application which has to be decided without full argument may lead to irremediable prejudice to one side or the other. There is a balance to be struck.

[105] The need to strike a balance between the prejudice to the defendant if he is required to disclose assets which it is later held he should not have been required to disclose and the prejudice to the claimant if the defendant is not required to disclose assets which it is later held he should have been required to disclose was recognised by this court in the *Motorola* case. The decision in that case illustrates that there is no general rule that a party against whom a freezing order has been made is entitled to a stay of the disclosure obligations ancillary to that order until after it has been finally determined whether the freezing order should stand. Indeed, it provides support for the proposition that, in a normal case, a stay of the disclosure obligations is likely to be refused. But it is no authority for the proposition that a defendant will always be refused a stay of the obligation to make disclosure pending the final determination of his application to set aside the freezing order; no authority for the proposition that, notwithstanding that his application to set aside the freezing order is made before the time at which he has to make disclosure, the question whether or not the obligation to make disclosure should be stayed pending the final determination of that application need not be entertained by the court; and no authority for the proposition that, having made an application within time, he should not be heard on that application (or on the question of an interim stay) until he has first made the disclosure to which he objects. The procedural history in the *Motorola* case illustrates the extent to which the courts will seek to accommodate, as a matter of urgency, a hearing to decide the question whether or not disclosure should be made pending the final determination of the application to set aside the freezing order; so as to avoid a position in which a party who has not been heard is faced with the dilemma of complying with an order which he seeks to challenge (and suffering irremediable prejudice thereby) or risking contempt.

[106] For those reasons I am in no doubt that Peter Smith J was wrong to make the finding of contempt which he did make on 11 October 2002. The judge should not have made a finding of contempt without hearing what Mr van Hoogstraten had to say. Knowing that Mr van Hoogstraten wished to be heard on that day—and was prevented from attending court by some

misunderstanding on the part of the Prison Service—he should have adjourned the hearing. If he had done so, he would have learnt that Mr van Hoogstraten had taken appropriate steps—and timeously—to set aside the order of 27 August 2002. He would then have been in a position to consider where the balance lay, in the particular circumstances of this case, between requiring disclosure before a final determination of the application to set aside the freezing order and staying the disclosure obligations until after final determination of that application. It may well be that he would have struck the balance in favour of immediate disclosure; but that is not to the point. The error lay in failing to take the step which would have led him to appreciate that there was a balance to be struck.

[107] It follows that I would allow the appeals under references 2003/0537 and 2003/0580 in relation to the order of 11 October 2002 to the extent of setting aside the findings of contempt and paras A1—A3 and B5 in that order.

THE STRIKING OUT OF THE DEFENCE AND COUNTERCLAIM

[108] As I have said, the grounds upon which the judge relied in striking out Mr van Hoogstraten's defence and counterclaim were (i) the continuing failure to comply with the disclosure obligations imposed by the order of 27 August 2002, in conjunction with the failure to comply with the associated unless order contained in para 3 of the order of 13 November 2002 and (ii) conduct which had put the fairness of any trial in jeopardy—that is to say Mr van Hoogstraten's part, as evidenced by his criminal conviction, in relation to the killing of Mr Mohammed Raja in July 1999.

[109] The claimant accepts, I think, that in the events which have happened since December 2002—and, in particular, the quashing of Mr van Hoogstraten's criminal conviction and the decision that he should not face further criminal proceedings in relation to the killing of Mr Mohammed Raja—he cannot now rely on the second of those grounds. That, as it seems to me, must be correct. It is clear from [107] and [109] of his judgment of 12 December 2002 (set out earlier in this judgment at [66], above) that the judge based his conclusion that Mr van Hoogstraten was implicated in a plan to frighten or intimidate Mr Mohammed Raja—so as to deter him from proceeding with, or giving evidence at a trial of, these proceedings—from a reading of the summing up in the criminal trial and the direction to the jury on manslaughter and from the jury's verdict. Now that the direction has been held to be flawed, and the conviction quashed, there is only the summing up to support that conclusion. But the judge in the criminal trial was not a judge of fact; and his summing up cannot, as it seems to me, be relied upon as evidence of fact in these proceedings. That is not, of course, to hold that the claimant cannot allege and prove facts in these proceedings which provide a foundation for an allegation of abuse of process. It is simply to hold that he cannot support the judge's conclusion on the basis of the material on which the judge relied.

[110] The question, therefore, is whether the judge was entitled to strike out the defence and counterclaim on the basis of a continuing failure to comply with the disclosure obligations imposed by the order of 27 August 2002 read with the unless order contained in para 3 of the order of 13 November 2002. In my view the answer to that question is No.

[111] I reach that conclusion for two reasons. First, there has remained, as it seems to me, real doubt as to what it was that Mr van Hoogstraten was required to do in order to comply with the disclosure obligations imposed by

paras 9(a) and 10 of the order of 27 August 2002. I have identified the points earlier in this judgment: they are (i) whether the extended meaning given to the expression 'the respondent's assets' by para 6 of the order of 27 August 2002 should be confined to the restraint imposed by para 5 or should be taken to enlarge the meaning of the expression 'all of his assets ... whether in his own name or not and whether solely or jointly owned' in para 9(a) and (ii) whether, if that extended meaning was intended to have effect in the context of the obligation to disclose information, Mr van Hoogstraten was required to identify all those persons and bodies who (although they could not be compelled to do so) might be expected to deal with their assets in accordance with his wishes and the assets within the compass of that expectation. The judge assumed the first point against Mr van Hoogstraten without really addressing the problem. He did not address the second point at all. That approach provides no firm foundation for findings of continued contempt; or for an unless order.

[112] The second reason is that, even if it were clear what Mr van Hoogstraten had to do in order to comply with the disclosure obligations, striking out his defence and counterclaim was not an appropriate response to his failure to make adequate disclosure. It must be kept in mind that the disclosure which Mr van Hoogstraten was required to make was not disclosure in the action; in the sense that it was necessary in order that there be a fair trial of the issues in the action. It was disclosure in aid of a freezing order made in anticipation of the claimant's success in the action. In that context the observations of Millett J in *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256, cited and applied in this court in *Arrow Nominees Inc v Blackledge* [2000] 2 BCLC 167 and by Sir Andrew Morritt V-C, in *Douglas v Hello! Ltd* [2003] EWHC 55 (Ch), [2003] 1 All ER 1087n, are directly in point. Millett J said:

> 'I do not think that it would be right to drive a litigant from the judgment seat without a determination of the issues as a punishment for his conduct, however deplorable, unless there was a real risk that that conduct would render further conduct of the proceedings unsatisfactory. The court must always guard itself against the temptation of allowing its indignation to lead to a miscarriage of justice.'

[113] There was, in the present case, no risk that the failure to make disclosure in aid of the freezing order would put in jeopardy the fairness of a trial of the issues in the action. The most that could be said was that failure to make disclosure in aid of the freezing order might lead to a position where the claimant's success in the action would be rendered nugatory by the dissipation of assets which ought to have remained available to meet any judgment which he obtained. In that sense it might, perhaps, be said that inability adequately to police the freezing order 'would render further conduct of the proceedings unsatisfactory'. But that, of course, is founded on the premise that the freezing order, made without notice to Mr van Hoogstraten and on which he had never been heard, was to stand. And, by refusing to hear and determine the application to set that order aside, the judge could not safely proceed on that basis.

[114] For those reasons I would allow the appeal under reference 2003/0537 in so far as it relates to the order of 12 December 2002. Paragraphs 1–12 of that order should be set aside.

SUMMARY OF CONCLUSIONS

[115] I would allow the appeals under references 2003/0537, 2003/0579 and 2003/0580. I would set aside paras 3 and 4 of the order of 10 September 2002; the findings of contempt and paras A1–A3 and B5 in the order of 11 October 2002; the costs order of 24 October 2002; and paras 1–12 of the order of 12 December 2002. I would set aside, also, the writ of sequestration and remit to a judge of the Chancery Division the question upon what terms the sequestrators should be discharged.

[116] Subject to any further submissions which the parties may wish to make, I would make no order on the appeal under reference 2003/0581.

[117] I would make no order on the appeal under reference 2003/0538, save to remit to a judge who is to determine the terms on which the sequestrators should be discharged any remaining questions arising on the order of 10 February 2003.

[118] I would make no order in the appeal under reference 2003/1704.

MAY LJ.

[119] I agree.

PILL LJ.

[120] I also agree.

Orders accordingly.

Kate O'Hanlon Barrister.

Street v Derbyshire Unemployed Workers' Centre

[2004] EWCA Civ 964

COURT OF APPEAL, CIVIL DIVISION

AULD, JACOB AND WALL LJJ

17 JUNE, 21 JULY 2004

Unfair dismissal – Protected disclosure – Qualifying disclosure – Disclosure made in good faith – Meaning of 'good faith' – Employment Rights Act 1996, ss 43C(1), 43G(1)(a).

The appellant employee had been dismissed from her employment with the respondent employer after making a series of allegations against its manager. Under the Employment Rights Act 1996 an dismissed employee was to be regarded as unfairly dismissed if the reason or the principal reason for the dismissal was that the employee had made a 'protected disclosure'. The provisions in the 1996 Act relating to protected disclosure, including ss 43C[a] and 43G[b], had been inserted into the 1996 Act by the Public Interest Disclosure Act 1998, the purpose of which in its long title was stated to be to protect individuals who made certain disclosures in the public interest, to allow such individuals to bring action in respect of victimisation, and for connected purposes. A 'qualifying disclosure' was made under s 43C if the worker making the disclosure made it 'in good faith' to his employer, or where the worker reasonably believed that the 'relevant failure' (inter alia, the failure of person to comply with a legal obligation to which he was subject) related to the conduct of a person other than his employer, or to any other matter for which a person other than his employer had legal responsibility, to that other person. Disclosures other than to an employer or responsible person, a legal adviser, or where appropriate a minister of the Crown or a prescribed person were governed by s 43G, which provided that a qualifying disclosure was made in accordance with that section if (a) the worker made the disclosure 'in good faith', (b) he reasonably believed that the information disclosed, and any allegations contained in it, were substantially true, (c) he did not make the disclosure for purposes of personal gain, (d) any one of a number of specified conditions, going to the worker's reasonable belief that he would suffer detriment or that evidence of the subject matter of his complaint would be concealed, were satisfied, and (e) in all the circumstances of the case it

a Section 43C, so far as material, provides: '(1) A qualifying disclosure is made ... if the worker makes the disclosure in good faith—(a) to his employer, or (b) where the worker reasonable believes that the relevant failure relates solely or mainly to—(i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person ...'

b Section 43G, so far as material, provides: '(1) A qualifying disclosure is made ... if—(a) the worker makes the disclosure in good faith, (b) he reasonably believes that the information disclosed, and any allegation contained in it, are substantially true, (c) he does not make the disclosure for purposes of personal gain, (d) any of the conditions in subsection (2) is met, and (e) in all the circumstances of the case it is reasonable for him to make the disclosure. (2) The conditions referred to in subsection (1)(d) are—(a) that at the time he makes the disclosure, the worker reasonably believes that he will be subject to a detriment by his employer if he makes a disclosure to his employer ...'

was reasonable for him to make the disclosure. The tribunal dismissed her claim, holding that, in making the disclosure, she had lacked the good faith required under ss 43C(1) or 43G(1)(a), because her disclosure had been motivated by her personal antagonism toward her manager. The Employment Appeal Tribunal upheld that ruling and remitted the case back to the same tribunal for it to consider a claim of ordinary unfair dismissal. The employee appealed. The issue on the appeal was the meaning 'good faith' in relation to protected disclosure.

Held – Section 43G(1) of the 1996 Act included the notion of good faith among a set of cumulative conditions and the draftsman had plainly contemplated that that notion should be capable of adding, according to the circumstances, something to that of reasonable belief in truth. The stated purpose of the 1998 Act was to protect those who made certain disclosures in the public interest, not to allow persons to advance personal grudges. Any one of the collection of partially overlapping requirements in s 43G would, if not fulfilled, defeat a worker's right to maintain that his disclosure was 'protected' within the meaning of the 1996 Act. Whether, in the circumstances of any particular case, the claim was defeated on that account was essentially a matter for the tribunal to assess on a broad and commonsense basis as a matter of fact, in the light of each of the requirements in s 43G(1)(a)–(e). In considering good faith as distinct from reasonable belief in the truth of the disclosure, it was clearly open to a tribunal, where satisfied as to the latter, to consider nevertheless whether the disclosure was not made in good faith because of some ulterior motive, which might or might not have involved a motivation of personal gain, and/or might or might not have made the disclosure unreasonable. Whether the nature or degree of any ulterior motive found amounted to bad faith, or whether the motive of personal gain was of such as nature and strength as to 'make the disclosure for purposes of personal gain' or 'in all the circumstances of the case' not reasonable, was equally a matter for its assessment on a broad basis. In conducting that exercise employment tribunals should only find that a disclosure had not been made in good faith when they were of the view that the dominant or predominant purpose of making it was for some ulterior motive, not for the purpose of the public interest. Where, as in the instant case, the tribunal had been driven on the evidence to conclude that none of the employee's disclosures could be regarded as having been made in good faith, but were instead motivated by personal antagonism, it was plain that it had found that such personal antagonism was the employee's dominant, if not her sole motive. Looked at against the broader public policy interest behind the legislation, protection of such powerfully motivated disclosures could not be said in the circumstances to serve the declared overall purpose of the 1998 Act of protecting those who make certain disclosures of information in the public interest. The appeal would accordingly be dismissed (see [44], [47]–[53], [56]–[61], [63], [68], [70], [75], [76], below).

Notes

For forms of making a protected disclosure, see 16 *Halsbury's Laws* (4th edn) (2000 reissue) para 56.

For the Employment Rights Act 1996, ss 43C, 43G, see 16 *Halsbury's Statutes* (4th edn) (2000 reissue) 630, 631.

Cases referred to in judgments

ALM Medical Services Ltd v Bladon [2002] EWCA Civ 1085, [2002] IRLR 807, [2002] ICR 1444.

British Steel Corp v Granada Television Ltd [1981] 1 All ER 417, [1981] AC 1096, [1980] 3 WLR 774, HL.

Central Estates (Belgravia) Ltd v Woolgar [1971] 3 All ER 647, [1972] 1 QB 48, [1971] 3 WLR 571, CA.

Company's application, Re a [1989] 2 All ER 248, [1989] Ch 477, [1989] 3 WLR 265.

Darnton v University of Surrey [2003] IRLR 133, [2003] ICR 615, EAT.

Horrocks v Lowe [1974] 1 All ER 662, [1975] AC 135, [1974] 2 WLR 282, HL.

Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd [1991] 2 All ER 597, [1991] 1 WLR 589.

Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2) [1972] 2 All ER 949, [1972] 2 QB 455, [1972] 2 WLR 1370, CA.

Appeal

Frances Muriel Street appealed from the decision of the Employment Appeal Tribunal ([2003] All ER (D) 75 (Dec)) on 22 December 2002 affirming in part the determination of the Sheffield Employment tribunal on 26 March 2002 that Mrs Street was not entitled to be regarded as unlawfully dismissed pursuant to s 103 of the Employment Rights Act 1996. The facts are set out in the judgment of Auld LJ.

Joel Donovan (instructed through the *Bar Pro Bono Unit*) for Mrs Street.

Colin Bourne (instructed by *Graysons*) for the centre.

Cur adv vult

21 July 2004. The following judgments were delivered.

AULD LJ.

[1] The appellant, Mrs Frances Muriel Street, appeals from a decision of the Employment Appeal Tribunal (EAT) ([2003] All ER (D) 75 (Dec)) affirming the determination of the employment tribunal at Sheffield (26 March 2002, unreported) turning on the meaning of the requirement of 'good faith' in making disclosures in the public interest that are 'qualifying' disclosures under s 43B of the Employment Rights Act 1996, and, therefore, 'protected' disclosures under ss 43A and 43C–43H of the Act.

[2] Dismissal of a worker on account, or principally on account, of him having made such a protected disclosure is, by s 103A of the 1996 Act, deemed to have been an unfair dismissal for the purposes of that Act. Those provisions were inserted in a new part, Pt IVA, of the Act by s 1 of the Public Interest Disclosure Act 1998, the purpose of which is clearly stated in its long title:

> 'An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.'

They relate to 'any disclosure of information which, in the reasonable belief of the worker making the disclosure, tends to show' among other things the commission or likely commission of a criminal offence or a failure or likely failure

by a person to comply with any legal obligation to which he is subject (see ss 43A and 43B(1)(a) and (b)). a

[3] Section 103A of the 1996 Act provides in effect for an automatic entitlement to be regarded as unfairly dismissed for the purpose of the Act if the reason, or if there is more than one, the principal reason, for the dismissal is that an employee made what the Act defines, in s 43A, as a 'protected disclosure', that is, one of various sorts so specified in s 43B, the degree of protection qualifying b for the purpose varying according to different circumstances specified in ss 43C–43H. It should be noted that if a disclosure does not qualify for protection, that is, an automatic entitlement to be regarded as unfairly dismissed, the worker is still entitled to pursue his claim for unfair dismissal before an employment tribunal under Ch II of Pt X of the 1996 Act in the ordinary way.

[4] In this case Mrs Street, who had worked as an administrator for the c Derbyshire Unemployed Workers' Centre (the centre) from 1989, was dismissed by the centre in January 2001 after making a series of allegations against the manager of the centre. She made a claim to an employment tribunal maintaining that she was entitled to be regarded as unlawfully dismissed under s 103A. The tribunal dismissed her claim, holding that, in making the disclosure, she had d lacked the good faith required under ss 43C(1) or 43G(1)(a). The EAT upheld that ruling and remitted the case back to the same employment tribunal for it to consider a claim of 'ordinary' unfair dismissal.

[5] The scheme of the 'whistle-blowing' provisions in the 1996 Act is to encourage employees to, and protect employees who, report concerns about malpractice in the workplace and elsewhere. The Act provides a three-tiered e disclosure regime under which, if the 'whistle-blower' is to secure the automatic protection of s 103A, his responsibility for justifying his disclosure is set progressively higher according to the distance of the person to whom he makes it from the main subject or object of his complaint. In all of them, save for s 43D—'Disclosure to legal adviser'—the minimum requirement for protection f is that the disclosure is made 'in good faith'.

[6] Thus, in s 43C, all that a worker who makes a disclosure to his employer or to another responsible person, or under s 43E—'Disclosure to Minister of the Crown'—, has to do to qualify to for automatic protection is to show that his disclosure was made 'in good faith'. One of the disclosures under consideration in this case was made to a member of the centre's management committee, and g was thus a candidate for protection under s 43C.

[7] The second tier of disclosure, in which greater justification is required for protection, is that provided by s 43F—'Disclosure to prescribed person'—where, in addition to showing that the disclosure was made 'in good faith', the worker must show that he reasonably believed that the malpractice of which he h complained falls within the description of the matters in respect of which that person is prescribed and that his complaint is 'substantially true'. None of Mrs Street's disclosures under consideration in this case falls within this category.

[8] The third tier of protection, with which this appeal is mainly concerned, is that provided for in s 43G—'Disclosure in other cases'—where the j 'whistle-blower' has to do much more to justify his automatic protection[a]. In addition to showing that he made the disclosure 'in good faith' under s 43G(1)(a), he must show that it was made: (i) in the reasonable belief 'that the information disclosed, and any allegation contained in it, are substantially true' (see

a See also s 43H—'Disclosure of exceptionally serious failure'

s 43G(1)(b)); (ii) it was not made 'for purposes of personal gain' (see s 43G(1)(c)); (iii) satisfaction of *any one* of a number of specified conditions going to the worker's reasonable belief that he would suffer detriment or that evidence of the subject matter of his complaint would be concealed (see s 43G(1)(d)); and (iv) 'in all the circumstances of the case, it is reasonable for him to make the disclosure' (see s 43G(1)(e)), in the determination of which, regard must be had to a number of factors in a non-exhaustive list in s 43G(3), including the identity of the person to whom the disclosure was made, the seriousness of the failure complained of and whether it was continuing or was likely to continue.

[9] It is plain from that summary of the relevant provisions that: (1) the conditions in s 43G(1) are cumulative, that is, that a disclosure is only a 'qualifying disclosure' if all of them are met; (2) the conditions in s 43G(2) are disjunctive, that is, it is sufficient if any one of them is met; (3) there is some overlap between them all; and (4) in making separate and cumulative provision in s 43G(1) for 'good faith' in para (a), reasonable belief in the truth of the disclosure in para (b) and reasonableness of the disclosure in all the circumstances in para (e), the draftsman has allowed for circumstances in which the disclosure, though made with reasonable belief in its truth, would not qualify for protection because it was not made in good faith and/or reasonably.

[10] Looking at the provisions overall, Mummery LJ has given the following useful narrative account of their requirements in his judgment in *ALM Medical Services Ltd v Bladon* [2002] EWCA Civ 1085, [2002] IRLR 807, [2002] ICR 1444, with which Sir Andrew Morritt V-C and Rix LJ agreed:

> '[4] The provisions can only be invoked if the relevant disclosure satisfies certain requirements. In outline they are as follows: (i) A disclosure of information only qualifies for protection if, in the reasonable belief of the worker making the disclosure, it tends to show one or more things specified in s.43B(a) to (f); for example, that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject; or that the health or safety of any individual has been, is being or is likely to be endangered. (ii) The disclosure must be made in accordance with the provisions of ss.43C to 43H: for example, the worker must make the disclosure in good faith to his employer (s.43C). (iii) Disclosure by a worker "in other cases" may be also protected under s.43G, if certain cumulative requirements are met: it must be made in good faith, he must reasonably believe that the information disclosed, and any allegation contained in it, are substantially true, he must not make the disclosure for the purposes of personal gain. (iv) In such "other cases" one or more of the conditions set out in s.43G(2) must also be met. They require that, at the time he makes a disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or that he reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or that the worker has previously made a disclosure of substantially the same information to his employer. (v) There is also a requirement that, in all the circumstances of the case, it is reasonable for the worker to make the disclosure. Section 43G(3) sets out the factors to which regard must be had, in particular, in determining whether it is reasonable for the worker to make the disclosure: eg the identity of the person to whom disclosure is made, the seriousness of the relevant failure, whether the

relevant failure is continuing or is likely to occur in the future and any action which the employer, to whom previous disclosure was made, has taken or might reasonably be expected to have taken as a result of the previous disclosure.'

THE FACTS

[11] Mrs Street began employment with the centre in May 1989 and was dismissed on 30 January 2001. She was initially employed as a part-time administrative assistant, and from 1993 onwards as a full-time administration worker. The centre is a voluntary non-profit-making organisation providing advice and assistance to unemployed, unpaid or low-paid people in North-East Derbyshire.

[12] The management of the centre is conducted by a management committee made up of persons, not employed by it, but who are elected or co-opted onto the committee by the various bodies that fund it. Those include the Chesterfield Borough Council (the borough council) and the North-East Derbyshire District Council (the district council). At all relevant times, the co-ordinator (effectively the manager) of the centre was Mr Colin Hampton. His assistant was a Mr Pemberton, and there were five other paid staff, including Mrs Street.

[13] On 22 May 2000 Mrs Street wrote to the treasurer of the borough council, a Mr Richard Earlam, making various allegations against Mr Hampton, a disclosure within s 43G. She headed her letter 'Private and Confidential under Whistle Blowers Legislation', and alleged that: (i) Mr Hampton had committed a fraud in setting up an allegedly secret account, namely the Chesterfield and District Trade Union Council (TUC) Contingency Account into which some £16,000 had allegedly been transferred by the Trade Union Safety Team (TRUST) of which Mr Hampton was treasurer, so that, it was alleged, it would appear for the purposes of any means-tested funding that TRUST had fewer assets than was the case. This allegation had been made earlier in March 2000 by a Mr Richard Easson, former treasurer of the TUC, at the annual general meeting of the TUC attended by Mrs Street. The TUC was a separate organisation from the centre, but the centre had been established by the TUC and both organisations shared the aims of the wider Labour movement. (ii) Mr Hampton had made trips abroad during his working time for the centre, but for the benefit of other organisations. Again, it appears that this allegation had been made before, this time in an anonymous letter of November 1999, written by a Mr French to Mr Earlam, making various allegations against Mr Hampton. The centre, in response to that letter, had called upon Mr Hampton to respond to the allegations, and he had done so by a letter of 10 January 2000. In the light of his explanation, the centre had taken no further action. (iii) Mr Hampton had frequently instructed Mrs Street to do work for other organisations in her normal working hours for the centre.

[14] Mr Earlam responded by letter of 25 May 2000. He stated that it would be difficult for the borough council to investigate the allegations because it did not have powers of entry or inspection of documents. He suggested that her letter could be shown to the chairman of the centre's management committee, Councillor Kendellen, or that he, Mr Earlam, could raise the issues with Councillor Kendellen on a non-attributable basis.

[15] Mrs Street, in her reply of 19 June 2000, rejected his suggestions, stating that she had no confidence in the centre's management committee. She also

referred to Mr Hampton's recent barring of District Councillor Patricia Williams from meetings of the centre's management committee (but of which she remained a member), for having allegedly breached the centre's equal opportunities policy and also complained that he had used an item of correspondence against another employee, Mr Derek Skinner, in breach of the Data Protection Act 1998. Mr Earlam's response was to suggest that they should meet, but she declined to do so.

[16] In the latter part of June 2001, Mrs Street showed Councillor Williams copies of the two letters she had written to Mr Earlam, a disclosure falling within s 43C of the 1996 Act as Councillor Williams had been a member of the centre's management committee. She also showed Councillor Williams a copy of what purported to be a report of the centre's staff meeting of 9 June 2000. That report recorded an incident during the meeting when a volunteer, Sarah Roy, had behaved in a way demonstrating disrespect towards persons with learning disabilities. In her note Mrs Street commented that she found it strange that Mr Hampton had not remonstrated with Ms Roy over the incident, and contrasted his treatment of Councillor Williams in barring her from the centre for alleged comparable conduct, namely her harassment of a Mr Skinner's estranged partner (a matter to which the employment tribunal was to make express reference in its extended reasons for its determination).

[17] At a meeting of the centre's management committee on 11 October 2000, the vice-chairman, Mr Johnson, reported the allegations of impropriety against Mr Hampton. The committee resolved on an investigation to be carried out by an independent person, namely, Mr John Burrows, a councillor of the borough council and chairman of its standards committee. The centre then invited Mr Burrows to conduct the investigation, but did not do so in writing and gave him no specific terms of reference.

[18] Mr Burrows investigated three separate issues, the first two arising out of Mrs Street's s 43G disclosures to Mr Earlam, namely the alleged use by Mr Hampton of work time for the centre when abroad and the issue of the centre's staff being used for non-centre work, and the third, Mrs Street's s 43C disclosure to Councillor Williams in her suggestion of his double standards in his implementation of the centre's equal opportunities policy. The centre did not instruct Mr Burrows in relation to the allegation of fraud—apparently that was considered to be a matter for the TUC.

[19] Mrs Street declined Mr Burrows' request to interview her for the purpose of his investigation. His report exonerated Mr Hampton and was critical of her for failing to co-operate with the investigation her allegations had prompted. He described her as being at best misguided and at worst malicious. He stated that the allegations were unfounded and possibly required serious disciplinary proceedings to be taken against her.

[20] Mr Burrows' report was presented to the centre's management committee at a meeting on 18 December 2000, at which the committee seemingly concluded that Mrs Street's allegations against Mr Hampton were unfounded. By letter of the same date, the centre's committee's assistant co-ordinator, a Mr Pemberton, wrote to her suspending her from work pending an investigation of the 'serious matters' to which Mr Burrows had referred. In a subsequent letter, Mr Pemberton invited her to a 'fact-finding' interview on 11 January 2001. She attended the interview with her union representative and gave an explanation for her disclosures to Mr Earlam and Councillor Williams and for her refusal to co-operate with Mr Burrows' investigation. She said that

she had gone to Mr Earlam, as treasurer of the borough council, and to Councillor Williams, a member of the centre's management committee, because she had feared that otherwise there would be a cover-up and that she would be victimised. And she said that she had not co-operated with Mr Burrows' investigation because she had not regarded him as truly independent, and because she thought of him as a friend of Mr Hampton.

[21] On 25 January 2001 Mrs Street attended, again with a union representative, a disciplinary interview at the centre. Following that interview, Mr Pemberton wrote to her informing her that the centre had summarily dismissed her for gross misconduct and breach of trust on the basis of her 'unfounded and libellous' allegation against Mr Hampton and her refusal to co-operate with Mr Burrows' investigation.

[22] Mrs Street's internal appeal against that dismissal was ultimately unsuccessful. Prior to its determination, she sought, in early February 2001, interim relief from the employment tribunal at Nottingham maintaining that she had been unfairly dismissed on account of her disclosures and that she was entitled to automatic protection from unfair dismissal under ss 43C, 43G and 103A of the 1996 Act.

THE EMPLOYMENT TRIBUNAL'S DETERMINATION

[23] The employment tribunal found that Mrs Street's various disclosures to Mr Earlam and Councillor Williams were qualifying disclosures under s 43B(1)(b) of the 1996 Act, as they were disclosures that she had reasonably believed tended to show that Mr Hampton had failed to comply with legal obligations to which he was subject, namely his contract of employment with the centre. The tribunal then considered whether those qualifying disclosures became protected disclosures under any of ss 43C–43H. It held that the disclosure to Councillor Williams fell to be considered under s 43C (disclosure in good faith to employer or other responsible person) and those to Mr Earlam, under s 43G (disclosure in good faith in other cases not covered by ss 43C–43F, but subject to the additional requirements set out in s 43G(1)(b)–(e) that I have mentioned).

[24] The tribunal concluded that none of Mrs Street's three disclosures was protected, because none had been made in good faith. In relation to her two disclosures to Mr Earlam, it found that, notwithstanding its finding that she had not made them in good faith (see s 43G(1)(a)), she had satisfied the other requirements of the section, namely she had reasonably believed in the substantial truth of her allegations (see para (b)), she had not made the disclosures for personal gain (see para (c)), she had satisfied one of the conditions in s 43G(2), namely that she had reasonably believed she would be subject to a detriment if she had reported the matters to her employer (see para (d)), and that in all the circumstances it had been reasonable of her to make the disclosures (see para (e)). Thus, as in the case of her disclosure to Councillor Williams, her claim that her disclosures to Mr Earlam were protected foundered on the tribunal's finding that she had not made them in good faith.

[25] On the issue of good faith, the critical issue for the tribunal was, therefore, what exactly is meant by that requirement, common to all, save one, of the forms of protected disclosure provided for in ss 43C–43H, and what, if anything, it adds to the requirement of reasonable belief in its substantial truth in ss 43F(1)(b)(ii) and 43G(1)(a) and, in the latter case, to the other requirements specified in s 43G(1), in particular, not for personal gain (see para (c)) and reasonableness (see

para (e)). Mrs Street's case was that good faith simply meant 'honestly' and added nothing to that concept, where, in addition, a reasonable belief in the substantial truth of the allegation is required. The centre's case was that the requirement of good faith in those provisions must require something more or different from a reasonable belief in the truth of the allegations, as otherwise there would be no need for its inclusion in them.

[26] The tribunal clearly took the view that, although there was some overlap between the requirements of good faith and of reasonable belief in the honesty of the content of a disclosure, that of good faith did add something, namely a consideration of motive. Having taken into account the circumstances surrounding Mrs Street's allegations, including their timing and her failure to co-operate with the later investigation, it concluded that none of them had been made in good faith, but had instead been motivated by her personal antagonism towards Mr Hampton. It, therefore, dismissed her claim to automatic protection under s 103A from dismissal. This is how it approached that matter of law in para 13(a) of its extended reasons:

> 'We note that ... good faith is the first matter which is required. It seems to us that there must be a certain degree of overlap between the concept of good faith in s 43G(1)(a) and the reasonable belief in the substantial truthfulness as set out in s 43G(1)(b). We find that applicant's allegations were as far as she was aware, true and in that sense we find that she has complied with sub-s (1)(b). The question of how that information is used is of course a separate matter going back to the issue of good faith. There has been no suggestion that the applicant made the disclosure for personal gain. We then consider the matters set out in s 43G(2) of which really the only relevant part is sub-s (2)(a) "that, at the time he makes the disclosure the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer ..." We find that such was the applicant's view of Mr Hampton that she did believe that a disclosure made to her employer would at best be ineffective and at worst would lead to what she believed had happened to others namely that if one was not for Mr Hampton one was perceived as being against him. Turning to s 43G(3) we find that a disclosure to someone in Mr Earlam's position namely treasurer of the local authority which was a major founder of the respondent can properly be regarded as reasonable. Accordingly, in general terms we find that the applicant satisfies the vast majority of the conditions imposed by s 43G.'

[27] Before moving on to the tribunal's consideration of good faith, I should say something about its favourable finding to Mrs Street on the issue of reasonableness (see s 43G(1)(e)) and, for this purpose, set out some of the potentially material factors in the non-exhaustive list of factors to which it was required, by s 43G(3), to have regard:

> '(a) the identity of the person to whom the disclosure is made, (b) the seriousness of the relevant failure, (c) whether the relevant failure is continuing or is likely to occur in the future ...'

[28] It will be noted from the concluding words of the tribunal's reasoning on the issue of reasonableness that the only matter to which it appears to have had regard was the identity of the recipient of her disclosure, namely the reasonableness of making it to someone in Mr Earlam's position as the treasurer

of the local authority as a major funder of the centre, as if that was enough for the purpose. It may be that it overlooked the fact that it was required, in the words of s 43G(1)(e), to have regard to 'all the circumstances of the case', not just those potential candidates listed in s 43G(3). It may be that it confused its inquiry as to reasonableness under those provisions with that under s 43G(1)(d) and (2) where satisfaction of any one of the conditions in s 43G(2) would suffice. It may be that it took the view that, although it had found, in considering the issue of good faith, that Mrs Street had made her attack on Mr Hampton in bad faith fuelled by her personal antagonism to him, it had to put that out of its mind when considering whether her conduct was 'in all the circumstances of the case ... reasonable ...' (see s 43G(1)(e)). If so, as will appear, I consider that it erred in those respects.

[29] The tribunal then went on to consider on the evidence before it, whether Mrs Street had acted in good faith when she wrote her two letters to Mr Earlam. In para 13(b) of its extended reasons, it found that she had not acted in good faith for the following reasons: (1) her second disclosure to Mr Earlam contained a passing reference to something that she knew to be untrue (ie not sufficient to affect the allegation's 'substantial' truth for the purpose of s 43G(1)(b)); (2) many of the matters about which she had complained had occurred or had ceased to occur many years before; (3) she had learned of the secret fund allegation in March 2000, but had done nothing about it until her first disclosure letter on 22 May 2000; (4) her perception that some of her colleagues had been got rid of by Mr Hampton; (5) and her failure to co-operate with Mr Earlam or the centre or Mr Burrows' investigation after having made her disclosures. Having set out those matters, the tribunal expressed its conclusion in the following terms:

> 'Accordingly in those circumstances we conclude that none of the disclosures made can be regarded as made in good faith but were instead motivated by the applicant's personal antagonism towards Mr Hampton fuelled in particular by his perceived treatment of Mr Skinner's and Councillor Williams' cases. It therefore follows that the applicant has not made a protected disclosure and accordingly that cannot be the reason for her dismissal ...'

THE EAT

[30] The EAT upheld the employment tribunal's holding and analysis:

> '25. As to good faith, we hold that there is a compelling finding of fact contained in the passage ... [ie that at [29], above]. The tribunal clearly had in mind the competing situations, that is, a faultless good faith disclosure and a disclosure made purely out of personal antagonism. It decided to reject the former description and accept the latter. There can be few areas on which the judgment of an employment tribunal is more fact-sensitive than in conducting such an exercise. As a matter of law, we see no question arising about that particular holding. Thus, it destroys the case (which would otherwise have been perfectly made by the applicant) for a successful claim under s 103A.
>
> 26. We reject the contention that the simple finding that the appellant believed the material, as far as she was aware, as being a complete answer. There is nothing inconsistent in an applicant holding such a belief that the material is true and yet promoting it for reasons which are based upon personal antagonism. It seems to us that what Lord Denning MR had in mind [in *Secretary of State for Employment v Associated Society of Locomotive*

Engineers and Firemen (No 2) [1972] 2 All ER 949 at 967, [1972] 2 QB 455 at 492 (see [41], below)], albeit in a different context, was that the motive for which a person does a particular act can change its character from good to bad, and so here.

27. We do not think that the slight overlap that there may be between s 43G(1)(a) and (b) and s 43[G](3) destroys the essential focus, recognised as fundamental in this case, on whether the applicant acted in good faith. Thus, it is important for the tribunal to assess motive and, as often, this matter is one of fact for it to determine in its own appreciation ...

29. Thus, the finding of lack of good faith in this case is one which was open to the tribunal, having directed itself correctly as we hold. *We agree that good faith involves the deployment of an honest intention* and, just as in public law, actions of a person can be vitiated if a purpose is advanced not in accordance with the statute, here s 43G.

30. It is not, in our view, the purpose of the Public Interest Disclosure Act 1998 to allow grudges to be promoted and disclosures to be made in order to advance personal antagonism. It is, as the title of the statute implies, to be used in order to promote the public interest. The advancement of a grudge is inimical to that purpose ...' (My emphasis.)

[31] It should be noted that the EAT, in para 29, was content with the proposition that good faith involves the deployment of an honest intention.

THE SUBMISSIONS

[32] Mr Joel Donovan, on behalf of Mrs Street, appeared at first in his submissions to accept that the requirement of good faith in s 43G(1)(a) is distinct from that of reasonable belief in the truth of disclosure in s 43G(1)(b). The distinction that he purported to draw was that, in addition to a reasonable belief in the truth of the disclosure, for it to be made in good faith a worker must make it 'honestly' or 'with honest intention'. But when pressed by the court in the course of his submission as to the meaning of 'honestly' or 'with honest intention' in this context and its distinction, if any, from reasonable belief in the truth of the information disclosed, he said that they are virtually 'indivisible' in meaning. He suggested that, if motivation is relevant, it would have to be both malicious and predominant to amount to bad faith. However, he submitted that the employment tribunal, in finding that Mrs Street had believed in the truth of her allegations, accepted 'in effect' that she had acted 'honestly' or 'with honest intention' and, thereby, in good faith.

[33] Mr Donovan suggested that the tribunal, in going on to find that, nevertheless, Mrs Street lacked good faith, simply illustrated that it had wrongly considered 'in good faith' to mean something more than or different from 'honestly' or 'with honest intention'. He focused on the implicit reference to motive by the employment tribunal, in its extended reasons, namely that 'how [the] information is used is ... a separate matter going back to the issue of good faith'. He maintained that, whilst such a consideration might relate to the requirement of reasonableness in s 43G(1)(e) on which the tribunal had expressly found in Mrs Street's favour, it was a distinct issue from 'with honest intention', and the tribunal had wrongly ignored or muddled the distinction.

[34] In his submissions, Mr Donovan drew on and adopted the written submissions to the court of Public Concern at Work (Public Concern), which it made, with the permission of the court, as an interested party. Public Concern is an independent charity and a legal advice centre established in 1993 specialising

in advising both employees and employers on 'whistle-blowing'. It is popularly known as 'the whistle-blowing charity'. The main thrust of its submission on this appeal, for which the court is grateful, was that it would seriously damage the purpose of the 1998 Act and the protection it provides in the public interest to 'whistle-blowers' if ulterior motivation, in particular the promotion of a grudge, were to deprive a disclosure of the quality of having been made in good faith. It urged the court to look at the general application of the Act, in particular, the protection that it provides against pre-dismissal reprisals. Its primary submission was that a disclosure made in good faith under the Act means simply one that is made honestly, that is with a view to something being done about the failure disclosed, and that where it is made with mixed motives, the good faith requirement is satisfied where it is made honestly in that sense even if accompanied by an ulterior motivation, such as a personal grudge.

[35] Alternatively, Public Concern suggested that, if an ulterior motive can vitiate the requirement of good faith, even where the disclosure is made honestly in the above sense, it should only have that effect where: (1) it is so 'wicked or malicious' that it approaches 'dishonesty'; and (2) it is the predominant motive for the disclosure. Whilst Mr Donovan had reservations that the threshold to bad faith should be put as low as 'approaching' dishonesty, he was prepared to accept Public Concern's propositions as a 'fall-back' submission should he fail in his primary one that motivation is irrelevant to the issue of good faith. At the very least, he argued, bad motivation should only negative good faith where it is the predominant motivation—and substantially so. Here, he said, the employment tribunal, at the very least, erred in failing to apportion in this way between good and bad motivations and in taking an 'all-or-nothing' approach.

[36] He relied in that respect on the express requirement in s 43G(1)(c) that the disclosure, if it is to be protected, must not be made for purposes of personal gain. He argued that a provision referring to such specific form of ulterior motive would be otiose if motive were relevant to the issue of good faith in s 43G(1)(a). Public Concern advanced the same argument in its written submission to the court.

[37] However, as Mr Donovan acknowledged, motivation is highly relevant to the requirement of reasonableness in s 43G(1)(e). Indeed, he conceded that if Mrs Street had fulfilled all the requirements, in which he substituted the words 'honesty' or 'with honest intention' for in good faith, but had made the disclosure out of pique or a grudge, as the employment tribunal found, she still risked being found to have acted unreasonably within s 43G(1)(e), having regard to the non-exhaustive list of factors in s 43G(3). Yet, as he acknowledged, albeit softly, the tribunal had strangely absolved her of any unreasonableness, whilst at the same time found that she had not acted in good faith because of her personal antagonism towards Mr Hampton. In making that submission, he acknowledged that the tribunal may have muddled the two requirements of good faith and reasonableness or may not have considered the issue of reasonableness under s 43G(1)(e) and (3) sufficiently widely. In short, he acknowledged that an ulterior motive could be a factor going to the reasonableness of disclosure and that, therefore, the best Mrs Street could hope for if she succeeded in this appeal on the good faith issue would be a remission of the issue of her disclosures to Mr Earlam under s 43G to the employment tribunal to reconsider the matter under the heading of reasonableness. (No such need for remission would arise in the case of the disclosure to Councillor Williams because that is governed by s 43C, which does not include a requirement of reasonableness.)

[38] However, Mr Donovan maintained that there was a separate and important question as to the meaning of the requirement of good faith in these provisions that went beyond its application along with the clutch of other cumulative requirements in s 43G, namely whether it amounts to a requirement of 'purity of motive'. Such an interpretation, he submitted, would significantly weaken—or indeed subvert—the purpose of the 1998 Act from which the provisions in the 1996 Act derive, of protecting those who make disclosures of information in the public interest from victimisation. He suggested that it cannot be a proper interpretation of the provisions to hold that a 'whistle-blower' loses that protection by reason of bad motivation, even in tiny part, towards his employer, however serious the failure disclosed, however understandable his antagonism and however reasonable it may have been for the disclosure to have been made to someone other than the employer.

[39] Mr Colin Bourne, on behalf of the centre, submitted that the separate but cumulative imposition by s 43G(1) of, inter alia, the requirements of in good faith and reasonable belief in truth, means that in good faith must mean something additional to or other than a reasonable belief in the truth of the information disclosed. He argued that, having regard to the nature of the wrongdoing in respect of which disclosures are specified in s 43B as qualifying for protection, the requirement of good faith must mean that the disclosure should be made for the purpose of disclosing one or more of those wrongdoings, not for some other ulterior motive such as personal antagonism to the person the subject of the disclosure, as the employment tribunal had found in this case. He submitted, therefore, that the EAT correctly did not interfere with the fact-finding function of the employment tribunal.

[40] As to the written submissions of Public Concern, Mr Bourne suggested that they overstate the risk of undermining the protection Parliament intended to confer on those making disclosure in the public interest. He said that where, as here, an employment tribunal has found that the worker, in making the disclosure(s) was motivated 'by ... personal antagonism' towards the person, it does not advance the public interest to protect such conduct.

CONCLUSIONS

[41] Shorn of context, the words 'in good faith' have a core meaning of honesty. Introduce context, and it calls for further elaboration. Thus in the context of a claim or representation, the sole issue as to honesty may just turn on its truth. But even where the content of the statement is true or reasonably believed by its maker to be true, an issue of honesty may still creep in according to whether it is made with sincerity of intention for which the Act provides protection or for an ulterior and, say, malicious, purpose. The term is to be found in many statutory and common law contexts, and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another. This is so even in closely related legislation such as the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1995, in which s 4(2) of the 1975 Act, s 2(2) of the 1976 Act and s 55(4) of the 1995 Act prevent as being discriminatory for the relevant purpose treatment prompted by an allegation that is 'false and not made in good faith'. In such a formulation which is concerned with the stark difference between truth or falsity, not, as here 'reasonable belief in [its substantial truth]', the notion of 'good faith' is the only vehicle for considering the honesty or dishonesty of the allegation. For those reasons, I do not consider that it is helpful

to turn in this context to some of the more distant examples of the use of the expression that have been cited to us, including *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No 2)* [1972] 2 All ER 949 at 967, [1972] 2 QB 455 at 492 per Lord Denning MR, where the issue was whether ASLEF had caused or would cause its members to breach their contracts of employment under the Industrial Relations Act 1971 by working to rule, and *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* [1991] 2 All ER 597 at 606, 607, 608, [1991] 1 WLR 589 at 597–598, 599, 600 per Browne-Wilkinson V-C, in the wholly different context of whether a company's refusal to consent to an increase in pension benefits was subject to an extra-contractual obligation to act in good faith.

[42] I should, however, say something about one other example, *Central Estates (Belgravia) Ltd v Woolgar* [1971] 3 All ER 647, [1972] 1 QB 48 which concerned the meaning of 'in good faith' in the Leasehold Reform Act 1967 on the issue whether motivation is relevant to whether something is done or said in good faith, Lord Denning MR's words in that context are a frequent point of reference ([1971] 3 All ER 647 at 649, [1972] 1 QB 48 at 55): '... under this Act a claim is made "in good faith" when it is made honestly and with no ulterior motive.' However, the issue in that case was whether claims by two tenants under the 1967 Act to acquire the freehold and an extended lease of their respective properties were made in good faith so as to enable them to defeat their respective landlords' claims for re-entry and forfeiture for breach of covenant under their leases. The issue was, therefore, the good faith of a claim, which does not necessarily involve consideration of the truth of any statement of fact in making it, and where motive, or honesty of motive was all. It is thus understandable that Megaw LJ in that context equated 'in good faith' with 'honestly', saying ([1971] 3 All ER 647 at 651, [1972] 1 QB 48 at 57):

> 'The words "in good faith", in my opinion, mean "honestly". A claim is not made honestly if it is made with the intention of committing a criminal offence, or of facilitating the future commission of a criminal offence. It does not make it any the less a dishonest claim because the intended criminal offence is itself not what is called an offence involving dishonesty.'

[43] Whereas in Mrs Street's case, the issue is the good faith of a disclosure containing a statement of fact—an allegation. If it falls within s 43C it involves no separately identified issue as to its truth or reasonable belief in its truth or other indicia of honesty. If it falls within s 43G there is required, in addition to good faith, reasonable belief in its truth, no motive of personal gain, on the contrary a good reason for not disclosing to the employer, and reasonableness. In short, these provisions may require employment tribunals on occasion to distinguish between good faith and honesty in a way not called for in the *Central Estates* case, notwithstanding Lord Denning MR's seemingly conjunctive rather than disjunctive use of the words 'honestly and with no ulterior motive'.

[44] I say 'may' require such a distinction because where a statement is made without reasonable belief in its truth, that fact would be highly relevant as to whether it was made in good faith (see, for example, *Darnton v University of Surrey* [2003] IRLR 133 at 136, [2003] ICR 615 at 623 (para 24) per Judge Serota QC), as indeed it would also be highly relevant as to its reasonableness. Mr Donovan accepted—indeed he prayed in aid—that degree of overlap between good faith, reasonable belief in substantial truthfulness and reasonableness in all the circumstances. But it does not necessarily follow that, where a statement is made

in that belief, it necessarily follows that it is made in good faith or reasonably. Where, as in a statutory provision like s 43G(1), the parliamentary draftsman has included the notion of good faith among a set of cumulative conditions of the qualification in question, it is plain that he contemplated that the notion of good faith should be capable of adding, according to the circumstances, something to that of reasonable belief in truth, as Mummery LJ appears to have accepted in his analysis of these provisions in *ALM Medical Services Ltd v Bladon* [2002] IRLR 807 at [4](iii), [2002] ICR 1444 at [4](iii) (see [10], above). It is noteworthy too that in s 43G, and also in s 43F, good faith is the first of the cumulative conditions stipulated.

[45] Nevertheless, giving focus to Mr Donovan's concern that some bad motivation, some personal antagonism towards the employer, could, under the banner of bad faith, deprive him of protection even if he met all the other requirements of s 43G, it is important to start, as Public Concern have stressed, with the context of the 1998 Act, the purpose and long title of which, for convenience, I repeat:

> 'An Act to protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes.'

Public Concern, in its written submission, suggested that the practical difficulty posed by any suggestion that a grudge or personal animosity or other motive is a bar to protection would be to cause a worker, considering making a disclosure in the public interest, to fear that he might lose protection and discourage him from doing so. And, as it suggested, such a state of mind is often integral to claims of this sort. That is especially so, as a claim can only be brought under the Act once the worker making it has been dismissed, and it is, therefore, easy for his employer to identify and allege.

[46] However, the authorities that Public Concern cited in support of its contention are not in point. The first was *Re a company's application* [1989] 2 All ER 248, [1989] Ch 477, which concerned a company's claim to restrain by way of interlocutory injunction a former employee from disclosing to a regulatory body its confidential material which he maintained showed impropriety by the company (see now, and cf, s 43J of the 1996 Act). The issue of motive arose not, as in Mrs Street's case, out of any conditional obligation imposed by law to make such disclosure in good faith, but out of an assertion inessential to the company's cause of action, based on the confidentiality of the information, that the former employee was motivated by malice. Scott J, as he then was, rejected the notion that either confidentiality of information or motivation of malice entitled the company to restrain disclosure of such information to a regulatory body, and made the following comment on which Public Concern relied ([1989] 2 All ER 248 at 251, [1989] Ch 477 at 482):

> 'It may be the case that the information proposed to be given, the allegations proposed to be made by the defendant to FIMBRA, and for that matter by the defendant to the Inland Revenue, are allegations made out of malice and based on fiction or invention. But, if that is so, then I ask myself what harm will be done. FIMBRA may decide that the allegations are not worth investigating. In that case, no harm will have been done. Or FIMBRA may decide that an investigation is necessary. In that case, if the allegations turn out to be baseless, nothing will follow the investigation. And, if harm is

caused by the investigation itself, it is harm which is implicit in the regulatory role of FIMBRA.' a

However, it seems to me that that comment was more of a practical observation on the facts of the case than a proposition of law. And even if it could be regarded as such a proposition or a pointer to the law, it would be both obiter and would say nothing about the effect of ulterior motive for doing something which, if it is to have a specific legal effect, the law requires to be done in good faith. Equally uninstructive on the issue of good faith as it is raised in Mrs Street's case was Public Concern's reliance on *British Steel Corp v Granada Television Ltd* [1981] 1 All ER 417, [1981] AC 1096, for the general proposition that the common law's underlying approach to public interest disclosures is that motive is generally irrelevant. b c

[47] On the broad point of construction by reference to the stated purpose of the 1998 Act, the reasoning of the EAT, at para 30 (see [30], above) is to the point. Its purpose is not to allow persons to advance personal grudges, but to protect those 'who make certain disclosures of information in the public interest'; namely those specified in s 43B of the 1996 Act. And it has to be remembered that even if a worker might be deterred from making a relevant disclosure because of concern that his employer might raise against him a suggestion of bad faith in the sense of a mix of motives, including personal antagonism, or fails in his s 103A claim on that account, all is not lost. His automatic protection provided by that section is lost, but he can still maintain an 'ordinary' claim for unfair dismissal against his employer in which a mix of motives may not be fatal to his claim. d e

[48] Turning more closely to the construction and effect of the cumulative conditions of protection set out in s 43G, even if one defines 'in good faith' as requiring simply 'honesty of intention', that still requires more than a reasonable belief in the truth of the allegations made. The draftsman must be taken to have intended some additional, even if partially overlapping, requirement with that of reasonable belief in the truth of the disclosure, when continuing in s 43G(1)(a) the requirement of good faith in the earlier provisions of Pt IVA of the 1996 Act. f

[49] As to overlap, I have already noted that the absence of a reasonable belief in the truth of a disclosure may be capable of indicating bad faith. Why else would a worker make such a disclosure if he did not reasonably believe in its truth? There is, as I have also noted, and Mr Donovan has acknowledged, scope for overlap between the requirement of good faith and that of reasonableness in s 43G(1)(e). g

[50] There is a similar problem of overlap, which does not arise on the finding of the tribunal in this case, namely that between a disclosure not made in good faith and one made for personal gain. Depending on the width of the construction of the latter and its nature in any particular case (note s 43L(2) of the 1996 Act, which provides that any reward payable by or under any enactment for a disclosure is not to be regarded as personal gain for this purpose) there is clearly scope for motivation of personal gain to negative good faith. But it may be a sufficiently justified motivation to pass the good faith requirement but not that of the absence of motivation of personal gain. So, depending on the outcome, it may be academic where personal gain is the, or the main, motivation for disclosure, whether it also serves to negative good faith—the disclosure loses its protection anyway. And here the specific requirement of the absence of a motivation of personal gain in s 43G(1)(c) may not be otiose any more than that of reasonableness in s 43G(1)(e), depending on the circumstances, for example h j

where the ulterior motive is not for personal gain and might be considered reasonable, but is not made for any of the purposes for which s 43B provides protection.

[51] It is against that large but not total overlap, or of 'overkill', or sheer untidiness of drafting on the part of the parliamentary draftsman of s 43G, that the court must consider the argument of Mr Donovan and Public Concern, that the requirement in s 43G(1)(c) of the disclosure not having been made for purposes of personal gain would be otiose if motive were relevant to the requirement of good faith.

[52] It follows that, in my view, s 43G provides a collection of partially overlapping requirements, any one of which, if not fulfilled, will defeat a worker's right to maintain that his disclosure is 'protected' within the meaning of the Act. Whether, in the circumstances of any particular case, the claim is defeated on that account is essentially a matter for the employment tribunal to assess on a broad and commonsense basis as a matter of fact, in the light of each of the requirements in paras (1)(a)–(e) of the section. Whether it approaches the question through one or more than one of those requirements and whether or not they overlap is essentially a matter for its evaluation on the evidence before it.

[53] In considering good faith as distinct from reasonable belief in the truth of the disclosure, it is clearly open to an employment tribunal, where satisfied as to the latter, to consider nevertheless whether the disclosure was not made in good faith because of some ulterior motive, which may or may not have involved a motivation of personal gain, and/or which, in all the circumstances of the case, may or may not have made the disclosure unreasonable. Whether the nature or degree of any ulterior motive found amounts to bad faith, or whether the motive of personal gain was of such a nature or strength as to 'make the disclosure for purposes of personal gain' or 'in all the circumstances of the case' not reasonable, is equally a matter for its assessment on a broad basis.

[54] When I first drafted this judgment I was of the view that, in the case of the requirement of 'in good faith' (I say nothing in this respect about motivation of personal gain because it is not an issue in the appeal), such an assessment should not, in my view, be cluttered with notions of predominance or degrees of predominance, as suggested by Public Concern and adopted by Mr Donovan as a 'fall-back' submission. In each case the answer one way or the other might be a 'judicial elephant' emerging from the tribunal's consideration of all the evidence. I considered that it could be unhelpful, often unreal when the countervailing considerations are of quite a different nature, and unduly prescriptive to introduce into the exercise an explicit formula of the sort suggested by Public Concern that an ulterior motive should only negative good faith when it is so wicked and/or malicious as to be or to approach dishonesty and is the predominant motive for the disclosure.

[55] However, I began to have second thoughts when considering the sort of circumstances to which employment tribunals should have regard, and the possibly different weight it might have to attach to some of them, when conducting this imprecise exercise, especially having regard to the overlapping requirements whether a disclosure was made in good faith, not for personal gain and reasonably. Such an exercise could require the tribunal to consider and evaluate the cumulative effect of a wide range of factors such as how serious and how wide-ranging are the effects of the failure, how old it is and the potential for disproportionate damage it could do to the employer whether the allegation turns out to be true or false. The tribunal would also have to keep in mind what

is commonplace in such a context, that a failure or refusal by an employer to remedy a perceived failure of duty and/or injustice to a worker is often likely to engender in him an understandable resentment or antagonism that may grow if the matter is not remedied quickly. That, in itself, should not necessarily be regarded as negativing good faith if, when making the disclosure, the worker is still driven by his original concern to right or prevent a wrong.

[56] On further reflection, it seems more in keeping with the declared public interest purpose of this legislation, fair and a more useful guide to employment tribunals in conducting this sometimes difficult, sometimes straightforward, exercise—depending on the facts—to hold that they should only find that a disclosure was not made in good faith when they are of the view that the dominant or predominant purpose of making it was for some ulterior motive, not that purpose. I have also been prompted to that view by the analysis, to which Mr Donovan drew our attention, of Lord Diplock in *Horrocks v Lowe* [1974] 1 All ER 662 at 669–670, [1975] AC 135 at 150–151, a case of defamation, of the state of mind required to constitute malice so as to deprive a defendant of the defence of qualified privilege:

> 'Even a positive belief in the truth of what is published on a privileged occasion—which is presumed unless the contrary is proved—may not be sufficient to negative express malice if it can be proved that the defendant misused the occasion for some purpose other than that for which the privilege is accorded by the law. The commonest case is where the *dominant motive* which actuates the defendant is not a desire to perform the relevant duty or to protect the relevant interest, but to give vent to his personal spite or ill-will towards the person he defames. If this be proved, then even positive belief in the truth of what is published will not enable the defamer to avail himself of the protection of the privilege to which he would otherwise have been entitled. There may be instances of improper motives which destroy the privilege apart from personal spite. A defendant's *dominant motive* may have been to obtain some private advantage unconnected with the duty or the interest which constitutes the reason for the privilege. If so, he loses the benefit of the privilege despite his positive belief that what he said or wrote was true. Judges and juries should, however, be very slow to draw the inference that a defendant was so far actuated by improper motives as to deprive him of the protection of the privilege unless they are satisfied that he did not believe that what he said or wrote was true or that he was indifferent to its truth or falsity. The motives with which human beings act are mixed. They find it difficult to hate the sin but love the sinner. Qualified privilege would be illusory, and the public interest that it is meant to serve defeated, if the protection which it affords were lost merely because a person, although acting in compliance with a duty or in protection of a legitimate interest, disliked the person whom he defamed or was indignant at what he believed to be that person's conduct and welcomed the opportunity of exposing it. It is only where his desire to comply with the relevant duty or to protect the relevant interest plays no significant part in his motives for publishing what he believes to be true that "express malice" can properly be found.' (My emphases.)

[57] Now, I acknowledge that the fit is not exact between the circumstances in which, in defamation, malice may defeat a defence of qualified privilege and in which, in this legislation, want of good faith may deny a worker's disclosure of its

protected status. First, in defamation, positive belief in the truth of the statement, whether reasonably held or not, suffices as a starting point. Second, malice is a sharper concept than bad faith and, on the whole, sets a higher threshold of proof than might be required for other or lesser forms of bad faith. Nevertheless, it seems to me a useful pointer for employment tribunals to look at Lord Diplock's analysis as he expressed it in the first of the two paragraphs in that passage in his references to the 'dominant motive'. They should similarly, in my view, look for the dominant or predominant purpose of a disclosure when considering whether it was made in good faith. However, I would not go so far as to fine-tune that test by adopting the proposal of Public Concern and/or the 'fall-back' submission of Mr Donovan that there should be a high degree of predominance, possibly, as Mr Donovan suggested, expressed in minimum percentage terms. Nor, with respect, am I persuaded along that route by Lord Diplock's suggestion to like effect in the concluding words of the second paragraph of the passage above that it is only when a defamer's—

> 'desire to comply with the relevant duty or to protect the relevant interest plays *no significant part* in his motives for publishing what he believes to be true that "express malice" can properly be found.' (My emphasis.)

I say that because that formulation seems to go further than his proposition of dominance or predominance of malicious motive in the first paragraph, and also because of what, depending on the facts, may often be the higher threshold necessary for the proof of malice in defamation than bad faith in this legislation.

[58] In my view, where, as here, the employment tribunal was driven on the evidence to conclude, as it did, that none of Mrs Street's disclosures 'could be regarded as made in good faith, but were instead motivated by [her] personal antagonism toward Mr Hampton', it is plain, as the EAT stated in para 25 of its judgment, that it found that such personal antagonism was her dominant, if not her sole, motive. In my view, the EAT was right not to interfere with that finding. Looked at against the broader public policy interest behind this legislation, protection of such powerfully motivated disclosures could not be said in the circumstances to serve the 1998 Act's declared overall purpose of protecting those 'who make certain disclosures of information in the public interest'.

[59] Accordingly, I would dismiss the appeal.

JACOB LJ.

[60] I agree.

WALL LJ.

[61] I have had the opportunity of reading Auld LJ's judgment in draft, and I am in complete agreement with him that this appeal should be dismissed for the reasons he gives. I add a short judgment of my own largely because this appeal raises directly the important question of what is meant by 'good faith' where it appears in Pt IVA of the Employment Rights Act 1996. On this point we not only heard argument from the Bar, but admitted a document from Public Concern at Work (Public Concern) (colloquially known as 'the whistle-blowing charity') to which Auld LJ refers at [34], above.

[62] I should, however, like to preface my remarks by expressing my gratitude to counsel on both sides (both of whom appeared pro bono) for the clear and helpful way they advanced their respective arguments.

[63] I am in no doubt at all that, on the facts of this case, the employment tribunal were entitled to reach the conclusion that the disclosures made by the appellant were not made in good faith but were instead motivated by her personal antagonism towards Mr Hampton fuelled in particular by his perceived treatment of Mr Skinner's and Councillor Williams' cases. They were, moreover, in my judgment, entitled to reach that conclusion whilst at the same time making a finding that the appellant reasonably believed that the information disclosed, and any allegation contained in it, were substantially true (see s 43G(1)(b) of the 1996 Act).

[64] Furthermore, in my judgment, the tribunal approached the case in exactly the right way. Having recited the facts in some detail and with great care, they then set out the relevant sections of the statute and proceeded to work their way through them. They asked, firstly: did the appellant make a protected disclosure or disclosures? They then continued:

> 'In order to assess this question, we direct ourselves that the scheme of the legislation is that we must first look to the content of what is disclosed (whether it is a qualifying disclosure) and then if appropriate consider the person or persons to whom the disclosure was made together with an assessment of the motive and means by which the disclosure is made.'

[65] The tribunal then proceeded conscientiously to perform that exercise. When they reached s 43G they found that the appellant 'in general terms satisfied the vast majority of the conditions imposed by s 43G'. That, however, left good faith, which they then examined. They then gave clear reasons for their conclusion (identified at [63], above) that the appellant was not acting in good faith. Auld LJ has summarised at [29], above the findings of fact they made in reaching that conclusion and which I need not repeat.

[66] The issue of whether or not a protected disclosure is made in good faith is, self-evidently and pre-eminently, an issue of fact for the employment tribunal sitting as the industrial jury. Here, there was manifestly material upon which the tribunal could make appropriate findings of fact: they did so, and explained why they did so. There is no suggestion that their findings were perverse. Accordingly, unless the tribunal have committed an error in law in their application of the statute, their decision is unimpeachable.

[67] For the appellant, Mr Donovan's primary argument was that 'in good faith' meant 'honestly'. For this proposition, he relied principally on the judgment of Megaw LJ in *Central Estates (Belgravia) Ltd v Woolgar* [1971] 3 All ER 647 at 651, [1972] 1 QB 48 at 57. Accordingly, he submitted, once the tribunal had found that the provisions of s 43G(1)(b) were satisfied, that should have been the end of the matter so far as good faith was concerned: a person who is acting honestly cannot be acting in bad faith.

[68] For all the reasons given by Auld LJ, I am unable to accept this argument in the context of s 43G of the 1996 Act. In my judgment it is manifest that a person may reasonably believe that the information disclosed and any allegation contained in it are substantially true, and still not make the disclosure in good faith. If good faith in s 43G meant simply a reasonably belief in the truth of the information disclosed, the inclusion of good faith in the checklist of factors contained in s 43G(1)(a)–(e) would be otiose. Moreover, good faith is a question of motivation, and as a matter of general human experience, a person may well honestly believe something to be true, but, as in the instant case, be motivated by personal antagonism when disclosing it to somebody else.

[69] If, however, good faith is not to be equated with honest belief in the truth of the disclosure, how is it to be defined? This is the point which I have found most difficult in the case. I am firmly of the view that it is not the function of appellate courts to superimpose a gloss onto the plain words of a statute. The mischief of such a course is obvious. Forensic attention thereafter tends to focus on the gloss rather than the words of the statute, with the result that a body of jurisprudence swiftly develops on what is meant by the gloss. Like Auld LJ, therefore, my initial instinct was to treat the concept of good faith as a form of judicial elephant: difficult to define, but readily identifiable through the good sense and fact-finding capabilities of employment tribunals. That would have been my preferred course, possibly leaving the question of mixed motivation in making a protected disclosure until it specifically arose for decision.

[70] Having listened to the argument, however, including Mr Donovan's adoption of the submission made by Public Concern, and having read Auld LJ's judgment, I am reluctantly persuaded that this will not do, and that this court should address (albeit in a limited and cautious form) the extent to which mixed motivation can undermine the protection given to the disclosures identified in s 43B(1) of the 1996 Act.

[71] Part IVA of the 1996 Act protects the disclosure of information relating to the issues identified in s 43B. The primary purpose for the disclosure of such information by an employee must, I think, be to remedy the wrong which is occurring or has occurred; or, at the very least, to bring the s 43B information to the attention of a third party in an attempt to ensure that steps are taken to remedy the wrong. The employee making the disclosure for this purpose needs to be protected against being victimised for doing so; and that is the protection the statute provides.

[72] Motivation, however, is a complex concept, and self-evidently a person making a protected disclosure may have mixed motives. He or she is hardly likely to have warm feelings for the person about whom (or the activity about which) disclosure is made. It will, of course, be for the tribunal to identify those different motives, and nothing in this judgment should derogate from the proposition that the question for the tribunal at the end of the day as to whether a person was acting in good faith will not be: did the applicant have mixed motives? It will always be: was the complainant acting in good faith?

[73] In answering this question, however, it seems to me that tribunals must be free, when examining an applicant's motivation, to conclude on a given set of facts that he or she had mixed motives, and was not acting in good faith. If that is correct, how is it to be done? I can see no more satisfactory way of reaching such a conclusion than by finding that the applicant was not acting in good faith because his or her predominant motivation for disclosing information was not directed to remedying the wrongs identified in s 43B, but was an ulterior motive unrelated to the statutory objectives.

[74] It would, of course, be folly to attempt to list what could constitute ulterior motivation or bad faith. The present case provides one example. Ulterior motivation, I am satisfied, is something that tribunals will be able both to identify and to evaluate on the facts of the individual case.

[75] In these circumstances, I am persuaded by para [57], above, that it should be open to tribunals when looking at the question of good faith under Pt IVA of the 1996 Act to conclude that an applicant was not acting in good faith if his or her predominant motivation was not to achieve the primary objective which I have identified at [71], above. In my judgment, this provides sufficient protection

for whistle-blowers, and does not undermine the protection given by the Act. It recognises that human beings have mixed motives. It will, I hope, enable tribunals to make assessments on a straightforward analysis of the evidence.

[76] For these reasons, which complement those given by Auld LJ, I too would dismiss this appeal.

Appeal dismissed.

Kate O'Hanlon Barrister.

R (on the application of Fisher and others) v English Nature

[2004] EWCA Civ 663

COURT OF APPEAL, CIVIL DIVISION
AULD, WALL LJJ AND PUMFREY J
22, 23 MARCH, 26 MAY 2004

Environment – Protection – Site of special scientific interest – Confirmation by statutory body of notification that site was of special interest – Existence and scope of power not to confirm – Wildlife and Countryside Act 1981, s 28.

The claimants were among the principal owners of certain farmland. The defendant, a statutory body corporate with responsibility for overseeing nature conservation, notified the claimants of its opinion that the farmland was a site of special scientific interest (SSSI) because of its internationally important population of stone-curlew. That notification was given under s 28(1)[a] of the Wildlife and Countryside Act 1981, which required the defendant, where it was of the opinion that any area of land was of special interest by reason, inter alia, of any of its fauna, to notify that fact to, inter alia, every owner and occupier of any of that land. Section 28(4) of the 1981 Act required such notification to specify, inter alia, any operations appearing to the defendant to be likely to damage the specified fauna. The defendant identified a number of such operations in relation to stone-curlew. Following notification, the defendant conducted a thorough consultation and investigative process in which it heard objections from the claimants and other affected parties. After that process was concluded, the defendant gave notice to the claimants that it had confirmed the s 28(1) notification. That confirmation was given under s 28(5) which provided that, where a s 28(1) notification had been given, the defendant 'may' within a specified period either give notice withdrawing the notification or give notice confirming it. The claimants brought judicial review proceedings, challenging the lawfulness of the decision to confirm the notification. Those proceedings were dismissed by the judge. On the claimants' appeal to the Court of Appeal, the issue arose, inter alia, whether the defendant had a discretion to refuse to confirm if, after hearing objections, it remained of the view that a site was an SSSI.

Held – On its true construction, s 28(5) of the 1981 Act gave rise to the exercise of a power not to confirm, which was to be exercised in accordance with the conclusion reached as a result of the outcome of a genuine, open-minded consultation/investigations process. Once the s 28(1) factors and the appropriateness of the matters specified under s 28(4) had been reconsidered, there was only a limited basis upon which it would be open to the defendant to refuse to confirm a notification under s 28(5). In the instant case, the decision to confirm could not be challenged on any of the grounds advanced by the claimants. Accordingly, the appeal would be dismissed (see [135], [149]–[152], below).

Decision of Lightman J [2003] 4 All ER 366 affirmed.

a Section 28 is set out at [12], below

Notes

For areas of special scientific interest, see 34 *Halsbury's Laws* (4th edn reissue) para 210.

For the Wildlife and Countryside Act 1981, s 28, see 32 *Halsbury's Statutes* (4th edn) (2004 reissue) 447.

Cases referred to in judgments

Fredin v Sweden (1991) 13 EHRR 784, [1991] ECHR 12033/86, ECt HR.

Holder v Law Society [2003] EWCA Civ 39, [2003] 3 All ER 62, [2003] 1 WLR 1059.

James v UK (1986) 8 EHRR 123, [1986] ECHR 8795/79, ECt HR.

Padfield v Ministry of Agriculture, Fisheries and Food [1968] 1 All ER 694, [1968] AC 997, [1968] 2 WLR 924, HL.

R (on the application of Aggregate Industries UK Ltd) v English Nature [2002] EWHC 908 (Admin), [2003] Env LR 83.

R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.

R v Nature Conservancy Council, ex p London Brick Co Ltd [1996] Env LR 1.

R v Secretary of State for Education and Employment, ex p Begbie [2000] 1 WLR 1115, CA.

Simplex GE (Holdings) Ltd v Secretary of State for the Environment [1998] 3 PLR 25, CA.

Tre Traktörer Aktiebolag v Sweden (1991) 13 EHRR 309, [1989] ECHR 10873/84, ECt HR.

Cases referred to in skeleton arguments

Mellacher v Austria (1990) 12 EHRR 291, [1989] ECHR 10522/83, ECt HR.

Oerlemans v Netherlands (1989) 62 DR 200, E Com HR.

Southern Water Authority v Nature Conservancy Council [1992] 3 All ER 481, [1992] 1 WLR 775, HL.

Appeal

The Hon Patrick Fisher and the Trustees of the Hon PV Fisher's 1986 Children's Settlement, who were among the principal owners of certain arable land known as the Breckland Farmland, appealed with permission of Carnwath LJ granted on 26 September 2003 from the decision of Lightman J on 4 July 2003 ([2003] EWHC 1599 (Admin), [2003] 4 All ER 366, [2004] 1 WLR 503) dismissing their application for judicial review of the decision of the respondent, English Nature, on 11 July 2001, communicated to the appellants by notice given on 3 August 2001, to confirm its view, notified to the appellants by letter dated 15 November 2000, that the Breckland Farmland was a site of special scientific interest. The facts are set out in the judgment of Wall LJ.

David Holgate QC and *Daniel Kolinsky* (instructed by *Richard Buxton*, Cambridge) for the appellants.

John Howell QC and *Jane Collier* (instructed by *Browne Jacobson*, Nottingham) for English Nature.

Cur adv vult

26 May 2004. The following judgments were delivered.

WALL LJ (giving the first judgment at the invitation of Auld LJ).

INTRODUCTION: THE APPEAL IN OUTLINE

[1] The Hon Patrick Fisher and trustees of the Hon PV Fisher's 1986 Children's Settlement (the appellants) are among the principal owners of some 13,335·7 hectares of intensely farmed arable land lying across the border between Norfolk and Suffolk and known collectively as the Breckland Farmland.

[2] By letter dated 15 November 2000, the respondent to this appeal, English Nature (formerly the Nature Conservancy Council), acting pursuant to s 28(1) of the Wildlife and Countryside Act 1981, notified the appellants (amongst others) that it was of the opinion that the Breckland Farmland was a site of special scientific interest (SSSI). Following a meeting of its council on 11 July 2001, and acting pursuant to s 28(5) of the 1981 Act, English Nature on 3 August 2001 gave notice to the appellants (amongst others) by letter confirming the notification. The reason for both the notification and the confirmation of the Breckland Farmland as an SSSI was the site's 'internationally important population of stone-curlew'.

[3] The appellants challenged the lawfulness of the decision to confirm the notification (the decision) by means of proceedings for judicial review instituted in the Administrative Court on 24 September 2001 and heard by Lightman J over three days on 18–20 June 2003. In a reserved judgment handed down on 4 July 2003, the judge rejected the challenge, dismissed the application and refused permission to appeal. His decision is now reported as *Fisher v English Nature* [2003] EWHC 1599 (Admin), [2003] 4 All ER 366, [2004] 1 WLR 503.

[4] The appellants now renew their challenge to the decision in this court. Permission to do so was granted on the papers by Carnwath LJ on 26 September 2003 on three of the five grounds raised in the appellant's notice, which I set out at [107], below.

THE STRUCTURE OF THIS JUDGMENT

[5] Despite the apparent simplicity of the application of s 28 of the 1981 Act to the facts of this case, and the judge's tautly muscular analysis of the issues, the arguments in this court ranged widely and developed a considerable degree of sophistication. I have therefore come to the conclusion that I need to set out the background to the case and the arguments arising from it in more detail than might normally be expected in an appeal involving the manner in which a specialist statutory body has exercised a clearly identified specialist statutory function. I therefore propose to address the issues raised by the appeal under separate headings. For ease of reference, I provide an index at this point, which charts the path of my attempt to identify and analyse the issues, from which the discerning reader can select whatever information he or she requires.

a

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THE ORNITHOLOGICAL BACKGROUND

[6] As this case is about the stone curlew, it is right that it should feature at the outset of the judgment. In this regard I can do no better than borrow the summary made by the judge ([2003] 4 All ER 366):

> '[6] Stone curlews are a migratory species nesting from March onwards in any year and migrating to southern Spain or North Africa from October. The birds nest from March each year in cultivated land which has plenty of bare ground and fairly short vegetation, as they prefer an open relatively unobstructed vista (so as to be aware of predators) and stony ground so that their eggs are camouflaged. The location of the nests of the stone curlew may vary from year to year and nesting attempts at different locations in one year are commonplace. Field work has found that stone curlews may travel up to 3 km from the nest site to forage. Stone curlews are very sensitive to recreational disturbance and benefit from lack of recreational access on agricultural land. They are not usually affected by mechanised agricultural operations.
>
> [7] The stone curlew is a species identified as being of European significance and as requiring special measures of conservation in the Birds Directive [Council Directive (EEC) 79/409 (on the conservation of wild birds) (1979 OJ L103 p 1)]. It is a species that is protected under Pt 1 of the 1981 Act by special penalties at all times. It is also a priority species under the United Kingdom Biodiversity Action Plan.
>
> [8] The stone curlew is an extremely scarce bird species nationally. Numbers have fallen by 85% in the past 50 years and by more than 50% since 1960. The British population was estimated to be 215 pairs in 1998 and 234 pairs in 1999. It is one of the rarest breeding bird species in Great Britain.'

ENGLISH NATURE: ITS ORIGINS, CONSTITUTION AND FUNCTIONS

[7] I take this part of my judgment from the helpful and authoritative explanation contained in the witness statement filed in the proceedings on 13 February 2003 by the acting chief executive of English Nature, Dr Andrew Brown. Dr Brown explains that, whilst there has been a specialist nature conservation body in England since 1949, it was the Nature Conservancy Council Act 1973 which created the Nature Conservancy Council as an independent body to oversee nature conservation. Its functions were concerned with nature reserves, the provision of advice to the Secretary of State on the development and implementation of policies relating to nature conservation, the provision of advice and the dissemination of knowledge about nature conservation and the commissioning and support of research relevant to those matters.

[8] The Nature Conservancy Council for England was dissolved on 21 December 1991 by order of the Secretary of State (see the Nature Conservancy Council (Dissolution) Order 1991, SI 1991/2923), and, by virtue of s 73 of the Countryside and Rights of Way Act 2000, the Nature Conservancy Council of England is now known instead as English Nature.

[9] English Nature are a statutory body corporate, and are not to be regarded as servants or agents of the Crown. The council of English Nature is required to comprise not less than 10 nor more than 14 members appointed by the Secretary of State. In practice, Dr Brown says, they are selected for their

particular experience, knowledge and expertise in various areas relevant to nature conservation. Dr Brown produces a list of the current members and points out that they have considerable expertise and experience in a range of relevant fields, including botany, biology, marine biology and geology. They also bring to the council of English Nature their experience of wider countryside and environmental issues including agriculture, town and country planning, and environmental management. The council meets at least quarterly at different locations. Since 16 May 2001, its meetings have been held in public.

[10] English Nature have some 900 members of staff. The vast majority of officers involved in nature conservation work have at least a first degree in a relevant scientific discipline in their field. Some work as conservation officers in one of 22 area teams with responsibilities for site designation, site management, assessing the condition of SSSIs and seeking to ensure their appropriate management.

THE SCHEME FOR DESIGNATING SSSIs

[11] An SSSI is defined by s 52 of the 1981 Act as 'an area of land which has been notified under section 28(1)(b)'.

[12] As the provisions of s 28 of the 1981 Act are the heart of this appeal, I propose to set out s 28(1)–(9) in full. For ease of reference, I have inserted the name 'English Nature' for the Nature Conservancy Council wherever it appears.

> '(1) Where [English Nature] are of the opinion that any area of land is of special interest by reason of any of its flora, fauna, or geological or physiographical features, it shall the duty of the Council to notify that fact—(a) to the local planning authority in whose area the land is situated; (b) to every owner and occupier of any of that land; and (c) to the Secretary of State.
>
> (2) [English Nature] shall also publish a notification of that fact in at least one local newspaper circulating in the area in which the land is situated.
>
> (3) A notification under subsection (1) shall specify the time (not being less than three months from the date of the giving og the notification) within which, and the manner in which, representations or objections with respect to it may be made; and [English Nature] shall consider any representation or objection duly made.
>
> (4) A notification under subsection (1)(b) shall also specify—(a) the flora, fauna, or geological or physiographical features by reason of which the land is of special interest, and (b) any operations appearing to [English Nature] to be likely to damage that flora or fauna or those features, and shall contain a statement of [English Nature's] views about the management of the land (including any views [English Nature] may have about the conservation and enhancement of that flora or fauna or those features).
>
> (5) Where a notification under subsection (1) has been given, the Council [English Nature] may within the period of nine months beginning with the date on which the notification was served on the Secretary of State either—(a) give notice to the persons mentioned in subsection (1) withdrawing the notification; or (b) give notice to those persons confirming the notification (with or without modifications).

(6) A notification shall cease to have effect—(a) on the giving of notice of its withdrawal under subsection (5)(a) to any of the persons mentioned in subsection (1); or (b) if not withdrawn or confirmed by notice under subsection (5) within the period of nine months referred to there, at the end of that period.

(7) [English Nature]'s power under subsection (5)(b) to confirm a notification under subsection (1) with modifications shall not be exercised so as to add to the operations specified in the notification or extend the area to which it applies.

(8) As from the time when there is served on the owner or occupier of any land which has been notified under subsection (1)(b) a notice under subsection (5)(b) confirming the notification with modifications, the notification shall have effect in its modified form in relation to so much (if any) of that land as remains subject to it.

(9) A notification under subsection (1)(b) of land in England and Wales shall be a local land charge.'

THE EFFECTS OF NOTIFICATION AND THE POWER TO DENOTIFY

[13] Rather than set out the statutory provisions in extenso, I gratefully adopt the summary made by the judge ([2003] 4 All ER 366 at [17]):

'Notification has a number of legal consequences. In particular: (1) English Nature may enter into an agreement with the owners, lessees and occupiers of any land within such an area for the purpose of conserving or restoring the matters by reason of which the area is of special interest (under s 15 of the Countryside Act 1968), imposing restrictions on the exercise of the rights of those persons and for the carrying out of work or the doing of such other things on the land as may be expedient. English Nature may acquire all or any part of an SSSI compulsorily if they are satisfied that they are unable to conclude an agreement as to the management of the land on reasonable terms or if any such agreement is breached in such a way that the land is not being managed satisfactorily; (2) English Nature may formulate a "management scheme" for conserving or restoring the matters by reason of which the area is of special interest, following the procedure set out in s 28J of the 1981 Act. If it appears to English Nature that any owner or occupier of land is not giving effect to a provision of a management scheme, that they are unable to conclude an agreement with him as to its management in accordance with the scheme and that, as a result, any such matters are being inadequately conserved or restored, they may serve a "management notice" on him (under s 28K of the 1981 Act). Such a notice may require him to carry out such work on the land or do such other things with respect to it as are reasonably required to ensure that the land is managed in accordance with the management scheme. Failure to comply with any requirement of a management notice without a reasonable excuse is a criminal offence and entitles English Nature to do what is required; (3) the owner or occupier of any land included in an SSSI may not carry out, or cause or permit to be carried out, on that land any operation specified in the notification itself as being likely to damage the matters by reason of which the area is of special interest, unless English Nature have been given notice of a proposal to carry it out (specifying its nature and the land on which it is proposed to be carried out) and the operation is carried out either in accordance with the

terms of a relevant agreement with English Nature, a management scheme or a management notice or with English Nature's written consent. English Nature's decisions in relation to such consents may be the subject of appeal to the Secretary of State. A person who contravenes these requirements without a reasonable excuse is guilty of a criminal offence. Such an excuse may exist if the operation carried out is an emergency operation, if it was authorised by certain planning permissions or if it was permitted by certain public bodies in other circumstances; and (4) other public bodies are required to take reasonable steps in the exercise of their own functions, in so far as their exercise is likely to affect matters by reason of which the area is of special interest, to further the conservation and enhancement of those matters provided that such steps are consistent with the proper exercise of their own functions. Such public bodies are also required to follow a specific procedure designed to protect such matters which requires them to take into account English Nature's advice if they propose to carry out, or to give any consent for, any operations that are likely to damage such matters.'

[14] As the judge commented, it is apparent that the consequences of notification go far beyond anything that can be achieved by voluntary agreement with affected landowners.

[15] Denotification is governed by s 28D of the 1981 Act and provides:

'(1) Where [English Nature] are of the opinion that all or part of a site of special scientific interest is no longer of special interest by reason of any of the matters mentioned in s 28(1) they may decide to notify that fact.'

[16] The procedure for denotification is essentially the same mutatis mutandis as the procedure for notification.

SECTION 28(4)(b) OF THE 1981 ACT: OLDs—'OPERATIONS APPEARING TO [ENGLISH NATURE] TO BE LIKELY TO DAMAGE' THE FAUNA IN THE INSTANT CASE

[17] Operations which English Nature identify under s 28(4)(b) of the 1981 Act as likely to damage the flora or fauna or the geological or physiographical features of the site are known by the acronym 'OLDs'. In the instant case, English Nature identified five OLDs in relation to the stone curlew namely:

'(1) Killing, injuring, taking or removal of stone curlews, or their eggs and nests. Intentional or reckless disturbance of stone curlews, their eggs or chicks.*

(2) Long term afforestation of farmland in excess of 5 hectares.

(3) Extraction of minerals including hard rock, sand and gravel, topsoil and subsoil except for farm use.

(4) Construction of roads, or the laying, maintenance or removal of pipelines and cables, above or below ground, except for agricultural or forestry purposes.

(5) Erection of permanent buildings or reservoirs, or the undertaking of engineering work, including drilling, except for agricultural or forestry purposes.

*Accidental disturbance through agricultural and game management, for example, is not regarded as intentional or reckless disturbance.'

[18] No complaint was made before the judge or before us about the OLDs identified by English Nature, and in particular no suggestion was made that English Nature was acting outside its powers in identifying or imposing these particular OLDs in accordance with their statutory duty under s 28(4)(b).

OTHER PROTECTIVE MECHANISMS FOR BIRDS: SPECIAL PROTECTED AREAS AND THE BIRDS DIRECTIVE

[19] Article 3 of Council Directive (EEC) 79/409 (on the conservation of wild birds) (1979 OJ L103 p 1) (the Birds Directive) requires member states to take the requisite measures to preserve, maintain or re-establish a sufficient diversity and area of habitats for all the species of naturally occurring wild birds in the wild state in the European territory of the member states to which the EC Treaty applies. By art 3(2):

> 'The preservation, maintenance and re-establishment of biotopes and habitats shall include primarily the following measures: (a) creation of protected areas; (b) upkeep and management in accordance with the ecological needs of habitats inside and outside the protected zones; (c) re-establishment of destroyed biotopes; (d) creation of biotopes.'

[20] According to the *Oxford English Dictionary* (2nd edn, 1989) vol II, pp 210–211, a biotope is '[t]he smallest subdivision of a habitat, characterized by a high degree of uniformity in its environmental conditions and in its plant and animal life'.

[21] Article 4 of the Birds Directive provides that the species mentioned in Annex I shall be the subject of special conservation measures concerning their habitat in order to ensure their survival and reproduction in their area of distribution. The stone curlew (burhinus oedicnemus) is one of the birds identified in Annex I. Article 4(1) continues:

> 'Member states shall classify in particular the most suitable territories in number and size as special protection areas for the conservation of these species, taking into account their protection requirements in the geographical sea and land area where this Directive applies.'

[22] Article 4(4) of the Birds Directive provides:

> 'In respect of the protection areas referred to in paragraphs 1 and 2 above, Member States shall take appropriate steps to avoid pollution or deterioration of habitat or any disturbances affecting the birds, in so far as these would be significant having regard to the objectives of this Article. Outside these protection areas, Member States shall also strive to avoid pollution or deterioration of habitats.'

[23] Article 18 of the Birds Directive requires member states to bring into force the laws, regulations and administrative provisions necessary to comply with the directive within two years of its notification.

[24] The special protection areas referred to in art 4(1) of the Birds Directive are colloquially known, and will hereinafter be referred to, as SPAs. Where (as in the case of the Breckland Farmland) a proposal has been put forward that the area should be an SPA but it has not yet been so designated, it is called a pSPA.

THE HABITATS DIRECTIVE

[25] Council Directive (EEC) 92/43 (on the conservation of natural habitats and of wild fauna and flora) (1992 OJ L206 p 7) (the Habitats Directive) creates areas known as 'special areas of conservation' (SACs). In the preamble to the directive, the sixth recital reads:

> 'Whereas, in order to ensure the restoration or maintenance of natural habitats and species of Community interest at a favourable conservation status, it is necessary to designate special areas of conservation in order to create a coherent European ecological network according to a specified timetable.'

[26] The preamble continues:

> 'Whereas all the areas designated, including those classified now or in the future as special protection areas pursuant to [the Birds Directive], will have to be incorporated into the coherent European ecological network.'

[27] Article 1 of the Habitats Directive defines conservation as—

> 'a series of measures required to maintain or restore the natural habitats and the populations of species of wild fauna and flora at a favourable status as defined in (e) and (i) [of art 1].'

[28] Article 1(e) defines conservation status of a natural habitat as—

> 'the sum of the influences acting on a natural habitat and its typical species that may affect its long-term natural distribution, structure and functions as well as the long-term survival of its typical species within the territory referred to in Article 2.'

[29] Article 1(l) defines an SAC as—

> 'a site of Community importance designated by the Member States through a statutory, administrative and or/contractual act where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitat and or/the populations of the species for which the site is designated.'

Article 1(k) defines a site of community importance as—

> 'a site, which, in the biogeographical region or regions to which it belongs, contributes significantly to the maintenance or restoration at a favourable conservation status of a natural habitat type in Annex I ...'

[30] Article 3(1) provides for a creation of a network of SACs to be known Natura 2000. It goes on:

> 'This network, composed of sites hosting the natural habitat types listed in Annex I ... shall enable the natural habitat types and the species' habitats concerned to be maintained or, where appropriate, restored at a favourable conservation status in their natural range. The Natura 2000 network shall include the special protection areas classified by the Member States pursuant to [the Birds Directive].'

[31] Article 6 of the Habitats Directive makes provision for SACs and the conservation measures which must be applied in relation to them.

THE CONSERVATION (NATURAL HABITATS) REGULATIONS 1994, SI 1994/2716

[32] These regulations make provision for the implementation of the Habitats Directive. Regulation 3(2) requires the Secretary of State and 'nature conservation bodies' to exercise their functions under the enactments relating to nature conservation so as to secure compliance with the requirements of the Habitats Directive. Those enactments include the relevant provisions of the 1981 Act. The regulations require the Secretary of State to propose a list of sites eligible for identification as being of community importance. The regulations make provision for notification to appropriate nature conservation bodies, landowners and relevant authorities. They provide for management agreements.

[33] Regulation 18 provides that any notification in force in relation to a European site under s 28 of the 1981 Act shall have effect for the purposes of the regulations, and empowers the appropriate nature conservation body (in this case English Nature) to amend the notification for the purposes of securing compliance with the Habitats Directive. Regulation 22 gives the Secretary of State power to make a still further designation of any land within a European site by making what is called a 'special nature conservation order' specifying operations which appear to the Secretary of State to be likely to destroy or damage the flora, fauna or geological or physiographical features by reason of which the land is a European site. Before making such an order, the Secretary of State is required to consult English Nature.

THE RELATIONSHIP BETWEEN SSSIs AND SPAs

[34] As the judge pointed out, the criteria for the selection of SPAs for birds and SSSIs for birds are similar. Broadly, a site qualifies if it is used regularly by 1% or more of the total British breeding population of the species in question. In 1999 the Breckland Farmland SSSI itself supported some 102 pairs of stone curlews (44% of the Great Britain population) and would thus easily qualify on its own as an SPA under the relevant criteria.

[35] In January 2000, English Nature submitted proposals to the Secretary of State for a Breckland SPA, which we understand he is minded to accept, but is awaiting the outcome of this litigation before making a final decision. This proposal is supported by the appellants. It is thus a pSPA. The SSSI falls within the larger Breckland pSPA.

[36] There is, of course, nothing in the legislation (either European or domestic) which prevents an SSSI being an SPA or vice versa. Rather to the contrary, as the judge pointed out, there were close links between the statutory schemes (see reg 3 of the 1994 regulations set out at [32], above). Furthermore, as Dr Brown explains in his witness statement, in England, the legal framework which in the government's view secures protection of SPAs is their designation as SSSIs, supplemented, since 1994, by the 1994 regulations, which implement the Habitats Directive and provide for the protection of European sites including areas classified as SPAs pursuant to art 4(1) of the Birds Directive.

[37] As will become apparent, it is the powers of enforcement contained within an SSSI which feature strongly in this case, coupled with a change of policy by English Nature in 2000 in the identification and notification of SSSIs, to which I now turn.

ENGLISH NATURE'S CHANGE OF POLICY IN THE IDENTIFICATION AND NOTIFICATION OF SSSIs IN 2000

[38] One of the appellants' irrationality arguments is that English Nature in reaching their decision in the instant case (a) departed from their previous practice operated between 1994 and 2000 of not granting SSSI status in cases of extensive areas of conventional plantation or to habitats for migratory birds or birds who nested in areas only sporadically; and (b) did so for flawed and tainted reasons, namely pressure from the Secretary of State, whose policy was that every SPA should be underpinned by SSSI status, and the enforcement powers which accompanied an SSSI.

[39] Dr Brown explains the position in his witness statement:

> 'In 1994, English Nature took a decision not to confirm a number of sites subject to rotational management because the particular interest of the areas used by the Annex I birds was transitory in time and space ... However, English Nature's approach with respect to "temporary habitats" such as arable land subject to annual cropping regimes was reassessed in February 2000. This followed discussion with the then Department of the Environment, Transport and the Regions (DETR).'

[40] Dr Brown exhibits a number of the documents relating to English Nature's change of policy, notably two relating to the 1994 decision not to confirm the Thames Basin Heath SPA as an SSSI. The first is a note by the secretariat, and the second, dated 18 October 1994, is a rationale for non-confirmation, identifying the factors which influenced the council of English Nature at a meeting on 29 June 1994. These explain that, in 1994, English Nature were not convinced, in this particular instance, that notification as an SSSI was the most appropriate mechanism to discharge responsibilities for the particular Annex I species concerned (not, it should be said, the stone curlew).

[41] Dr Brown also produces correspondence between English Nature and the DETR. On 24 January 2000, Dr Brown wrote to Mr Pritchard of the DETR about three sites, including Breckland and Thames Basin Heath. In the course of that letter, he said:

> 'As you are aware, English Nature's Council has taken the view that the plantation and arable areas should not be SSSI as the special interest is "transitory in time and space". We thus request that further consideration be given to treating these sites as special cases. We believe they should be SPA and that the conservation interest and pattern of ownership means that adequate protection and management action can be taken without SSSI designation. This is of course a similar proposition to the two cases in Scotland where the UK Government has already adopted this approach.'

Mr Pritchard replied on 11 February 2000. He said:

> 'We have considered again the option of designating these SPA without the usual SSSI underpinning. Whilst recognising that there may be some practical difficulties for EN, we have concluded that the Department is not prepared to classify these SPAs unless they are also notified as SSSIs. As we have said previously, the most important and inescapable fact is that EN are under a duty to notify any area of land which is of special interest by reason of any of its flora, fauna, etc. With this in mind, it seems incongruous to argue that a Special Protection Area is of international

importance, but not of national importance. It also seems rather odd when EN have pressed for the existing SSSI legislation to be strengthened. How can we accept anything less for internationally important sites? I do not believe we can guarantee meeting our obligations under art 4 of the Birds Directive (as amended by the Habitats Directive) without the legal safety net provided by SSSI notification, supplemented by the Habitats Regulations. I suspect that RSPB share this view. To illustrate the point, I understand that there have been some difficulties with the Corncrake SPA in Scotland, whereby certain crofters have joined the scheme, but have not managed the appropriate land in the correct manner. Without the backstop of SSSI notification, I am told that there have been some enforcement difficulties. From a policy perspective, I strongly believe that accepting SPAs without SSSIs on these particular sites would set an unwelcome precedent in England. Such a decision will almost certainly lead to pressure for more and bigger SPAs and SACs without SSSIs.'

[42] (It should be noted, in parenthesis, that English Nature's subsequent change of stance in relation to part of the Thames Basin Heath SPA, and its decision to notify and confirm SSSI status on that part (known as Bramshill) was the subject of a challenge by way of judicial review heard by Forbes J in April 2002. Forbes J's decision is reported as *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2002] EWHC 908 (Admin), [2003] Env LR 83). Although the basis of the challenge in the *Aggregate Industries* case was different, Lightman J makes a number of references to it, and Forbes J discusses English Nature's change of policy in some detail. I examine the decision in the *Aggregate Industries* case at [84]–[93], below).

[43] The general committee of the council of English Nature met on 29 February 2000. It had before it a paper entitled *Temporary Habitats within SPAs: Consideration for Designation as SSSIs* by Peter Clement, International Sites Project. Attached to it was a cover note from Dr Brown, from which Forbes J cites in the *Aggregate Industries* case (see [90], below). The paper records the conflict between the DETR policy and English Nature's policy of including only areas of natural or semi-natural habitats within SSSIs. The purpose of the paper was to inform the council of the issues regarding the inclusion of areas of 'temporary' habitats within the three pSPAs and to seek agreement on how to proceed.

[44] The paper makes the point that understanding of legal obligations under the Birds Directive had increased substantially since 1994, as had knowledge of the ecology of the species and the sites. The paper describes it as axiomatic that land designated as of international importance must also be of national importance. The question was whether or not an SSSI was the only mechanism available to underpin international designation and put in place the mechanisms required to secure the appropriate management of the site.

[45] The conclusion which the paper reached was that the three sites should be designated SSSIs in order to support the SPA classification. That was also Dr Brown's view, and the committee agreed.

[46] It is, I think, worth pointing out that Lightman J gave the irrationality argument based on an inappropriate change of policy argument short shrift. He said ([2003] 4 All ER 366 at [26]):

'... English Nature decided in February 2000 not to be bound in future by this practice and rightly so, for their duty required them to accept no such

constraints on the exercise of the judgment committed to them. This decision in February 2000 has never been challenged in judicial review proceedings, no doubt because any such challenge was doomed to failure. I cannot see how the earlier (later abandoned) practice is of any assistance.' a

THE JOINT NATIONAL CONSERVANCY COUNCIL GUIDELINES FOR THE SELECTION OF SSSIs b

[47] Another argument advanced before the judge was that English Nature, in confirming the SSSI designation for the Breckland Farmland, had departed from the guidelines for the selections of SSSIs provided by the Joint Nature Conservation Committee (JNCC) (the guidelines). As a consequence, substantial extracts from the guidelines were contained in our papers. c

[48] The judge found that in so far as the guidelines departed from the 1994 stance on SSSIs they were entitled—indeed bound—to do so, but that he could not in any event detect any material departure by English Nature from the guidelines. He pointed out that the guidelines advised care and caution before deciding to notify or confirm largely artificial habitats for the reason of the presence of rare birds; and that croplands should not normally be selected. His view, however, was that this in no way precluded the decision, and that the evidence revealed that all due care was exercised by English Nature in reaching the decision. d

[49] Having read the guidelines, I agree with the judge that what matters is the decision, and the manner in which the decision came to be taken. It is, however, only fair to English Nature to point out that in my judgment the guidelines are plainly the product of much careful thought and research, and that, like the judge, I can detect no departure from them. e

THE MANNER IN WHICH THE DECISION (A) TO NOTIFY AND (B) TO CONFIRM BRECKLAND FARMLAND AS AN SSSI WERE TAKEN f

[50] In the light of the sustained challenge that English Nature took immaterial factors into account when confirming the Breckland Farmland as an SSSI, it is necessary, in my judgment, for this court to examine the decision-making process with some care. In his witness statement, Dr Brown describes over many pages the detailed investigations and consultations which were undertaken before the decision to notify was made. It is also noteworthy that, although, for obvious reasons, English Nature were under no obligation to consult prior to notification, there was in fact extensive prior consultation in this instance. g

[51] In July 2000 the Council of English Nature considered a paper prepared by the area team recognising the novel implications of the designation as an SSSI of arable land subject to annual cropping regimes. The report recognised the success of voluntary measures, and it was also recognised that the continuation of arable cultivation, with small-scale interventions to protect nests, would ensure the conservation of the stone curlew. The report acknowledged that potential resistance to designation might prejudice co-operation, and accordingly the paper proposed that the list of operations likely to damage the features of special interest should be confined as far as possible to enable present and future anticipated farming practices to continue, whilst complying with English Nature's duty to specify any operation appearing to the council to be likely to damage the features of interest. h j

[52] Officers of English Nature then set up a working group to discuss the practical implications of an SSSI designation on arable land subject to annual cropping regimes, and to advise English Nature on its proposals. This group comprised representatives of English Nature, the Country Landowners Association, the National Farmers' Union, the Elveden and Goodstone Estates (two of the site landowners), the Royal Society for the Protection of Birds (RSPB) and the Farming and Rural Conservation Agency. A well-known local land agent was invited to advise the working group because of his particular understanding of Breckland Farmland landowners' concerns.

[53] The working group met in September and October 2000 to discuss the list of proposed OLDs, following which a number of amendments were proposed. A pilot wildlife enhancement scheme was proposed and subsequently launched on 14 February 2001. Between September and November 2000 area team officers made contact with all the owners and occupiers of the proposed SSSI, explaining the role of the working group and offering to meet with them to discuss the proposed notification and, in particular, the proposed site boundaries.

[54] On 4 October 2000, the council of English Nature met to consider a report prepared by the area team recommending the notification. A copy of that report is in evidence. Amongst the many other documents put in evidence were the minutes of the meeting of the council on 28 October 2000.

THE PROCESS OF CONFIRMATION

[55] No complaint is made by the appellants of the manner in which English Nature carried out the notification, nor are the OLDs attacked in any way. Dr Brown records that during the statutory period of consultation lasting until March 2001 some 84 landowners and occupiers were notified and, in all, 14 objections were made, involving some 17 separate owners or occupiers. There was, moreover, substantial communication between English Nature, the first appellant, his legal advisers, and the second appellant. Dr Brown produces the correspondence.

[56] In May 2001 council members attending a meeting of English Nature in Thetford took the opportunity to visit the Breckland Farmland SSSI. Council members were escorted round one of the largest land units in the SSSI, the Elveden Estate and met Lord Iveagh, one of the objectors.

[57] In the light of the objections and representations received, area team officers of English Nature prepared a report for consideration by the council. That report recommended notification be confirmed with a small modification. Dr Brown produces the report.

THE MEETING OF THE COUNCIL OF ENGLISH NATURE ON 11 JULY 2001

[58] As this is the meeting which resulted in the decision, I propose to examine it in some detail. The council of English Nature met on 11 July 2001 to consider the officers' report. Of the 84 owners and occupiers notified, the council was requested to consider 14 objections. A chartered surveyor, Mr Michael Falcon represented a group of landowners, including the second appellant. Mr Falcon made oral representations and other objectors, including the first appellant, addressed the meeting.

[59] We have the benefit not only of the minutes of the meeting but of a transcript of that part of it which relates to the Breckland Farmland. Four objectors had requested to speak. They were: (1) Mr Falcon; (2) the first appellant; (3) Mr Barry Hawkins for the Edward Moundeford Charity and others;

and (4) Mr Jim Rudderham from the Elveden Estate. It is, I think, instructive to see what was said by the objectors. a

[60] Mr Falcon, a rural chartered surveyor, took the point that in his opinion it was not legally necessary to designate, and that there would be no benefit in doing so. He argued that the existence of an SPA did not in itself obligate the United Kingdom government to create an SSSI. He argued that while it may have been the policy of the DETR in England to support SPAs with SSSI status, b there were precedents for an SPA without an SSSI designation.

[61] Mr Falcon's second point was that there was no scientific justification for designation. He queried the reasons for the change in policy from 1994, and argued that the designation of such a large area of arable land was inappropriate and very concerning to those whose livelihood depended on being able to utilise c the land effectively.

[62] Thirdly, Mr Falcon criticised the drawing of the SPA boundary and argued that the scientific data did not support the boundaries currently drawn, since they included woodland unsuitable for nesting and in some cases on the boundaries there were fields where there was no record of stone curlew having d nested.

[63] Fourthly, Mr Falcon argued that English Nature had discriminated against landowners who had co-operated. There was 'complete bafflement' as to why English Nature seemed to consider a designation necessary and why it had been reluctant to consider alternative approaches in conjunction with the landowners. English Nature, he said, were well aware that the breeding e performance of the stone curlew in the Brecklands over the last five years had been good, and that numbers had increased. This could not have happened without the positive contribution and support of the landowners, who were now penalised by the designation.

[64] Fifthly, Mr Falcon argued that the owners had suffered financially as a f result of the proposed designation and would continue to do so if the designation proceeded. They had incurred a considerable amount of professional costs, and a large area of arable land would be devalued through designation.

[65] Finally, Mr Falcon argued that the stone curlew would thrive better without land being designated as an SSSI, and with positive co-operation from the g landowners. It was perfectly possible for English Nature to enter into agreements with landowners whether or not SSSI designation applied. The landowners remained fundamentally opposed to the SSSI designation whilst firmly committed to the conservation of the stone curlew. He described the proposed designation as 'unnecessary bureaucracy'.

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[66] Mr Falcon was then questioned by members of the council firstly as to the estimated loss of value and secondly as to what the landowners thought they would not be able to do if their land was designated that they would otherwise have been able to do. What sort of constraints did the landowners think they would be under?

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[67] Mr Falcon was unable to quantify the prospective loss due to the devaluation in the land since the situation was unique. He was, however, certain that there would be devaluation. As to restraints, Mr Falcon recognised that a lot of work had been done in trying to minimise the effect that an SSSI would have on the agricultural operation, but he was, once again, unable to be specific about the constraints, which would be involved. He said:

'There are a number of different operations that come along that one will need to seek authority from English Nature and in a lot of cases that would be given, but in some cases it won't be. It is a bureaucratic shackle which landowners do not need.'

[68] In the light of the argument that SSSI status constitutes an unwarranted and disproportionate interference with the appellants' rights under art 1 of the First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) (see [94](6) and (7), below) this is, I think, a significant answer.

[69] The first appellant then addressed the council. He read a document, which he had prepared. He complained that over 15 years ago he had granted access to the RSPB to assist with the stone curlew recovery project. He had acted in good faith. For that, he had been repaid by what he described as a 'gross breach of trust'. He had not been informed that English Nature had become involved. He complained of a lack of pre-designation consultation. He described the citation for the designation as 'fundamentally flawed, and based on unpublished information that was not gathered specifically or with scientific validity for the purpose'. He complained that his rights under the Data Protection Act 1998 may have been infringed.

[70] The first appellant then accused English Nature of breaching its own procedures by failing to seek his permission to access the land for an area of search, survey or mapping. English Nature had achieved what he described as his 'undying enmity', and although it was contrary to the officers' recommendation, lifting the designation was the only way to begin to recover his co-operation. He recommended any landowner with any sense of responsibility to curtail any links they may have with English Nature and the RSPB, however enjoyable their current relationship. The stone curlew was a protected species wherever it was found; landowners who had proved their commitment to its conservation were not being heeded as to how best a greater population could be achieved.

[71] The council then heard from Mr Barry Hawkins who described himself as 'only a Norfolk countryman'. He accepted that the conditions that had been set down at the present time did not look onerous, but as time passed those designations would change. He was equally sure that there would be devaluation in the land over a period of time, because of the loss of freedom of action on the part of the landowner, which was the concomitant of an SSSI. He confirmed that his clients would continue to look after the stone curlew.

[72] Mr Hawkins was asked what his clients would do differently to help the stone curlew if there were no SSSI designation. His response was that the SSSI was another layer of bureaucracy, a further layer of red tape, which discouraged co-operation.

[73] It was also suggested to Mr Hawkins that land values would not necessarily fall since the land could be sold to someone who was of the opposite opinion and welcomed the designation. Mr Hawkins accepted that this might be the case.

[74] The final objector was Mr Rudderham who managed the conservation interests at the Elveden Estate. He had been involved in the working group, which discussed the issue. He had three complaints. The first related to the fall in land values. The second related to the time constraint under which the objectors had had to work to consider their position. The third was the approach

and methodology used in informing landowners of the proposed designation. He also complained that the scientific evidence used to support the designation was dated.

[75] As to the first complaint, Mr Rudderham regarded the falling land prices as potential rather than actual. He did not know if it would happen, nor did he know what recourse would be open to landowners if it did. As to the second, the Birds Directive and Natura 2000 were enough. As to the third, he felt misled over the methodology. In 1999, all owners and occupiers had received a letter explaining the need to 'check the boundaries we have identified as being important'. The same letter explained the SPA designation and its role in nature conservation. With that letter, landowners had received a leaflet called *Special Sites for Birds* in which it stated that in England, as in the rest of the United Kingdom, all SPAs were protected as SSSIs. He said that this had been taken at face value to mean that SPAs were only to be designated on existing SSSIs. The leaflet had not said that all SPAs were to be protected by SSSIs. Accordingly, he felt deceived.

[76] Mr Rudderham's final point, which he developed at some length, was that it would be more appropriate to designate the SPA in the immediate future on the existing heathland SSSI, and look for a more united solution to the arable population.

[77] There was then a discussion amongst the council members, of which, once again, we have a transcript. It is unnecessary to cite at length from it. It is sufficient to recall that the discussion was both highly informed and relevant. Some points made are, however, of importance for the purposes of this judgment. Mr Nicholas Woolley made the point that it was common ground amongst the landowners that the Breckland Farmland should be designated an SPA. Mr Woolley commented:

> '... in the light of the English legislation and in the light of quite clear specific government direction to us, this justifies and requires this land to be designated an SSSI and I feel that in many respects that there is no further argument. It is accepted that it qualifies as an SPA and under our government's direction that means that it must be designated an SSSI.'

[78] Mr Woolley's point was picked up by Mr Stephen Tromans, a barrister who specialises in environmental law. He said:

> 'The first point which just really follows on from what Nicholas said about SPAs. The way I look at it is slightly different to that in that my approach is the fact that land may be an SPA is clearly relevant to our decision, I don't think however we can simply pass the buck and say because land is an SPA therefore automatically it must pass the SSSI test. I think we have to make our own minds up on that on the information available because that is what the legislation requires us to do.'

[79] Slightly later in the discussion, another council member, Mr Ed Gallagher, reverted to the SPA/SSSI point. He said:

> 'I am unclear having heard a spectrum of arguments put forward about this SPA/SSSI argument, the most extreme is we have to, if it's SPA we have to—no choice, at the other extreme we can exercise a fair amount of discretion. To help me understand this, if we put it the other way around

and we decided not to do it, would there be pressure for judicial review or pressure from government that we were not following their guidelines?'

[80] The chairman, Sir Martin Doughty then asked Mr Tromans to address this point. Mr Tromans said:

'Well Chair, simply it seems to me that whatever government policy may be as to the linkage between SPAs and SSSIs, the question for us this morning as Richard Barlow said is whether the land meets the criteria of the legislation that we are dealing with. We can't regard ourselves as being bound by government policy to say something is an SSSI if we don't think in our heart of hearts that it really is, I think that is the key to it.'

[81] Sir Martin then commented that this was very clear and asked Mr Woolley to come back on the point. Mr Woolley said:

'I am sorry when I spoke before about my feelings that it followed that it should be designated an SSSI, my feeling which in my strong belief I should say which I didn't perhaps make clear, was that to my mind if we have an area of land whether it be large or small, if it is of sufficient international interest that it should be declared an SPA. Surely to goodness if it's of such international importance it is very hard to believe that it isn't of sufficient national interest. If the science is there to back up the international interest it surely is there in abundance to back up the national interest, that is that one point.'

[82] The only other contribution to the debate that I need to record comes from Ms Anne Kelaart who said:

'I just wanted to say that I have a great deal of sympathy with the landowner point of view, there is nothing more galling than being told what you must do on your own land and even more particularly when it's something you are already doing, but it is difficult. I do feel in this case however, that English Nature has gone the extra mile, that we have tried to come up with an imaginative solution, and that a tremendous amount of effort has gone in and I'm really happy that so many of the landowners are content with this. I think that there is no contest but that this is a huge site but of outstanding interest.'

[83] The minutes, which I do not propose to record in detail, accurately reflect both the objections made and the subsequent discussion. They conclude:

'Council discussed the issues noting that a decision was required upon the existence of special interest at the site and concluded that such special interest is in place on the Breckland Farmland site. Council confirmed the notification with modifications in accordance with the officer's recommendation, modifying the citation and the boundaries of the site as shown in ... [details given].'

THE DECISION OF FORBES J IN THE *AGGREGATE INDUSTRIES* CASE

[84] Before turning to the challenge to the decision in the instant case, and Lightman J's judgment, it is, I think, instructive to consider the decision of Forbes J in the parallel case of *R (on the application of Aggregate Industries UK Ltd) v*

English Nature [2003] Env LR 83 in which the claimant's challenge to English Nature's SSSI confirmation was rejected by the judge.

[85] The land in question comprised in that case some 600 acres in Hampshire which had planning permission for mineral extraction and is identified for the purposes of the decision as 'Bramshill'. The basis of the challenge was threefold, namely that: (1) the decision breached the claimant's right to a fair trial under art 6 of the convention; (2) the decision breached the claimant's legitimate expectations; and (3) there was no justifiable basis for the decision. In the alternative, the claimant sought a declaration that s 28 of the 1981 Act was incompatible with its art 6 rights.

[86] Forbes J rejected all three heads of challenge, and dismissed the application for a declaration of incompatibility. He decided the art 6 point on what can loosely be described as *Alconbury* principles (see *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295), namely that whilst English Nature did not have a sufficient appearance of independence and impartiality, there were sufficient safeguards built into its decision-making process which, when added to the court's powers of judicial review, rendered the process art 6-compliant, as the court possessed 'full jurisdiction' to deal with the case.

[87] For the legitimate expectations limb of its argument, the claimant relied on a sequence of events starting with the fact that in February 1989 about 12% of the site had been confirmed as an SSSI. In 1993 the whole site was notified as an extension to the existing 1989 SSSI, but on 29 June 1994 the council of English Nature had refused to confirm the notification. The judge summarised English Nature's rationale as follows ([2003] Env LR 83):

> '[32] ... Stated shortly, the Council decided that the only feature of special scientific interest which was to be found on the site and which was not already covered by the existing SSSI was the fact that certain areas provided suitable habitat for a number of Annex I bird species but, because those areas of habitat were only transitory in nature, the Council was not convinced that an SSSI was the most appropriate mechanism for the protection of the species in question ...'

[88] Forbes J cites a number of passages from the June 1994 rationale, including the following:

> 'In this case extensive areas of conventional plantation occupying much of each site could not under any circumstances be regarded as "special", by virtue of plant species or vegetation classification. The particular interest of those areas now supporting Annex I birds is transitory in time and space, i.e. will no longer provide favourable habitat for these bird species after 5–10 years as the growing tree crop closes over. Furthermore these areas have no other special interest.'

[89] However, as Forbes J records (at [34]), English Nature's approach to notification as SSSIs of areas providing such 'temporary habitats' changed in February 2000. It is also clear that English Nature had received a request from the then DETR to consider designating as SSSIs certain areas of temporary habitat which supported various species of Annex I birds (and which included both the Brecklands and Bramshill) so that progress could be made on classifying those areas as SPAs from their existing status as pSPAs.

[90] As summarised by Dr Brown for the purpose of the meeting of the council held on 29 February 2000, and cited by Forbes J (at [36]):

> '2. The two options open to English Nature are:
>
> a. to agree to the request (from the DETR), designate the areas as SSSI and make these sites an exception by virtue of the international importance of the bird population they support;
>
> b. to maintain the previous position that because the special interest is to some extent transitory in time and space the areas should not be SSSI. Maintaining the decision not to confirm these areas as SSSI will, in all likelihood, attract a Ministerial request to do otherwise as the Government is obliged to designate all areas which qualify as SPA and it is DETR policy for all SPA to be confirmed as SSSI. There are a number of reasons for acceding to this request, including the now greater clarity of the legal obligations under the Birds Directive, several decisions of the European Court of Justice, advice from the EC and improved knowledge of the three species requirements ...
>
> 5. Council is invited to:
>
> a. note the request from DETR to consider the inclusion of areas of temporary habitats which support rare or vulnerable birds as SSSI;
>
> b. approve the designation of the areas as SSSI in order to support the SPA designation.'

The notification and confirmation of Bramshill as an SSSI followed.

[91] In the instant case, of course, the challenge based on the change of policy is not argued as a breach of legitimate expectation. However, the answer which Forbes J gave to it is, in my judgment, equally applicable to the argument that the change of policy was unwarranted and irrational because it was brought about by political pressure. The judge said:

> '[117] ... As [Mr Howell QC, counsel for English Nature] pointed out, s. 28 of the 1981 Act imposes a duty upon English Nature to notify a site if it is of the opinion that it is of special scientific interest. Accordingly, Aggregate Industries' only legitimate expectation (if it can be so characterised) is that English Nature will properly discharge its statutory duties. Any legitimate expectation must yield to the terms of any statute and the Council cannot estop itself from discharging its statutory functions in the public interest: see the judgment of Peter Gibson L.J. in (*R v Secretary of State for Environment Transport and the Regions ex parte Begbie* [2000] 1 WLR 1115 at 1125). Accordingly, once the current members of the Council of English Nature came to the conclusion that the previous decision that the site did not have special interest was wrong, as was effectively the case at the Council's meeting of July 11, 2001, they were duty bound to act in accordance with their own opinion.'

[92] It is also noteworthy that in the *Aggregate Industries* case the claimant advanced the argument that the decision to designate was made for an irrelevant reason, namely to accommodate the DETR's requirement to have the SSSI statutory regime to underpin SPAs, so that there would be compliance with the United Kingdom's European obligations under the Birds Directive. The claimant argued that a decision to designate an SSSI on that ground alone and without any factual basis to support any finding that a special interest

existed of the type specified in s 28(1) of the 1981 Act was irrational and unlawful.

[93] Forbes J rejected that argument in a passage which was cited by Lightman J in the instant case. He said (at [125]):

> Mr Howell emphasised, correctly in my view, that to assert that the site does not qualify as an SSSI, because the guideline figure for a relevant bird species has not been met, is to treat the guideline as if it were a criterion to be used as a substitute for judgment, it ignores the rarity of the bird species in question and its international importance. It also fails to take account of the site's function as part of a larger area of European importance. I accept Mr Howell's submission that the basis of the Council's decision to confirm the 2001 SSSI was not simply to provide assistance to the Secretary of State ... To accept such a submission would be, in effect, to come to the conclusion that the members of the Council had failed properly to exercise their scientific, technical and professional expertise and knowledge. I can see no possible basis for any such conclusion. On the contrary, having regard to the contents of Dr Brown's witness statement and to all the documents which I have read and considered in this case, it is obvious to me that the Council conducted its decision-making in a manner that was entirely fair and which involved a scrupulous and careful consideration of all the issues which they had to determine in deciding whether to confirm the SSSI in question. I agree with Mr Howell that the decision which was ultimately reached by the Council was one which was open to it to make as a specialist body for the reasons that it did ...'

THE APPLICATION FOR JUDICIAL REVIEW

[94] The stage is, I hope, now thoroughly set for the appellants' challenge to the decision. In their amended statement of facts and grounds, the claimants advanced the following grounds of challenge.

(1) English Nature has exceeded the powers afforded to it under s 28 of the 1981 Act by designating as an SSSI a vast area of ordinary farmland which stone curlews use on a transient basis at a very low density.

(2) By designating the Breckland Farmland as an SSSI English Nature has adopted a construction of "special interest by reason of ... its ... fauna" in s 28(1) which was beyond the reasonable range of meanings open to it. In this context the claimants relied on the emphasis in s 28 on the intrinsic interest of the land itself in contrast to the purposes of the relevant European legislation.

(3) English Nature had failed to carry out adequate investigations and had failed to ask itself the right questions and to take reasonable steps to acquaint itself with the relevant information to enable it to properly designate the land an SSSI. In this regard it had failed to identify those parts of the 13,335·7 hectares where the stone curlews were in fact present. Consequentially large parts of ordinary farmland in which no stone curlews were regularly present and in respect of which there was no scientific interest had been designated.

(4) The decision was irrational because it proceeded on the basis of flawed logic. The decision-making process had been tainted by the incorrect assumption that just because the land in question had been identified as a pSPA, it followed that it was necessary to designate it an SSSI. Properly understood the decision to designate had to be made by English Nature based on different criteria than whether the land in question was part of a pSPA. There was no requirement (as

a matter of law) for or benefit (in practice) from double designation. English Nature's approach had been in effect to apply a presumption in favour of a double designation (resulting from pressure from the Secretary of State to designate every part of pSPAs as SSSIs) and wrongly to equate the mere fact that the land in question qualified as part of a pSPA with the satisfaction of the test that the land was itself of special scientific interest (and national importance) without b understanding the different focus of the 1981 Act from the relevant European legislation. These recurring flaws in the decision-making process reveal an error of law.

(5) Furthermore the double designation was also irrational because the OLDs added nothing of substance to the protection which was already available; they simply duplicated existing controls whereas the designation as an SSSI did add c extra restrictions, which served no useful purpose.

(6) English Nature had acted in breach of s 6 of the 1998 Act in a way incompatible with a convention right. The right engaged was art 1 of the First Protocol to the convention which provides:

> d 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

(7) Article 1 required a fair balance to be struck between the interests of the state and the rights of the individual. In order to satisfy the fair balance test e there had to be a reasonable relationship of proportionality between the means employed and the aim pursued. The designation to notify engaged art 1, and whilst the protection of stone curlews was a legitimate public interest the designation of such a large area of arable land imposed unnecessary restrictions on the claimants' enjoyment of their property and was disproportionate.

f THE JUDGMENT OF LIGHTMAN J

[95] Lightman J dealt first with the question of statutory construction. He said ([2003] 4 All ER 366):

> g '[18] I should first say a few words on the construction of ss 28 and 28D of the 1981 Act. English Nature have a duty under s 28(1) to notify an area of land if it holds the opinion that the statutory criteria are satisfied. If (for example) English Nature are of the opinion that an area of land is of special interest because of the bird population, which it supports, then it must notify. Section 28(1) affords scope for judgment: it affords no scope for discretion. The notification has immediate legal effect. English Nature h must however thereafter within nine months decide whether to withdraw the notification or confirm it (with or without modifications) or it will lapse. Though s 28(5) in setting out the alternative courses available to English Nature uses the word "may", a term which ordinarily connotes a discretion, notwithstanding the obiter dictum in *R v Nature Conservancy* j *Council, ex p London Brick Co Ltd* [1996] Env LR 1 to the contrary, as it appears to me, if English Nature continues to be of the opinion that the statutory criteria are satisfied, the discretion can only lawfully be exercised one way, that is in favour of confirming the notification. They cannot lawfully withdraw the notification or allow it to lapse. For any other course than confirmation would bring into play once again the immediate duty of English Nature to make the notification, and the legislature cannot

sensibly have intended this roundabout method of continuing the legal consequences of the continuing opinion of English Nature that the statutory criteria are satisfied. a

[19] The statutory scheme requires English Nature at two distinct and successive stages to exercise its expert judgment on three matters: (1) to determine whether the statutory criteria are satisfied; and if so (2) to specify the flora, fauna or geological or physiographical features by reason of which it is of special interest; and (3) to specify any operations likely to damage the flora, fauna or those features. The first stage is the notification stage and the second is the confirmation stage when the decisions at the notification stage require reconsideration in the light of objections, representations and further information received in the interim. English Nature in determining whether the area is of special interest for any of the four possible statutory reasons will have regard to the fact that the judgment is called for in the context both of their nature conservation function and of legislation directed at nature conservation and designed to place constraints on landowners required in the interests of such conservation. There is no requirement that the land is of national importance (cf s 29(2)(b) of the 1981 Act since repealed by the 2000 Act). b c d

[20] In view of the arguments before me I must underline one consequence of the fact that the exercise required of English Nature is exclusively one of judgment. If English Nature are of the opinion that the statutory criteria are satisfied, they have no discretion to decline to notify or confirm (and accordingly displace s 28 of the 1981 Act and the statutory scheme of which it forms part) by reason of a preference for application of some other statutory or non-statutory scheme or by reason of any objection to or dissatisfaction with the legal consequences of notification or confirmation. In particular English Nature cannot refuse to confirm (as submitted by the claimants) because they consider that the population of stone curlews would be protected more effectively and in a way occasioning less interference with the peaceable enjoyment of their possessions by landowners by voluntary agreements with landowners or by the classification by the Secretary of State of the area of land in question as part of an SPA. e f

[21] Further it is clear (notwithstanding submissions by the claimants to the contrary effect) that the duty of English Nature to exercise their own judgment and notify and confirm in accordance with their expert judgment cannot and should not be qualified by their own past practice or by provisions in the guidelines. The guidelines may inform English Nature in reaching their judgment, but not constrain. This fully accords with the judgment of Forbes J in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83, who made clear that, once the current members of the council of English Nature (the council) came to the conclusion that a site did satisfy the statutory criteria, they were duty bound to act in accordance with their own opinion, whether or not this involved a departure from a previous decision or a change in policy. g h j

[22] As I have already said, it is to the existence of the legal consequences of the notification and confirmation that the claimants take objection as unfair and unnecessary interferences with their rights of ownership and which (they contend) are avoidable by classification as an SPA instead of confirmation as an SSSI as the statutory vehicle for bird

protection or by recourse to non-statutory means, namely agreements with the landowners. In my view, for the reasons which I have given, these grounds of objection are not legally tenable. English Nature are statutorily obliged to apply the criteria laid down in s 28 of the 1981 Act. Whether the area satisfies the criteria of an SSSI cannot be affected, still less determined, by the existence (let alone the possible future existence) of what may appear more attractive alternative courses of action (e g classification as an SPA) nor can their existence lawfully deflect English Nature, if satisfied that the criteria are satisfied, from the course of notification and confirmation.'

[96] Lightman J then turned to deal with the claimants' challenges to the decision. He found that it was clear from the minutes of its meetings and beyond dispute that the reason for the resolutions of English Nature to notify and confirm the notification was the internationally important population of stone curlew. He pointed out that on both occasions English Nature had stated this was reason for their resolution. The decision was, accordingly, on its face, valid.

[97] Turning to irrationality, the judge summarised the challenges as (1) a departure from previous practice between 1994 and 2000 of not granting SSSI status in the case of extensive areas of conventional plantation or to habitats of migratory birds or birds who nested in areas only sporadically; and (2) departure from the JNCC guidelines. I have already summarised the manner in which the judge dealt with these.

[98] The third and the most serious allegation which the judge then identified was that English Nature had decided to confirm the notification, not on its merits, but to give effect to the wishes of the Secretary of State, and to underpin the pSPA in this way and to improve the prospects that the Secretary of State would classify the SPA.

[99] The judge identified two matters required to be considered in this context: (1) the relationship of designations or classifications as SPAs and SSSIs; and (2) the approach adopted by English Nature to designating the SSSI and the statements made by, on behalf of and to English Nature up to and including the meeting at which the decision was made.

[100] The judge then reviewed the relationship between the designations of SPA and SSSI in the following paragraphs:

'[29] ... This application is not the occasion for any detailed examination of or exegesis on the relevant legislation (and in particular European legislation) relating to SPAs. In this context it is important to bear in mind that there is as yet no SPA and (in particular in the absence of an SSSI) there may never be, and the performance of the duty of English Nature under s 28 of the 1981 Act cannot lawfully be deferred to await the exercise of jurisdiction by the Secretary of State to classify an SPA. It is sufficient for the purpose of this application to have in mind two matters. The first matter is that there are close links between the two statutory schemes. In this context it is relevant to note: (1) reg 3 of the Conservation (Natural Habitats) Regulations 1994, SI 1994/2716 provides that English Nature shall exercise their powers under s 28 so as to secure compliance with the Habitats Directive; (2) the guidelines, after referring to the international obligation to nature conservation in terms of site protection under (amongst other treaties) the Birds Directive and the Habitats Directive

(transposed into English law by the 1994 regulations), go on at p 560 (para 3.2) to say:

> "It seems axiomatic that, if an area, feature or species is of international importance, it must be of special interest in its total national occurrence. In these cases it is necessary to select all sites above a critical standard, and not to [rely] on choosing only exemplary areas, in order to meet the international conservation obligation. This can apply to habitats which are extensive (e g blanket bog) and to species which are numerous ... as well as to habitats and species which are localised and rare."

and (3) in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83 at [125], Forbes J held that English Nature were to take into account "the site's function as part of a larger area of European importance".

[30] The second matter is the government's views on the relationship between the two schemes. By letter dated 19 June 2003, the Treasury Solicitor confirmed to this court: (1) that "the Government takes the view that the provisions of the Birds Directive with respect to SPAs, as adapted by the Habitats Directive, are transposed in part by the provisions of the 1981 Act relating to SSSIs, as supplemented and adapted by the provisions of the Habitats Regulations 1994"; (2) that "the Government's view on the interrelationship of sites of international importance (such as SPAs) and SSSIs is as recorded by Forbes J in para 25 of his judgment in [the *Aggregate Industries* case]"; and (3) that the government's view on the question whether an area should not be classified as an SPA unless it has also been notified as an SSSI was reflected in the same paragraph.

> "The Government would expect, as a matter of logic, a site appropriate for SPA designation to fulfil the criteria for SSSI notification. If a site being considered for SPA designation were to be regarded as not fulfilling the SSSI selection criteria, the Government would wish to reconsider the evidence supporting SPA candidature."

These clearly have been the thrust of the government's views for some time and were correctly understood as such by English Nature when the decision was made.'

[101] The judge then reviewed the change of policy, the correspondence and what occurred at the meeting, citing essential passages from the record which I have set out above. He concluded:

'[36] It is manifest from the transcript and minutes of the meeting that the members of the council were advised and recognised that they had to determine whether the land notified was of special interest as stated in s 28 of the 1981 Act. It was not simply Mr Tromans who gave that advice; he was endorsing the advice provided previously by the council's own solicitor, given after representations made by a representative of some of the landowners affected about the relationship between SPAs and SSSIs. The chairman found Mr Tromans' advice very clear and Mr Woolley did not suggest that in the light of it he remained of the view that there was any legal requirement as such to notify if the land was in an SPA. There is no reason to doubt (and the claimants have not alleged that the minutes are untruthful when they state) that the council noted that "a decision was required upon the existence of special interest at the site" and that they concluded that there was such a special interest. The council accordingly

addressed themselves to, and answered, the correct statutory question and confirmed the reason why the area of land had special interest.

[37] In my judgment it is wrong to suggest that it is legally irrelevant or impermissible for English Nature to take into account, in deciding whether an area is of special interest by reason of the bird population it may support, the fact they consider that that area is (or forms a part) of one of the most suitable territories in number and size for the conservation of birds who are recognised as being of special significance at a European level as well as in national legislation. Indeed (as I have already said) Forbes J held in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83 at [125] that English Nature were entitled to take into account "the site's function as part of a larger area of European importance". I refer also to the matters and the passage in the guidelines set out at [11]–[12], above.

[38] I see no reason to disagree with the government's views as to the relationship between SPAs and SSSIs in terms of the transposition of the Birds Directive but whether or not those views are correct is immaterial. What is clear is that English Nature applied and determined the issue of confirmation by reference to the statutory criteria and for the reason which they gave, namely to protect stone curlews and for no such collateral reason as the claimants allege; and that, so far as they regarded it as a relevant consideration in the exercise of their judgment whether the statutory criteria were satisfied that the area of land in question was appropriate to be classified as an SPA and that they had made a recommendation to this effect to the Secretary of State, that was a view they were fully entitled to take. But even if I am wrong and they were not entitled to treat as a relevant consideration the fact that the site was in their view appropriate to be classified as an SPA, there can be no doubt that, even if English Nature had ignored this consideration, they would have reached (and indeed could only have reached) the same conclusion namely that the statutory criteria under s 28 of the 1981 Act were satisfied.'

[102] On the question of English Nature's jurisdiction to designate the entirety of 13,335·7 hectares as an SSSI the judge stated (at [39]):

'As I have already held, there were in fact no such departures from the guidelines, but whether or not this is so, as a matter of law none of these considerations could preclude a determination by English Nature that the statutory criteria were satisfied: rather these are at most relevant considerations for English Nature to take into account in the exercise of the jurisdiction committed to them of deciding whether the statutory criteria were satisfied and the area in respect of which it was satisfied. It at all times remained open to English Nature reasonably and sensibly to reach the conclusion which they did that the whole area was of special interest because of the support which it provided for such a significant proportion of such an important and rare bird species recognised as being of European significance (consider the *Aggregate Industries* case at [132]). English Nature had to decide whether to confirm and (if so) how extensive the SSSI area had to be if it was to provide the requisite protection. The members visited the area between the dates of notification and confirmation and applied their expertise and judgment. There is no basis on which this court can or should substitute its judgment for that of English Nature. As Forbes J said

in the *Aggregate Industries* case at [106](iii): "English Nature is far better placed and qualified than a court to make the requisite assessments and value judgments". In this context it is to be noted (as I said earlier) that the claimants, though granted permission to challenge the decision on the ground that English Nature had failed to provide a scientifically justified basis for the land which it notified, did not pursue this ground and there is accordingly no vulnerability or exposure to criticism of the decision on this ground.'

[103] The judge turned finally to the argument under art 1 of the First Protocol. The judge found that the allegation that the confirmation of English Nature's notified opinion that the area was of special interest was disproportionate (assuming that opinion to be genuinely and not unreasonably held) was plainly not maintainable because English Nature was duty bound to confirm the notification if it held that opinion and accordingly its decision to do so could not be such as to be incompatible with the convention right: only the statutory provisions could be incompatible and the claimants had disavowed any such challenge to the legislation. Furthermore, the claimants did not, and could not, contend that the mere notification or confirmation of English Nature's opinion would in itself be incompatible with their convention rights. That opinion of itself did not interfere with the peaceful enjoyment of their possessions in any respect: it simply represented English Nature's opinion.

[104] There was no challenge to the confirmation of the specification of OLDs, nor could there be. All the specification required was that consent be obtained for them before they were carried out on pain of committing a criminal offence.

[105] As to a complaint based on the effect of being within an SSSI under other statutory regimes, and to the effect that restrictions imposed under the regimes in respect of land within SSSIs were more than are strictly required, the judge regarded that complaint as likewise misconceived. It was, in his judgment, irrelevant to English Nature's decision to confirm notification. At best, from the claimants' point of view, they might show that the effect of being within an SSSI under other statutory regimes was unlawful as being disproportionate. Their complaint in such a case would be that the other statutory regime (for example a General Development Order) was unlawful as being incompatible with their convention rights. But that did not mean that English Nature's decision that this area was of special interest and that their confirmation of the notification were themselves incompatible with the claimant's rights under art 1 of the First Protocol.

[106] The judge concluded with these two paragraphs:

'[45] (iv) Finally, a complaint that the claimants' property should lie within, not an SSSI, but within an SPA is again irrelevant. The only decision for English Nature relates to whether or not to notify, and to confirm the notification of, the area of land as being of special interest. Given that English Nature are duty bound to notify and maintain the notification if in their judgment the statutory criteria are satisfied, any complaint on the part of the claimants must be that the statutory scheme (not the decision) is incompatible with their convention rights if it permits or requires such notification when (a) English Nature think that the land ought to be within an SPA or (b) when it is. Such a case of statutory incompatibility the claimants disavow.

[46] I should add that if the legal merits of any complaint did need to be examined in any more detail, under art 1 of the First Protocol to the convention a fair balance must be struck between the general interest and the interest of any property owner. But in considering questions of proportionality under art 1 the European Court of Human Rights has made it plain that states enjoy a wide "margin of appreciation" in this area relating to the control of the use of land in the public interest for environmental reasons, and that the controls prescribed or interferences involved must be without any reasonable foundation if the court is to regard them as disproportionate (see *Fredin v Sweden* (1991) 13 EHRR 784). It is well established that a reasonable relationship of proportionality under art 1 does not import a test of strict necessity (as Mr Holgate QC has argued). The fact that there may be other even better methods of achieving the same ends does not necessarily mean that any particular measure is disproportionate under art 1 (see *James v UK* (1986) 8 EHRR 123; *Tre Traktörer Aktiebolag v Sweden* (1991) 13 EHRR 309). That "margin of appreciation" is properly reflected domestically in the respect that is due: (a) to the choices that the legislature is entitled to make in this area (for which it is democratically accountable): and (b) to any judgment made by English Nature as a specialist regulator, expert in the matters of nature conservation (cf *Holder v Law Society* [2003] EWCA Civ 39, [2003] 3 All ER 62, [2003] 1 WLR 1059). As Forbes J stated in *R (on the application of Aggregate Industries UK Ltd) v English Nature* [2003] Env LR 83, the legislation and decision fall well within the areas of respect to be accorded to the legislature and English Nature. Most particularly the provisions for notification and confirmation are essential parts of a regime: (a) designed by the legislature to ensure that informed decisions are made before potentially damaging (and indeed irreversible) actions are taken; and (b) to be brought into play in appropriate situations by English Nature; but (c) leaving the landowners free at all times to apply to be absolved from the bonds imposed on them. It was a choice which the legislature was entitled to take in this area and it was likewise open to English Nature to make the decision.'

THE APPELLANT'S NOTICE AND THE BASIS UPON WHICH PERMISSION TO APPEAL WAS GRANTED

[107] The judge refused permission to appeal. In their skeleton argument prepared for the permission application, Mr David Holgate QC and Mr Daniel Kolinsky summarise the grounds contained in the appellants' notice in the following terms.

'Ground 1: That the learned judge erred in his rejection of the appellants' contention that English Nature had erred in law by taking account of immaterial considerations in deciding to confirm the notification of the SSSI on 11 July 2001. In dealing with the ground the learned judge failed both to appreciate and to address the different ambits of SSSI notification as compared with designation as an SPA under the Birds Directive (as amended by the Habitats Directive).

Ground 2: That the learned judge erred in his construction of s 28 of the 1981 Act. In dealing with this ground, the learned judge failed both to appreciate and to address the different ambits of SSSI notification as compared with designation.

Ground 3: That the learned judge erred in deciding that the appellants should have challenged English Nature's decision of February 2000 (as to which types of habitat were capable of being designated as SSSIs).

Ground 4: That the learned judge erred in rejecting the appellants' contention that the notification of this particular SSSI interfered with the appellants' art 1 of the First Protocol rights and was accordingly in breach of those rights.

Ground 5: That the learned judge erred in refusing to allow the appellants to amend their claim form to allege that English Nature had failed to take account of the "serious concerns" expressed by the Ministry of Agriculture, Fisheries and Food (MAFF) in deciding to confirm the notification of the SSSI.'

[108] Carnwath LJ on the papers granted permission on grounds 1, 2 and 4 of the appellant's notice. His reasons for so doing are as follows:

'Although the judge's reasoning is comprehensive and persuasive, there is an arguable issue as to whether the judgment required by s 28 is as unconfined as implied by the unusual facts of this case, particularly having regard to art 1 of the First Protocol. The emphasis is on grounds 2 and 4 but there is an overlap with ground 1 ... I refuse permission on grounds 3 and 5—the judge did not rule out the challenge because of the failure to make a challenge in 2000; his decision on MAFF was clearly within his discretion.'

THE APPELLANT'S ARGUMENTS IN THIS COURT

[109] Mr Holgate and Mr Kolinsky argued that the immateriality issue identified in ground 1 of the appellant's notice focused on three matters which they contended were taken into account by English Nature in the decision-making process, and which influenced English Nature to a substantial extent. These were: (1) a perceived need to 'underpin' SPA designation with SSSI status; (2) a belief that it was axiomatic that if land met the criteria for SPA based on international interest then every single part of that land must meet the criteria for SSSI; and (3) an assumption that there were only two possible outcomes—either (i) the land is designated both as an SPA and SSSI or (ii) it is designated as neither.

[110] Mr Holgate and Mr Kolinsky began by identifying the common ground between themselves and English Nature. They accepted that the area of land designated by English Nature as an SSSI formed part of a wider area which the government proposed to designate as an SPA under the Birds Directive. The appellants were content that the land should be designated an SPA. The only reason the government had not so designated the land was, it appeared, because it was awaiting the final outcome of the appellants' application for judicial review.

[111] By way of background, Mr Holgate and Mr Kolinsky argued that there was no legal requirement for all or any particular land included within an SPA under the Birds Directive to be notified as an SSSI in its own right; and secondly, that the two regimes did not have synonymous purposes. They argued that SSSIs were concerned with the protection of existing and established scientific interests whereas SPAs could be established for broader purposes including the enhancement of the species or its habitat. They pointed out that the statutory scheme relating to SSSIs made no reference to possible

enhancement or recovery of a species or its habitat, and that while s 28(4) of the 1981 Act enabled English Nature to give its 'views' about management of land including 'conservation and enhancement' the controls which followed did not require landowners to undertake 'enhancement'. 'Restoring', the term used in s 28J of the 1981 Act when dealing with the burdens which could be imposed on landowners by management schemes, was distinct from 'enhancement' and did not require the creation of new or additional ecological values.

[112] Mr Holgate and Mr Kolinsky accordingly sought to argue that the notification and confirmation in the instant case were for a purpose not envisaged by the 1981 Act, namely that it was to 'recover' the stone curlew population: this was enhancement, and whilst it fitted well within the broad purposes of the scheme for SPAs, it did not fit within the SSSI scheme.

[113] Counsel pointed out that the measures taken to enhance the stone curlew population depended critically upon the co-operation of the landowners. The SPA regime provided a mechanism to underpin such voluntary co-operation through reg 16 of the 1994 regulations. Agreements could be made for wide purposes ('for the management, conservation, restoration or protection of the site, or any part of it'), as such agreements were underpinned by the existence of compulsory purchase powers (see reg 32).

[114] Counsel then took us through the correspondence between English Nature and the DETR and other documentation produced in the period leading up to the decision to notify. They argued that what they called the 'immaterial' considerations' featured significantly at all stages of the decision-making process, and were prominent in the documentation produced by English Nature for both internal and external communication.

[115] As to the discussion which took place prior to the decision to confirm the notification, counsel criticised the judge for relying on the comments by Mr Tromans and the advice given by Mr Barlow which I have set out at [78]–[80], above. They submitted that even those comments do not contain any oral direction at the meeting excluding from consideration the immaterial considerations which had featured in the decision-making process. They submitted that the judge did not address the issue of whether the immaterial considerations were effectively excluded from the decision-making process. They submitted that the minutes of the meeting do not explain the basis upon which it was considered that the site was of special interest or reveal what influenced members. Nor, they submitted, did the minutes record any effective exclusion of the immaterial matters. Accordingly, counsel argued that the immaterial matters were not effectively excluded from consideration and influenced English Nature to a substantial extent.

[116] Mr Holgate and Mr Kolinsky then turned to the judge's reasoning. They criticised him for treating the decision to notify as a discrete stage from the decision to confirm. This had led him wrongly to criticise the appellants for not challenging the notification itself.

[117] The judge's approach to the construction of s 28 had, counsel argued, been wrong. His analysis deprived English Nature of any discretion. He did not address the issue of what the relevant criteria were which had to be taken into account by English Nature in forming its opinion. By failing to do so, the judgment simply did not engage with the appellants' complaints that immaterial considerations pervaded the decision-making process.

[118] The judge's construction of s 28, counsel argued, precluded English Nature from considering the legal consequences of notification. He thus did not

undertake any comparative analysis between the legal consequences between SSSI status as compared with the effects of designation of the land as an SPA. As such, his analysis did not touch upon the correctness of the repeated assertion by English Nature that it was necessary to underpin the SPA with SSSI status. They argued that the judge had simply not addressed the legal issue of whether the SSSI statutory scheme was capable of being used for nature promotion purposes (stone curlew recovery) which, factually, was the sole basis for justifying the designation in this case.

[119] Counsel argued that the judge's analysis of the relationship between SPAs and SSSIs was erroneous. He was wrong to place emphasis on the fact that there was, as yet, no SPA in relation to the Breckland Farmland when the only reason why SPA designation had not been made was the outcome of the appellants' challenge was being awaited. The fact of the matter was that, as a matter of law, the Secretary of State was under a duty to designate the SPA.

[120] Counsel argued that the judge was wrong to reject the appellants' contention that English Nature's decision to confirm the notification was based on immaterial considerations. He should have taken into account the entire decision-making process, and not simply what was said at the meeting of 11 July 2001. He failed to address the question as to whether or not the matters relied upon by English Nature (the immaterial considerations) were correct. He failed to recognise that there was no need in law to underpin every SPA with SSSI designation over all the land within it. He failed to give any weight to the consideration that on the facts of this case double designation served no useful purpose since the protection which English Nature wanted would have been available under reg 16 of the 1994 regulations without the need for SSSI notification. Furthermore, the assumption that the criteria for SPAs were identical to those for SSSIs was erroneous, and the judge demonstrated a fundamental misunderstanding of the difference between the regime under the 1981 Act and the relevant European legislation. This was because the Birds Directive promoted not just the conservation but also the enhancement or addition of habitats for birds. In contrast, the 1981 Act was concerned with the conservation of existing scientific interest and management, not the recovery or enhancement of species. Furthermore, it was to be expected that SPAs could cover wider areas than SSSIs. In relation to the present case, the SPA could extend to areas which had not been surveyed as potential habitat for stone curlew. Furthermore, as a matter of law, it was entirely possible for land properly contained within a larger area of an SPA not to meet the criteria for an SSSI. Thus it was open to English Nature, as a matter of law and fact, to make recommendations to the government to designate the Breckland Farmland as an SPA without including it within the SSSI. The judge had treated the government's views and English Nature's acceptance of them as a matter of established fact rather than evaluating whether the substance of those views were correct as a matter of law or not. In these circumstances, the principle established in *Simplex GE (Holdings) Ltd v Secretary of State for the Environment* [1998] 3 PLR 25 applied, and the decision to confirm the designation should be quashed as being based in part on immaterial considerations.

[121] As to the construction of the 1981 Act, s 28(1), counsel submitted, was open-textured and contained no real guidance as to what is special. The application of the approach to the construction of statutes established in *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997 namely the duty to notify once the 'specialness' criteria are satisfied, was not the end in

itself but exists for specific statutory purposes (that is to say the legal consequences contained in the 1981 Act). Counsel argued that it could not be right that in deciding whether something was special no regard should be had to the statutory consequences which flow from that. Otherwise, they argued, identification would follow under the statutory scheme even if it served no relevant statutory purpose.

[122] The purposive construction of the statute which treated the consequences of notification as a material consideration in the formation of a judgment as to the specialness of the proposed site was consistent with the repeated reliance by the officers of English Nature on the need to underpin the SPA as part of the justification for an SSSI, and with the approach reflected in the JNCC guidelines. By approaching the construction of s 28 in what counsel described this 'unduly narrow way' the judge, they argued, had erred by failing to decide the facts of this 'unique' case were beyond the reasonable range of meanings which could be attached to 'site of special scientific interest'.

[123] As to the argument on art 1 of the First Protocol, if the appellants were correct in submitting that the legal consequences of notification were relevant to deciding 'specialness' then the effect of those consequences on the appellants' right to enjoyment of their property was relevant; the availability of other measures which would achieve English Nature's ecological objective at less harm to landowners was also relevant; and the issue of proportionality arose.

[124] The appellants' contention was, on the unique facts of this particular case, that notification of the Breckland Farmland as an SSSI served no useful purpose and was counter-productive. Accordingly, to the extent that it interfered with the appellants' property rights it did so in breach of art 1 of the First Protocol.

[125] The appellants relied in particular on the following facts and matters. (1) That the SSSI regime imposes restrictions all year around even though the stone curlew are only present from March to October. By contrast SPA designation leads to more targeted controls (imposed under the 1994 regulations) which relate to the purpose of the SPA and thus are no more onerous than necessary. (2) SSSI designation necessarily imposes additional consultation requirements whereas SPA status leads to more targeted consultation requirements. (3) Because we are here concerned with high-value agricultural land, there is a real danger that an additional level of designation will have an impact on land values. (4) The restrictive regime of the SSSI lacks logic in that: (a) restrictions are imposed even though voluntary co-operation is working. Those restrictions may well jeopardise the voluntary co-operation which exists; and (b) the favourable conditions for the stone curlew depend upon crop rotation. Yet crop rotation is the one thing which will not be controlled—so there is nothing to stop farmers sowing winter crops which would destroy the stone curlews nesting conditions.

DISCUSSION AND ANALYSIS

[126] At the conclusion of the argument, I find myself unpersuaded by any of the appellants' arguments, and in overall agreement with the judge's analysis. Throughout Mr Holgate's sustained and detailed argument, which I have deliberately set out in considerable detail, I found myself inexorably and repeatedly coming back to two points. The first was that this is an application for judicial review of a decision made by a specialist body, and thus only

susceptible to challenge on the limited grounds provided by judicial review. The second was the point made by Mr John Howell QC and Miss Jane Collier in their skeleton argument on behalf of English Nature namely: what the appellants have not done is to explain how English Nature could ever reasonably take the view that an area of land was not of special scientific interest by reason of the birds it supports when in their opinion it is of European significance for those birds.

[127] The only answer to this question provided by the appellants was that this had been English Nature's view in 1994, and they had been wrong to change it in 2000. But once it is established, as the judge found (and, in my judgment, as the evidence manifestly bears out), that English Nature's change of stance had been adopted after careful consideration and was rational, then the simple fact of the matter is that on the post-2000 criteria, the Breckland Farmland manifestly is an SSSI for the reason Mr Howell and Miss Collier identify.

[128] The rest, in my judgment, follows inexorably. English Nature reasonably formed the opinion that the area of land was of special interest by reason of its internationally important population of stone curlew. This led to the duty to notify under s 28(1) of the 1981 Act. There is nothing in the process of consultation, or in English Nature's consideration of the objections, to which objection can be taken. The process is thus rational and procedurally fair, and at the end of it, having listened to and considered the objections, English Nature remained of the same opinion and confirmed the notification. At this level, the case, it seems to me, is very simple, and is a straightforward application of English Nature's statutory responsibilities to the facts of a particular case.

[129] Speaking for myself, I do not think that there is anything in the point that the judge misdirected himself by criticising the appellants for not mounting a formal challenge to the decision to notify. I tend to agree with the appellants that a challenge to that decision might well, within the structure imposed by s 28 of the 1981 Act, have been met with the judicial retort that it was premature, and that the appellants should wait until confirmation (if it occurred) before mounting a challenge. I regard the consultation/objection process as being of considerable importance. That process had to be properly carried out. But the resultant question, in my judgment, is unaffected. Was the decision one which it was properly open to English Nature to make on all the information available to them? In my judgment, the answer to that question is plainly Yes.

[130] However careful and sophisticated the argument to the contrary, it seems to me that the words contained in s 28(1) of the 1981 Act are very clear. The Breckland Farmland is an area of land, and on any construction of the language it is 'of special interest by reason of ... its ... fauna' (its population of stone curlew). The fact that it is a pSPA in my judgment simply serves to underline the point.

[131] The 1981 Act does not define the size of an SSSI. The words used are deliberately vague: 'any area of land'. Mr Howell pointed out that the Breckland Farmland SSSI was not the largest SSSI in the United Kingdom, and to my mind, provided the designation of the site is directly related to the fauna by reason of which it is of special interest, there is no reason why it should not comprise 13,335·7 hectares or even more.

[132] It is quite clear from the European legislation and the 1994 regulations that an area of land may be at one and the same time an SPA and an SSSI. Doubtless it can also be, at the same time, part of Natura 2000 and various other things beside. Absent any attack on the lawfulness of the scheme contained within s 28 of the 1981 Act for identifying and confirming SSSIs, I do not, speaking for myself, find the arguments about the nature and purpose of other designations particularly helpful. Discussion of the relative concepts of preservation, conservation, and enhancement, do not, in my judgment, advance the argument.

[133] If English Nature were correct to notify, were they right to confirm? The judge took the view that once notification had occurred, English Nature had, in effect, no discretion to refuse to confirm if they maintained their opinion, after hearing objections, that the site was still an SSSI. But did that mean, for example, that English Nature could have no regard to the consequences of confirmation, notably in the context of art 1 of the First Protocol? This is the point which troubled Carnwath LJ.

[134] Although I do not disagree with the judge's construction of s 28 of the 1981 Act, I would approach the analysis from a slightly different direction. English Nature are a creation of statute, and derive their powers from statute. Section 28(5) of the 1981 Act sets out the powers English Nature have in this context. They can (1) withdraw the notification or (2) confirm the notification (with or without modifications) or do nothing for nine months, at which point, as the judge pointed out, the original notification ceases to have any effect, and the duty to notify revives, provided English Nature remain of the same mind.

[135] What, in my judgment, is of critical importance, and gives the statutory procedure meaning, is the process whereby English Nature satisfy themselves whether or not their original identification of the land as an SSSI remains correct. That process requires investigation, consultation and the consideration and analysis of objections. Any suggestion that remaining of the same opinion involves no expenditure of physical or intellectual energy, or that confirmation is an automatic rubber stamp, is plainly wrong. Thus I would prefer to construe s 28(5) of the 1981 Act as giving rise to the exercise of a power not to confirm, which is to be exercised in accordance with the conclusion reached as a result of the outcome of a genuine, open-minded consultation/investigation process. Once the s 28(1) factors and the appropriateness of the matters specified under s 28(4) have been reconsidered, there is only a limited basis upon which it would be open to English Nature to refuse to confirm a notification under s 28(5).

[136] It is for these reasons that I regard the consultation/investigative process post-notification as so important, and why I set it out in such detail. Were that process defective in any way—were, for example, improper or irrelevant considerations to have entered into and tainted the decision-making process, the decision could undoubtedly be quashed, and English Nature directed to reconsider. But on the facts presented to English Nature; the content of the objections put forward at the meeting on 11 July 2001; and on the basis of the record of the meeting, which demonstrates the care which was taken over the decision, I am wholly satisfied that in this respect the decision to confirm the notification was properly taken and is challenge-proof.

[137] The judge, in my view, was manifestly correct to reject challenges based on English Nature giving in to government pressure or misdirecting themselves

as to the law to be applied. The reasons for the change of policy in 2000 are transparent. There was plainly a debate with the DETR and an acknowledgement by English Nature of the DETR policy. Government departments are sometimes right: a change of stance to bring oneself in line with government policy on a particular issue is not automatically to be equated with giving in to government pressure. The government regarded SSSI status as necessary to underpin SPAs. But English Nature could only go along with that policy if the area of land they were being invited to designate as an SSSI fulfilled the SSSI criteria as English Nature determined them to be.

[138] Initially, as the evidence makes clear, English Nature withheld SSSI status from sites such as Bramshill and the Breckland Farmland for the reasons explained by Dr Brown and set out at [39]–[40], above. The government's view was if land was sufficiently important to be an SPA it must qualify as a SSSI. For English Nature, after a considered and informed internal debate, to accept that point of view in relation to the three sites in issue, and the Breckland Farmland in particular, seems to be (a) perfectly rational and (b) incapable of being designated as improperly giving in to government pressure.

[139] Furthermore, as the extracts from the discussion on 11 July 2001 demonstrate, the council of English Nature gave itself clear, cogent and (in my judgment) correct advice on the point. It did not confirm the SSSI on the basis that that was what the government wanted it to do. It had to (and did) make up its mind, applying the statutory criteria, whether or not, in its judgment, Breckland Farmland was an SSSI. The council decided, having heard the objections, having considered the matter carefully, and having applied its independent expertise, that it was. That was a decision they were plainly entitled to reach, and, like the judge, I do not think (subject to the argument on art 1 of the First Protocol) that it is open to a court exercising the powers of judicial review to interfere with it.

[140] This leaves the argument under art 1 of the First Protocol. I have set out fully the objections put forward at the meeting of the council of English Nature on 11 July 2001. In so far as they go to the lawfulness of the decision to confirm, the highest the case is put is that SSSI status is not necessary to protect the stone curlew and simply imposes a further and unnecessary layer of bureaucracy. That does not seem to me, with respect, to be a reason for saying that the Breckland Farmland is not an SSSI. And in so far as the objections went to the consequences of designation, English Nature had, as Mr Falcon recognised, done a lot of work to minimise the effect that an SSSI would have on the agricultural operation. His point about the inclusion of fields where there were no records of birds having nested likewise does not go to the overall lawfulness of designation.

[141] Speaking for myself, I would accept that if designation as an SSSI could be shown to have a disproportionate impact on the appellants, and one which English Nature had failed to take into account, that failure could found an argument for judicial review of the decision. This, as I understand it, is essentially the basis of the art 1 of the First Protocol argument. However, this argument in my judgment fails on the facts.

[142] I have to say that on the art 1 of the First Protocol point, I find the objections voiced at the meeting surprisingly weak. The evidence about land values was equivocal. There was no complaint about the OLDs. When, as I have just indicated, Mr Falcon was asked about the restraints on landowners' activities,

he recognised the work which had been done by English Nature to minimise the effect that an SSSI would have on the agricultural operation, but was unable otherwise to be specific (see the answer I have recorded at [67], above. Indeed, that paragraph, and the reference to SSSI status as an unwanted bureaucratic shackle, seems to sum up the objectors' case.)

[143] Equally surprisingly, to my mind at least, the weakness of the art 1 of the First Protocol argument on the facts persisted throughout Mr Holgate's submissions. In the absence of an attack on the lawfulness of the scheme itself, I struggled to ascertain why it was that the imposition of an SSSI on the appellants was so disproportionate as to render the decision to confirm unlawful. A bare assertion that the SSSI serves no useful purpose is not, in my judgment, a reason of itself for refusing to confirm.

[144] The three examples given of disproportionate impact were: (1) restrictions all the year round when the stone curlew are only present from March to October; (2) additional consultation requirements; and (3) the effect of designation on land values. None of these, in my judgment, on the evidence and in the absence of greater detail comes anywhere near a disproportionate interference with the appellants' art 1 of the First Protocol rights, particularly as English Nature were at pains to preserve the agricultural use of the land.

[145] In these circumstances, it seems to me that consideration of the Birds and Habitats Directives adds nothing to the appellants' argument. The government no doubt prefers the underpinning of an SPA with an SSSI because of the additional powers of enforcement the latter provides: no doubt the appellants object for the same reason. But neither consideration, in my judgment, affects the issue which English Nature had to address.

[146] In these circumstances, it seems to me that the judge was right to decide that the change of policy in 2000 in no sense vitiated the decision made by English Nature in 2001. What matters above all, however, is that when it comes to confirmation of the notification, the council of English Nature should direct its mind properly to the statutory provisions and to the guidelines and express itself independent of government policy in so far as government policy conflicts with the terms of s 28. That, it seems to me, is precisely what the council of English Nature did at the meeting in July 2001, and in my judgment its decision-making process cannot be criticised.

[147] The judge was of the view that the issue of proportionality only arose if the scheme itself was not 1998 Act-compliant. That was his short answer to the proportionality point. I do not necessarily disagree with him, but equally do not need to go that far. In practical terms, and on the facts, all that SSSI status brought with it was the need to consult English Nature before any particular activity was engaged in, and in so far as there are restrictions on particular activities, no evidence seems to me to have been placed before the council of English Nature—or has been put before this court—which would render such restrictions disproportionate.

[148] If there was no irrationality in the decision-making process, there was manifestly no procedural irregularity in the process of making the decision. I find myself, therefore, at the end of this very long judgment where, tentatively, I found myself at the beginning. English Nature were entitled both to notify and confirm the Breckland Farmland as an SSSI. The judge was right to hold that English Nature had not erred in law by taking account of immaterial considerations in deciding to confirm the notification. The notification was

lawful within the scheme created by s 28 of the 1981 Act. There was no procedural irregularity, and, on the facts, no disproportionate impact on the appellants' art 1 of the First Protocol rights. a

[149] The decision cannot, accordingly, be challenged on any of the grounds advanced by the appellants. In its fundamentals this is a simple case, and the judge was right.

OUTCOME b

[150] I would, accordingly, dismiss this appeal.

PUMFREY J.

[151] I agree.

AULD LJ. c

[152] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Note

Bow Spring (owners) v Manzanillo II (owners)

[2004] EWCA Civ 1007

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, CLARKE AND SEDLEY LJJ WITH CAPTAIN R CHEW OF TRINITY HOUSE AS A NAUTICAL ASSESSOR

17, 18 MAY, 28 JULY 2004

Assessor – Evidence obtained from assessor – Disclosure of evidence to parties – Guidance.

In a judgment of the court delivered by **CLARKE LJ** but to which all its members had contributed, the Court of Appeal dismissed an appeal by the defendants, the owners of the dredger Manzanillo II, from the decision of David Steel J on 22 July 2003 ([2003] EWHC 1802 (Admlty), [2004] 1 Lloyd's Rep 647) that their vessel was 50% to blame for the grounding of the Bow Spring, a chemical tanker owned by the claimants, outside the eastern edge of the Northern By-pass Channel of the Suez Canal on 8 July 1999. In a postscript to its judgment, the Court of Appeal gave the following guidance on the practice to be adopted by the court when it has received evidence from an assessor:

> '[57] The common law principles of natural justice anticipated by many years the concept of a fair trial which has been elaborated by the European Court of Human Rights under art 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998). This article provides, among other things, that in the determination of his civil rights and obligations everyone is entitled to a fair and public hearing before an independent and impartial tribunal established by law.
>
> [58] Both the common law and the convention regard fairness as including the need for the court to know, before it reaches a conclusion, what the parties have to say about the issues and the evidence which goes to them. As the Strasbourg court put it in *Krcmar v Czech Republic* App No 35376/97 (3 March 2000, unreported):
>
> > "40. ... the concept of a fair hearing ... implies the right to adversarial proceedings, according to which the parties must have the opportunity not only to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision ..."
>
> [59] Where the court has evidence from an expert who has not been called as a witness by either party—and CPR 61.12 makes it clear that nautical assessors are such experts—the principle needs to be adapted to the procedure. Its effect is that any consultation between the assessors and the court should take place openly as part of the assembling of evidence. Because the judge is not bound to accept the advice he receives from the assessors (see *Admiralty Comrs v SS Ausonia (owners)* (1920) 2 Ll L Rep 123 at

124), the parties are entitled to an opportunity to contend that he should or should not follow it. In many, perhaps most, cases the questions and advice taken together will be susceptible of little or no argument that has not already been directed to the issues which have prompted the questions. But fairness requires the opportunity to be given.

[60] The nautical assessor is a time-honoured example of the statutory court-appointed expert. CPR 35.15(4) now provides for the disclosure and use at trial of such experts' initial reports. CPR PD 35, para 7.4 indicates that the parties are to be sent copies of any report prepared by the assessor, but that he or she will not give oral evidence or "be open to cross-examination or questioning". This sits comfortably with the traditional role of the nautical assessor, which in the past approximated to that of a special jury: hence the practice of formulating questions and—until 1867—taking the answers in open court. It appears from a note to the report of *The Hannibal* (1867) LR 2 A & E 53 at 56, that it was at the conclusion of judgment in that case that Sir Robert Phillimore announced that—

> "for the future in causes of collision and salvage, heard before the Trinity Masters, he should not sum up the evidence; but that the Court and Trinity Masters would retire and, on their return, the judgment of the Court would be given."

[61] Such a practice would not, in our view, be compatible with art 6; and it is right that, except in cases where such a discussion is unnecessary in the light of submissions made earlier, the preferable modern practice of putting questions to the assessors after discussion with counsel should be complemented by a practice of disclosing their answers to counsel, either orally or in writing—in order that any appropriate submission can be made as to whether the judge should accept their advice.'

The full text of the judgment in this case, in which *Nigel Meeson QC* (instructed by *Hill Taylor Dickinson*) represented the appellant defendants and *Simon Kverndal QC* (instructed by *Jackson Parton*) represented the respondent claimants, can be found on our online service, All England Direct, at [2004] All ER (D) 522 (Jul).

Kate O'Hanlon Barrister.

Attorney General's Reference (No 5 of 2002)

[2004] UKHL 40

HOUSE OF LORDS

LORD BINGHAM OF CORNHILL, LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOPE OF CRAIGHEAD AND LORD WALKER OF GESTINGTHORPE

29 JULY, 14 OCTOBER 2004

Criminal evidence – Interception of communications – Telephone intercepts – Lawful interception of communication in the course of its transmission by means of private telecommunication system by person with a right to control operation or use of the system – Prohibition of evidence disclosing any contents of intercepted communication from which its origin might be inferred in conduct falling within definition of offences of unlawfully intercepting communication by means of a public or a private telecommunication system – Prosecution advancing case on basis of lawful interception of private telecommunication system – Whether defence prohibited from asserting interceptions made in public part of telecommunications system – Regulation of Investigatory Powers Act 2000, s 17(1).

Certain police officers were believed to be supplying confidential and sensitive information to a known criminal and others. The chief constable gave his consent for the interception of communications to take place on a number of telephone extensions in the telephone system which linked several police stations and which comprised several private automated branch exchanges linked together by component parts of the public telecommunications system. Four people were subsequently prosecuted for misconduct in a public office. The provisions of s 17(1)(a)[a] of the Regulation of Investigatory Powers Act 2000 were, inter alia, subject to certain exceptions which did not include s 1(6)[b] of the 2000 Act, that no evidence was to be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of, or in connection with any legal proceedings which (in any manner) disclosed, any of the contents of an intercepted communication, in circumstances from which its origin in anything falling within s 17(2) could be inferred. Falling within s 17(2) were, inter alia, conduct by a person falling within sub-s (3) that was, or would be an offence under s 1(1) or (2) of the 2000 Act. The persons within sub-s (3) included any person to whom a warrant for interception could be addressed, any person employed by or for the purposes of a police force, any person providing a public telecommunications service or employed for the purposes of any business of providing such a service. Section 1(1) created the offence of intentionally intercepting without lawful authority any communication in the course of its transmission by means of, inter alia, a public telecommunications system. The offence under s 1(2) was committed where a person intentionally and without lawful authority, and otherwise than in circumstances in which his conduct was excluded by s 1(6) from criminal liability, intercepted any communication in the course of its transmission by means of a private telecommunication system.

a Section 17 is set out at [18], below

b Section 1, so far as material, is set out at [15], below

Lawful authority was defined in s 3[c] which provided that conduct consisting in the interception of a communication was authorised (i) if the communication was one which was, or which that person had reasonable grounds for believing was, both a communication sent by a person who had consented to the interception, and a communication the intended recipient of which had so consented; (ii) if the communication was one sent by, or intended for, a person who had consented to the interception, and surveillance by means of that interception had been authorised under the 2000 Act; and (iii) if it was conduct by or on behalf of a person who provided a postal service or a telecommunication service, and it took place for purposes connected with the provision or operation of that service or with the enforcement of any enactment relating to that service. Lawful authority was also provided by s 4[d], under which the Secretary of State could authorise any such conduct as appeared to him to constitute a legitimate practice reasonably required for the purpose, in connection with the carrying on of any business, of monitoring or keeping a record of communications by means of which transactions were entered into in the course of that business, or other communications relating to that business or taking place in the course of its being carried on. The exclusion provided by s 1(6) from criminal liability under s 1(2) when a person made an interception of a communication in the course of its transmission by means of a private telecommunication system, was if he was a person with a right to control the operation or the use of the system, or he had the express or implied consent of such a person to make the interception. At trial the prosecution case was that the interceptions had taken place wholly within the police private telecommunications system, and it served evidence before trial to prove that fact. The defence case was that the interceptions had taken place on the public system. The defence submitted that s 17(1) prevented it from advancing a case that the interceptions occurred on part of the public system because this involved a suggestion that an offence had been committed under s 1(1) by a person mentioned in s 17(3). The judge ruled that s 17 did have that effect, but it did not prevent the prosecution from adducing evidence that the interception had taken place on the private side of the system. The defence then submitted that the prosecution evidence should be excluded since it would not be fair to admit that evidence and shut out the defence case. The judge acceded to that submission and the prosecution were obliged to offer no evidence, with the result that the defendants were acquitted on the judge's direction. The Attorney General sought the opinion of the Court of Appeal on the correct construction of s 17(1). The court accepted the argument advanced for the Attorney General but exercised its power to refer the questions to the House of Lords.

Held – Section 17(1) of the 2000 Act did not prevent, in criminal proceedings, any evidence being adduced, question asked, assertion or disclosure made or other thing done so as to ascertain whether a telecommunications system was a public or a private telecommunications system, whether or not the evidence, question, assertion, disclosure or other thing done related to events which had taken place before the 2000 Act had come into force. Where an interception of a communication had taken place on a private telecommunications system, it was permissible in criminal proceedings to ask questions, adduce evidence, make

c Section 3, so far as material, is set out at [16], below
d Section 4, so far as material, is set out at [17], below

assertions or disclosures or do other things to establish that the interception had been carried out by or on behalf of the person with the right to control the operation or use of the system, subject, where the interception had taken place after the 2000 Act had come into force, to the facts of the particular case. There was nothing whatever in the 2000 Act which suggested an intention to depart from the principle that the issue of warrants by a Secretary of State and all matters pertaining to such warrants should not be the subject of inquiry in the course of a criminal trial. There was nothing which questioned or threw doubt on the decisions in which the court had examined whether an interception had been made within a public or private system. Given the obvious public interest in admitting probative evidence which satisfied the requirements of ss 1(6), 3 and 4 of the 2000 Act, and the absence of any public interest in excluding it, a court could properly inquire whether an interception was of a public or private system and, if the latter, whether the interception was lawful. If the court concluded that it was public, that was the end of the inquiry. If the court concluded that it was private but unlawful, that also would be the end of the inquiry. If it was private but lawful, the court could (subject to any other argument that there might be) admit the evidence (see [14], [20], [22], [23], [28], [30]–[32], [36], [40]–[42], below).

R v Ahmed (Iftikhar) [1995] Crim LR 246 and *R v Effik* [1994] 3 All ER 458 considered.

Notes

For interception of communications: exclusion of matters from legal proceedings, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 270A.15.

For the Regulation of Investigatory Powers Act 2000, s 17, see 45 *Halsbury's Statutes* (4th edn) (2003 reissue) 815.

Cases referred to in opinions

Halford v UK (1997) 24 EHRR 523, [1997] ECHR 20605/92, ECt HR.
Institute of Patent Agents v Lockwood [1894] AC 347, HL.
Malone v UK (1985) 7 EHRR 14, [1984] 8691/79, ECt HR.
Morgans v DPP [2000] 2 All ER 522, [2001] 1 AC 315, [2000] 2 WLR 386, HL.
R v Ahmed (Iftikhar) [1995] Crim LR 246, CA.
R v Allan [2001] EWCA Crim 1027, [2001] Crim LR 739.
R v Effik [1994] 3 All ER 458, [1995] 1 AC 309, [1994] 3 WLR 583, HL; *affg* (1992) 95 Cr App R 427, CA.
R v Goodman [2002] EWCA Crim 903.
R v P [2001] 2 All ER 58, [2002] 1 AC 146, [2001] 2 WLR 463, HL.
R v Preston [1993] 4 All ER 638, [1994] 2 AC 130, [1993] 3 WLR 891, HL.
R v Sargent [2001] UKHL 54, [2002] 1 All ER 161, [2003] 1 AC 347, [2001] 3 WLR 992.
R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire [2004] UKHL 39, [2004] 4 All ER 193, [2004] 1 WLR 2196.
R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 4 All ER 654, [2002] 1 WLR 2956.

Cases referred to in list of authorities

Huvig v France (1990) 12 EHRR 528, [1990] ECHR 11105/84, ECt HR.
Klass v Germany (1978) 2 EHRR 214, [1978] ECHR 5029/71, ECt HR.
Kruslin v France (1990) 12 EHRR 547, [1990] ECHR 11801/85, ECt HR.

Malone v Comr of Police of the Metropolis (No 2) [1979] 2 All ER 620, [1979] Ch 344, [1979] 2 WLR 700.
R v Boodhoo (Mohammed Noor) [2001] EWCA Crim 1027, [2002] 1 Cr App R (S) 33.
R v H [2004] UKHL 3, [2004] 1 All ER 1269, [2004] 2 AC 134, [2004] 2 WLR 335.
R v Turner [1995] 3 All ER 432, [1995] 1 WLR 264, CA.
Valenzuela Contreras v Spain (1999) 28 EHRR 483, [1998] ECHR 27671/95, ECt HR.

Reference

On 12 June 2003 the Court of Appeal (Clarke LJ, Morison J and Dame Heather Steel), on a reference by the Attorney General pursuant to s 36 of the Criminal Justice Act 1972 ([2003] EWCA Crim 1632, [2003] 1 WLR 2902), gave its opinion on the points of law set out at [22], below and referred the questions to the House of Lords. The facts are set out in the opinion of Lord Bingham of Cornhill.

David Perry and *Duncan Penny* (instructed by the *Crown Prosecution Service*) for the Attorney General.
Timothy Roberts QC and *Robin McCoubrey* (instructed by *Brown Beer Nixon Mallon*, Redcar) for the acquitted person.

Their Lordships took time for consideration.

14 October 2004. The following opinions were delivered.

LORD BINGHAM OF CORNHILL.

[1] My Lords, by this reference under s 36(1) of the Criminal Justice Act 1972 the Attorney General sought the opinion of the Court of Appeal on the correct construction of s 17(1) of the Regulation of Investigatory Powers Act 2000. Although the points of law which he referred were more elaborately expressed, the essential thrust of his questions was whether, and if so to what extent, a criminal court may investigate whether intercept material relied on by the Crown has been obtained by tapping a private as opposed to a public telecommunications system. The Court of Appeal (Clarke LJ, Morison J and Dame Heather Steel) considered the questions referred in considerable detail and accepted the argument advanced for the Attorney General: see [2003] EWCA Crim 1632, [2003] 1 WLR 2902. The court however recognised the difficulty and complexity of the 2000 Act and exercised its power under s 36(3) of the 1972 Act to refer the Attorney General's questions to the House.

[2] The acquittal which is necessary to trigger the Attorney General's power to refer under s 36(1) of the 1972 Act came about in this way. It was believed that Det Sgt W and two other police officers were supplying confidential and sensitive information to a known criminal, C, and that W had provided sensitive and confidential information to another man, L, and also to journalists. On 30 May 1996 the chief constable of the force to which W and the other officers belonged gave his consent in writing for the interception of communications to take place on a number of telephone extensions used by W and others. It is agreed between counsel that the telephone system used to make the interceptions was a system which linked several police stations and which comprised several Private Automated Branch Exchanges linked together via BT Megastream lines, which were component parts of the public telecommunications system operated by British Telecommunications plc under licence from the Secretary of State pursuant

to s 9 of the Telecommunications Act 1984. The equipment used to carry out the interception was a system known as 'Dial Up' which worked in the following way. A telephone call received on or made from the telephones in question activated the interception equipment. The interception equipment created a duplicate call which was relayed through a BT telephone line to another police station where equipment capable of recording the calls had been installed. The telephone calls were thus monitored and recorded.

[3] The product of this interception confirmed the suspicion that W was supplying information of a confidential and sensitive nature to persons who had no entitlement to receive it. The interception continued until 21 June 1997 and the three officers and C were prosecuted in reliance on the material thus obtained. An indictment was preferred, charging all the defendants (in count 1) with conspiring to commit misconduct in a public office. Additional counts alleging misconduct in public office were laid against W alone.

[4] The prosecution case at trial was that the interceptions had taken place within a private telecommunications system, and it served evidence on the defence before the trial to prove that fact. The defence case was that the interception had taken place on a public telecommunications system. At the trial in May 2002, before the prosecution evidence had been called, the defence submitted that s 17 of the 2000 Act prevented any investigation into the circumstances of the interception and, in particular, into whether the interception had taken place on the public side of the telecommunications system. Having heard argument, the judge ruled that s 17 prevented the defence from asserting that the interception had taken place on the public side of the system, although it did not prevent the prosecution from adducing evidence that it had taken place on the private side. The defence then submitted that the judge should exclude the prosecution evidence that the interception had taken place within a private telecommunications system under s 78 of the Police and Criminal Evidence Act 1984, since it would not be fair to admit that evidence and shut out the defence case that it had taken place on the public side of such a system. To this submission the judge acceded. This obliged the prosecution to offer no evidence, with the result that W and his co-defendants were acquitted on the judge's direction.

[5] It is unnecessary to trace the history of official interception in the United Kingdom before 1985, which is uncontroversial and has been summarised on other occasions: see, for example, *R v Preston* [1993] 4 All ER 638 at 645, 650, [1994] 2 AC 130 at 142, 147–148, *R v P* [2001] 2 All ER 58 at 63–66, [2002] 1 AC 146 at 155–157, *The Interception of Communications in the United Kingdom* (Cmnd 9438 (1985)). It is enough to draw attention to four features of the practice as it then existed. First, telephones had for many years been tapped, and mail intercepted, pursuant to warrants issued by an appropriate Secretary of State. Secondly, in cases culminating in criminal prosecution the tap or intercept was used for purposes of preventing and detecting crime, and not for the purpose of prosecuting culprits: the product of the tap or intercept was not relied on as evidence. Thirdly, there was no rule of law or practice which rendered inadmissible in criminal proceedings the product of any unofficial or private eavesdropping activity. While a trial judge might exclude such evidence in the exercise of his overriding discretion to ensure the fairness of a trial, he would not in the absence of special circumstances have been at all likely to do so. Fourthly, the process of interception, by whatever means, official or unofficial, of communications, whether public or private, was wholly unregulated by statute.

[6] It was this last feature of the prevailing practice which led the European Court of Human Rights to hold, in the context of warranted police tapping of Mr Malone's telephone, that the interference with his right to privacy which the facts disclosed was not, as required by art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969), 'in accordance with the law': see *Malone v UK* (1985) 7 EHRR 14. This adverse finding obliged the United Kingdom under arts 1 and 46 of the convention to secure the protection of art 8 rights to all within its jurisdiction and to abide by the judgment. This it sought to do by enacting the Interception of Communications Act 1985. It is unnecessary for present purposes to cite the detailed provisions of that Act, but certain cardinal features of it should be noted. First, the United Kingdom did not respond to the adverse decision in *Malone v UK* by enacting a comprehensive scheme to regulate the whole field of interception. The scheme embodied in the 1985 Act was directed to interception which was or should have been warranted, such as Mr Malone had successfully challenged. Thus s 1 of the Act made it an offence to intercept, intentionally, a communication in the course of its transmission by post or by means of a public telecommunication system (subject to an exception in s 1(3)), but the Act did not address interception otherwise than within the post or such a system. Secondly, the Act preserved the existing practice for issuing interception warrants by an appropriate Secretary of State. The practice was very greatly formalised, and detailed provisions were made to govern the issue, form, contents, duration and effect of warrants, to provide for access to a tribunal to resolve complaints and to provide for retrospective judicial invigilation of the new practice. But it was a reform of the old warrant regime in order to comply with the Strasbourg decision, not the establishment of a new regime. Thirdly, it remained the rule that, in the context of criminal activity, interception was to be an instrument of prevention and detection, not an instrument of prosecution. This was made clear by s 2(2)(b) of the Act which, in the criminal field, empowered a Secretary of State to issue a warrant only if he judged it to be necessary 'for the purpose of preventing or detecting serious crime', and by s 6(3) which required destruction of the interception product as soon as its retention was no longer necessary for that purpose. Fourthly, the Act was drafted in terms plainly intended to preclude any forensic inquiry into any aspect of the procedure of applying for or giving effect to warrants. This was made clear by s 9 of the Act, the terms of which must be quoted. As enacted, the section read:

> '(1) In any proceedings before any court or tribunal no evidence shall be adduced and no question in cross-examination shall be asked which (in either case) tends to suggest—(a) that an offence under section 1 above has been or is to be committed by any of the persons mentioned in subsection (2) below; or (b) that a warrant has been or is to be issued to any of those persons.
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> (2) The persons referred to in subsection (1) above are—(a) any person holding office under the Crown; (b) the "Post Office" and any person engaged in the business of the Post Office; and (c) any public telecommunications operator and any person engaged in the running of a public telecommunication system.
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> (3) Subsection (1) above does not apply—(a) in relation to proceedings for a relevant offence or proceedings before the Tribunal; or (b) where the evidence is adduced or the question in cross-examination is asked for the purpose of establishing the fairness or unfairness of a dismissal on grounds of

an offence under section 1 above or of conduct from which such an offence might be inferred; and paragraph (a) of that subsection does not apply where a person has been convicted of the offence under that section.

(4) In this section "relevant offence" means—(a) an offence under section 1 above or under section 45 of the Telegraph Act 1863, section 20 of the Telegraph Act 1868, section 58 of the Post Office Act 1953 or section 45 of the 1984 Act; (b) an offence under section 1 or 2 of the Official Secrets Act 1911 relating to any sketch, plan, model, article, note, document or information which tends to suggest as mentioned in subsection (1) above; (c) perjury committed in the course of proceedings for a relevant offence; (d) attempting or conspiring to commit, or aiding, abetting counselling or procuring the commission of, an offence falling within any of the preceding paragraphs; and (e) contempt of court committed in the course of, or in relation to, proceedings for a relevant offence.'

The prohibition in sub-s (1) applied both to interception which had been duly warranted and to interception which should have been duly warranted but had not, if in either case any person within sub-s (2) had been involved. The obvious purpose of this prohibition was to preserve the secrecy of what had, to be effective, to be a covert operation.

[7] These last two features of the regime established by the 1985 Act have been judicially recognised on a number of occasions: see, for example, *R v Preston* [1993] 4 All ER 638 at 646, 667–668, 670, [1994] 2 AC 130 at 143–144, 167–168, 170, *Morgans v DPP* [2000] 2 All ER 522 at 527, 542–544, [2001] 1 AC 315 at 321, 337–339, *R v Sargent* [2001] UKHL 54 at [28], [2002] 1 All ER 161 at [28], [2003] 1 AC 347, *R v P* [2001] 2 All ER 58 at 72–73, [2002] 1 AC 146 at 163–164. As Lord Hobhouse of Woodborough said in the last cited case:

> '... the dominant principle guiding the interpretation of the provisions of the [1985] Act was the policy of preserving the secrecy of the surveillance operations to which the Act applied and, to that end, preventing as far as possible any evidence relating to such operations ever reaching the public domain.' (See [2001] 2 All ER 58 at 73, [2002] 1 AC 146 at 164.)

He added:

> 'In this country it is, in the judgment of the government, the necessity to have a fully effective interception system which creates the necessity for secrecy and consequently the need to keep the evidence of it out of the public domain. But where secrecy is not required, the necessity is that all relevant and probative evidence be available to assist in the apprehension and conviction of criminals and to ensure that their trial is fair. The latter necessity exists in both cases but in the former case it is trumped by the greater necessity for secrecy, as the speeches in *R v Preston* explain.' (See [2001] 2 All ER 58 at 73–74, [2002] 1 AC 146 at 165–166.)

[8] Following enactment of the 1985 Act, the courts were more than once called upon to consider whether evidence on which it was sought to rely was the product of interception of a public or private telecommunications system: see *R v Ahmed (Iftikhar)* [1995] Crim LR 246, *R v Effik* [1994] 3 All ER 458 at 461, [1995] 1 AC 309 at 314. The focus of the inquiry in the latter of these cases is shown by the ruling of Lord Oliver of Aylmerton, with which all members of the committee agreed (see [1994] 3 All ER 458 at 464, [1995] 1 AC 309 at 317):

'Once again, one sees the emphasis on the duty of the person running the public system and the transmission through that system. My Lords, in the light of these statutory provisions, I do not, for my part, entertain any doubt that the trial judge was right in concluding that the Geemarc cordless telephone used by Miss Sumer was a privately run system. The apparatus was clearly not "comprised in" the public British Telecommunications system although it was connected to it by means of the socket at which, on the judges' finding, that system ended. A communication through a telecommunication system consists of a series of electronic impulses and what was actually intercepted by the use of the police officers' radio receiver consisted of the impulses transmitted between the base unit and the handset, both of which formed part of a telecommunication system "run" by Miss Sumer (s 4(2) of the 1984 Act) but formed no part of the public telecommunication system run by British Telecommunications.'

In none of these cases does it appear to have been suggested that the inquiry whether the system was public or private was one which should not, or could not, be carried out.

[9] The United Kingdom suffered a further reverse in the Court of Human Rights in *Halford v UK* (1997) 24 EHRR 523. On this occasion the successful challenge related not to warranted interception of a public telecommunications system but to unwarranted interception by the police of a senior police officer's office telephone. But the outcome was very much the same. It was held that the interception, being wholly unregulated by statute, was not 'in accordance with the law' and was thus an interference with the officer's art 8(1) right not saved by art 8(2). Thus the need for statutory intervention again arose, this time of unwarranted interception. It might, no doubt, have been decided to introduce a measure designed simply to provide the statutory regulation which had been found to be lacking in *Halford v UK*. But the years since 1985 had been a time of rapid technological advance in the telecommunications field, and had moreover seen a proliferation of commercial service providers in the postal and telecommunications field which had formerly been the preserve of public monopoly providers. So the decision was made to introduce a measure, which became the 2000 Act, covering (in Ch I) the whole field of interception, and also regulating other forms of surveillance. Chapter I was drafted to apply to postal as well as telecommunications services; to public as well as private systems; to interception requiring the issue of a warrant as well as interception not requiring such a warrant; to warrants requiring to be certified and warrants not requiring certification; to interception outside the United Kingdom as well as within it; to civil remedies as well as criminal liability. The draftsman faced a daunting task. If, however, as Lord Mustill suggested in *R v Preston* [1993] 4 All ER 638 at 651, [1994] 2 AC 130 at 148, the 1985 Act was a 'short but difficult statute', the 2000 Act is both longer and even more perplexing. The trial judge and the Court of Appeal found it difficult to construe the provisions of the Act with confidence, and the House has experienced the same difficulty.

[10] In seeking to overcome these problems, it is in my opinion helpful to begin by recognising the objects which, as I think plainly, Parliament was seeking to achieve in Ch 1 of this Act. First of all, it was seeking to make good the deficiency identified in *Halford v UK* by regulating the tapping of private telephones. It did not do so by prohibiting such interception altogether. The Court of Human Rights in *Halford v UK* had not held such a prohibition to be

necessary: see (1997) 24 EHRR 523 at 544–545 (para 49). But it was necessary that such interception by a public authority should be regulated by law, and it was also necessary for the subject of such interception, if it was unjustified, to have a civil remedy. This was provided by s 1(3) of the Act, which read:

> 'Any interception of a communication which is carried out at any place in the United Kingdom by, or with the express or implied consent of, a person having the right to control the operation or the use of a private telecommunication system shall be actionable at the suit or instance of the sender or recipient, or intended recipient, of the communication if it is without lawful authority and is either—(a) an interception of that communication in the course of its transmission by means of that private system; or (b) an interception of that communication in the course of its transmission, by means of a public telecommunication system, to or from apparatus comprised in that private telecommunication system.'

[11] Secondly, and for present purposes less importantly, the 2000 Act attempted to provide for past and continuing technological advance in the telecommunications field. Whereas the 1985 Act had offered no definition of interception, the 2000 Act did so in s 2(2).

[12] Thirdly, the 2000 Act made express provision for private as well as public service providers. This was evidenced by use of the expressions, defined in s 2(1), 'postal service', 'public postal service', 'private telecommunication system', 'public telecommunications service' and 'public telecommunication system'.

[13] Fourthly, ss 5–11 and 15 of the 2000 Act preserved all the essential features of the regime established by the 1985 Act for the issue of warrants by a Secretary of State. Section 65 established a tribunal with greatly enlarged jurisdiction as compared with that established under the 1985 Act, but the new tribunal was still to have jurisdiction to entertain complaints about conduct for or in connection with the interception of communications in the course of their transmission by means of a postal service or telecommunication system. There was still to be a judicial invigilator of the interception process: see s 57 of the 2000 Act.

[14] There are three further points, all of them negative, but all of them in my opinion very important, which should guide the construction of the 2000 Act. First, there is nothing whatever which suggests an intention to depart from the principle that the issue of warrants by a Secretary of State and all matters pertaining to such warrants should not be the subject of inquiry in the course of a criminal trial. Secondly, there was nothing in the 2000 Act, nor in the consultation paper which preceded it (*The Interception of Communications in the United Kingdom* (Cm 4368 (1999)), nor in the Hansard references to which the House was referred, which questioned or threw doubt on the decisions in *R v Ahmed* and *R v Effik* (see [8], above) in which the court had examined whether an interception had been made within a public or a private system. Since the 2000 Act was passed, there have been further Court of Appeal decisions in which the same inquiry has been conducted: see *R v Allan* [2001] EWCA Crim 1027, [2001] Crim LR 739, *R v Goodman* [2002] EWCA Crim 903. Thirdly, there is nothing in the 2000 Act or in any other materials the House has been shown to suggest a parliamentary intention to render inadmissible as evidence in criminal proceedings any material which had previously been admissible, save to the extent explained in [20], below. As already shown, the United Kingdom practice has been to exclude the product of warranted interception from the public

domain and thus to preclude its use as evidence. But this has been a policy choice, not a requirement compelled by the convention, and other countries have made a different policy choice. Article 8(2) of the convention permits necessary and proportionate interference with the right guaranteed in art 8(1) if in accordance with the law and if in the interests of national security, public safety, the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals or the protection of the rights and freedoms of others. Save where necessary to preserve the security of warranted interception, there is no reason why it should have been sought to exclude the product of any lawful interception where relevant as evidence in any case whether civil or criminal.

[15] Section 1(1) of the 2000 Act re-enacts, with immaterial differences of language, the offence created by s 1(1) of the 1985 Act of intentionally and without lawful authority intercepting in the United Kingdom any communication in the course of its transmission by means of a public postal service or a public telecommunication system. Lawful authority derives from a warrant duly issued by a Secretary of State under s 5. Section 1 continues:

> '(2) It shall be an offence for a person—(a) intentionally and without lawful authority, and (b) otherwise than in circumstances in which his conduct is excluded by subsection (6) from criminal liability under this subsection, to intercept, at any place in the United Kingdom, any communication in the course of its transmission by means of a private telecommunication system.'

This subsection is of course new, as is the subsection on civil liability, quoted in [10], above, which follows. The references to lawful authority and exclusion from criminal liability are clarified in sub-ss (5) and (6):

> '(5) Conduct has lawful authority for the purposes of this section if, and only if—(a) it is authorised by or under section 3 or 4; (b) it takes place in accordance with a warrant under section 5 ("an interception warrant"); or (c) it is in exercise, in relation to any stored communication, of any statutory power that is exercised (apart from this section) for the purpose of obtaining information or of taking possession of any document or other property; and conduct (whether or not prohibited by this section) which has lawful authority for the purposes of this section by virtue of paragraph (a) or (b) shall also be taken to be lawful for all other purposes.
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> (6) The circumstances in which a person makes an interception of a communication in the course of its transmission by means of a private telecommunication system are such that his conduct is excluded from criminal liability under subsection (2) if—(a) he is a person with a right to control the operation or the use of the system; or (b) he has the express or implied consent of such a person to make the interception.'

[16] The first source of lawful authority to tap a private telecommunication system is defined in s 3 of the 2000 Act, which so far as material provides:

> '(1) Conduct by any person consisting in the interception of a communication is authorised by this section if the communication is one which, or which that person has reasonable grounds for believing, is both—(a) a communication sent by a person who has consented to the interception; and (b) a communication the intended recipient of which has so consented.

(2) Conduct by any person consisting in the interception of a communication is authorised by this section if—(a) the communication is one sent by, or intended for, a person who has consented to the interception; and (b) surveillance by means of that interception has been authorised under Part II.

(3) Conduct consisting in the interception of a communication is authorised by this section if—(a) it is conduct by or on behalf of a person who provides a postal service or a telecommunications service; and (b) it takes place for purposes connected with the provision or operation of that service or with the enforcement, in relation to that service, of any enactment relating to the use of postal services or telecommunications services.'

The last of these subsections reproduces the effect (although not the language) of s 1(3)(a) of the 1985 Act, the subject matter of which was considered in depth by the House in *Morgans v DPP* [2000] 2 All ER 522, [2001] 1 AC 315, without any suggestion that this was a subject matter into which it could not inquire.

[17] The second source of lawful authority to tap a private, domestic, telecommunication system is defined in s 4(2) and (3) of the 2000 Act, which provide:

'(2) Subject to subsection (3), the Secretary of State may by regulations authorise any such conduct described in the regulations as appears to him to constitute a legitimate practice reasonably required for the purpose, in connection with the carrying on of any business, of monitoring or keeping a record of—(a) communications by means of which transactions are entered into in the course of that business; or (b) other communications relating to that business or taking place in the course of its being carried on.

(3) Nothing in any regulations under subsection (2) shall authorise the interception of any communication except in the course of its transmission using apparatus or services provided by or to the person carrying on the business for use wholly or partly in connection with that business.'

In sub-s (7), 'business' is defined to include any activities of a government department, or any public authority, or any person or office holder on whom functions are conferred by or under any enactment. The section makes special provision for the authorisation of conduct taking place in prisons, high security hospitals and certain Scottish hospitals. Plainly, the provisions of this section are apt to permit an employer to monitor such matters as insider-dealing, money-laundering or compliance with regulatory requirements.

[18] Section 17 of the 2000 Act, to which this reference by the Attorney General is directed, must be quoted in full. It provides:

'*Exclusion of matters from legal proceedings.*—(1) Subject to section 18, no evidence shall be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings which (in any manner)—(a) discloses, in circumstances from which its origin in anything falling within subsection (2) may be inferred, any of the contents of an intercepted communication or any related communications data; or (b) tends (apart from any such disclosure) to suggest that anything falling within subsection (2) has or may have occurred or be going to occur.

(2) The following fall within this subsection—(a) conduct by a person falling within subsection (3) that was or would be an offence under section 1(1) or (2)

of this Act or under section 1 of the Interception of Communications Act 1985; (b) a breach by the Secretary of State of his duty under section 1(4) of this Act; (c) the issue of an interception warrant or of a warrant under the Interception of Communications Act 1985; (d) the making of an application by any person for an interception warrant, or for a warrant under that Act; (e) the imposition of any requirement on any person to provide assistance with giving effect to an interception warrant.

(3) The persons referred to in subsection (2)(a) are—(a) any person to whom a warrant under this Chapter may be addressed; (b) any person holding office under the Crown; (c) any member of the National Criminal Intelligence Service; (d) any member of the National Crime Squad; (e) any person employed by or for the purposes of a police force; (f) any person providing a postal service or employed for the purposes of any business of providing such a service; and (g) any person providing a public telecommunications service or employed for the purposes of any business of providing such a service.

(4) In this section "intercepted communication" means any communication intercepted in the course of its transmission by means of a postal service or telecommunication system.'

Section 18, to which s 17(1) is expressed to be subject, provides for the disapplication or partial disapplication of s 17(1) in certain situations which need not for present purposes be examined. Subsections (4) and (5) of s 18 should, however, be noted:

'(4) Section 17(1)(a) shall not prohibit the disclosure of any of the contents of a communication if the interception of that communication was lawful by virtue of section 1(5)(c), 3 or 4.

(5) Where any disclosure is proposed to be or has been made on the grounds that it is authorised by subsection (4), section 17(1) shall not prohibit the doing of anything in, or for the purposes of, so much of any legal proceedings as relates to the question whether that disclosure is or was so authorised.'

[19] These provisions plainly have the effect of excluding from the public domain in legal proceedings any product of any interception by a person falling within s 17(3) for which a warrant had been or should have been issued. If a warrant had not been obtained there would be an offence within sub-s (2)(a). If it had, the matter would fall within sub-s (2)(c), (d) or (e). In either event, the matter would fall within sub-s (2) and therefore within the prohibition in s 17(1).

[20] The inclusion in s 17(2) of an offence under s 1(2) of the Act poses an obvious problem of interpretation given the very sweeping language in which s 17(1) is expressed. The requirement in s 17(2)(a) that the conduct must be by a person falling within sub-s (3), and the listing in that subsection of persons and bodies involved in the warranty regime, strongly suggest that the focus of the prohibition is, as in the 1985 Act, on that regime. It is also relevant to recall that interception of a private telecommunication system is only criminal under s 1(2)(a) if without lawful authority and s 18(4) expressly provides that s 17(1)(a) shall not prohibit the disclosure of the contents of a communication if the interception of that communication was lawful by virtue of s 3 or s 4. In other words, disclosure is not prohibited if the interception was lawfully authorised under those sections. It would be absurd to conclude that there could be no

inquiry to establish whether the interception was lawfully authorised or not, and whether or not the interceptor's conduct was excluded from criminal liability under s 1(6). In a civil claim under s 1(3) such an inquiry would be inevitable. Given the obvious public interest in admitting probative evidence which satisfies the requirements of ss 1(6), 3 and 4, and the absence of any public interest in excluding it, I am satisfied that a court may properly inquire whether the interception was of a public or private system and, if the latter, whether the interception was lawful. If the court concludes that it was public, that is the end of the inquiry. If the court concludes that it was private but unlawful, that also will be the end of the inquiry. If it was private but lawful, the court may (subject to any other argument there may be) admit the evidence.

[21] This construction is, in my opinion, strongly supported by the explanatory notes issued on the 2000 Act following its receipt of the Royal Assent in July 2000. That reference may properly be made to such material as an aid to construction of a Bill was established in *R (on the application of S) v Chief Constable of South Yorkshire, R (on the application of Marper) v Chief Constable of South Yorkshire* [2004] UKHL 39 at [4], [2004] 4 All ER 193 at [4], [2004] 1 WLR 2196, following *R (on the application of Westminster City Council) v National Asylum Support Service* [2002] UKHL 38 at [2]–[6], [2002] 4 All ER 654 at [2]–[6], [2002] 1 WLR 2956, and I have no reason to think that these explanatory notes on the Act differed from those on the Bill. The commentary on s 17 reads:

> '**Section 17: Exclusion of matters from legal proceedings**
>
> 136. Section 17, subject to certain exceptions, prohibits evidence, questioning or assertion in (or for the purposes of, or in connection with) legal proceedings likely to reveal the existence or absence of a warrant. A similar provision is contained in section 9 of the Interception of Communications Act 1985, which this Act repeals.
>
> 137. *Subsection (1)* imposes the basic prohibition. It does this directly, by stating that the contents of intercepted material and associated communications data may not be disclosed, and indirectly by prohibiting the disclosure of any suggestion that actions under subsection (2) have occurred.
>
> 138. *Subsection (2)* describes the actions which may not be disclosed, including actions by persons named in subsection (3) which would constitute offences under this Act or section 1 of the 1985 Act.
>
> 139. *Subsection (3)* lists the people referred to in subsection (2)(a). They are people who may be in possession of information about authorised interception. In paragraph (3)(b) persons holding office under the Crown includes constables and, by virtue of Section 81(6), Crown servants and members of the Armed Forces.'

The note on s 18(4) provides:

> '142. *Subsection* (4) allows the disclosure of the contents of a communication if the interception was lawful without the need for a warrant by virtue of Sections 1(5)(c), 3 or 4. This means that interception carried out in those circumstances may be evidential.'

[22] In the case of W the interception took place before the passing of the 2000 Act and the trial took place after it. This affected the questions referred by the Attorney General which, as amended during argument in the Court of Appeal, were these:

'1. Does s 17(1) of the 2000 Act operate so as to prevent, in criminal proceedings, any evidence being adduced, question asked, assertion or disclosure made or other thing done so as to ascertain whether a telecommunications system is a public or a private telecommunications system?

2. Is the answer to question 1 above different if the evidence being adduced or question asked etc relates to events which took place before the 2000 Act came into force?

3. Where an interception of a communication has taken place on a private telecommunications system, is it permissible in criminal proceedings to ask questions or adduce evidence etc to establish that the interception has been carried out by or on behalf of the person with the right to control the operation or use of the system (a) where the interception took place before the 2000 Act came into force; and (b) where the interception took place after the 2000 Act came into force?'

To the first two questions the Court of Appeal answered No, and I agree with those answers. To question 3(a) it answered Yes, and again I agree. To question 3(b) it answered 'Yes, subject to the facts of a particular case'. While I am unsure that the qualification is really necessary, I would accept this answer also. On each of these points, I agree with the opinion of all my noble and learned friends.

LORD NICHOLLS OF BIRKENHEAD.

[23] My Lords, I agree with the views expressed by all your Lordships. The problem arises out of s 17 of the Regulation of Investigatory Powers Act 2000. The basic object of this provision appears to be to preserve the secrecy of the warrant system. Section 17(1) seeks to achieve this object by excluding evidence on several points. It excludes evidence tending to suggest that an interception warrant has been issued. It also excludes evidence tending to suggest that the police or other persons listed in s 17(3) have committed an offence under s 1(1) or (2) by making an intercept without lawful authority.

[24] This latter provision is widely drawn. Indeed, if s 17 were to stand alone it would apply too widely. It would apply to cases where the warrant system was not in any way involved in obtaining the intercept. Interception pursuant to a warrant issued under s 5 is only one of the circumstances where a person may have lawful authority to intercept a communication. Interception may also be authorised under ss 3 or 4 of the Act, or s 1(5)(c).

[25] Take a case where the prosecution assert that both the sender and the intended recipient agreed to the interception, as envisaged by s 3(1). Court investigation of whether that was the position and, if it was, disclosure in court of the contents of the intercept would not damage the warrant system. It would not damage the warrant system even if a challenge by the defendant to the assertion that the interception was authorised under s 3(1) suggested that an offence had been committed under s 1(1) or (2).

[26] So s 18(4) cuts down the width of s 17 in such cases. Section 17(1)(a) does not prohibit disclosure of the contents of a communication if interception was lawful by virtue of ss 1(5)(c), 3 or 4. Section 18(5) takes the further, consequential step of permitting the doing of anything in legal proceedings relating to the question whether disclosure was authorised on one of those grounds. This

enables the defendant to have a proper opportunity to test the prosecution evidence that the interception was duly authorised as alleged.

[27] Thus far there is no difficulty. The difficulty which has arisen concerns *other* ingredients of the offence created by s 1(2). No offence is committed under s 1(2) if the interception is in course of transmission by a private telecommunication system and the interception was made by the person in charge of the system ('with a right to control the operation or the use of the system') or with his consent: see s 1(2), (6). The question which arises is this: if the prosecution seeks to give evidence of the contents of an intercept as properly admissible on the basis that the interception was of a communication in the course of transmission by means of a *private* telecommunication system carried out with the consent of the person in charge of that system, can the defence advance a case that the place where the intercept occurred was part of a *public* telecommunication system even though this might involve the suggestion that an offence had been committed under s 1(1) by a person mentioned in s 17(3)?

[28] Like all your Lordships I am in no doubt that the answer to this question is Yes. Investigating this issue, essential to the conduct of a fair trial, would not imperil the secrecy of the warrant system. Investigation of the 'lawful authority' grounds specified in ss 1(5)(c), 3 or 4, essential to a fair trial when those issues are raised, would not imperil the secrecy of the warrant system, and Parliament has expressly cut down the width of s 17 to enable such an investigation to take place. The Act makes no comparable provision on the point now under consideration but it is impossible to suppose Parliament intended the position should be different. The rationale underlying the exclusionary provision in s 17 is as much absent in the case now under consideration as it is in the 'lawful authority' instances mentioned in ss 1(5)(c), 3 and 4. Section 17 must therefore be interpreted as inapplicable as much in the type of case now under consideration as it is in the cases specifically mentioned in s 18(4). Any other result would lack rational justification. It would serve no useful purpose, and would have the bizarre effect of rendering the offence-creating provision of s 1(2) nugatory in circumstances where disclosure would not jeopardise the operation of the warrant system. It would also make the civil liability provision in s 1(3) unworkable. A statute should be interpreted so as to avoid such results if at all possible. I would therefore answer the questions raised by the Attorney General in the way proposed by my noble and learned friend Lord Bingham of Cornhill.

LORD STEYN.

[29] My Lords, the Regulation of Investigatory Powers Act 2000 is not easy to understand. On the other hand, there is a foothold or two to which one can cling in regard to the central question posed by the Attorney General, viz whether a court may investigate whether intercept material relied on by the Crown has been obtained by tapping a private as opposed to a public telecommunication system.

[30] For my part, the critical matter is that explained in [14] of the opinion of my noble and learned friend Lord Bingham of Cornhill. Before the statute of 2000 was enacted the clear understanding was that a court may examine whether an interception was made within a public or private system. Of course, Parliament could have legislated to place such an examination beyond the power of the court. If that had been intended, one would have expected the structure and scheme of the 2000 Act to have made that crystal clear. Neither the text of

the 2000 Act, nor any of the external aids to its construction, give any indication that such a radical change of policy was intended. a

[31] It is true, as Lord Bingham has pointed out, that the inclusion in s 17(2) of an offence under s 1(2) of the Act creates a linguistic difficulty given the language in which s 17(1) is expressed. In my view, however, this point is decisively outweighed by a purposive interpretation of the statute. No explanation for resorting to purposive interpretation of a statute is necessary. One can b confidently assume that Parliament intends its legislation to be interpreted not in the way of a black-letter lawyer, but in a meaningful and purposive way giving effect to the basic objectives of the legislation. So approached the answer to the central question is obvious: a court may inquire into the question whether tapping took place on a private system.

[32] I am in full agreement with the opinion of Lord Bingham. I would answer c the Attorney General's questions as Lord Bingham proposes.

LORD HOPE OF CRAIGHEAD.

[33] My Lords, the crux of the problem that your Lordships have been asked to resolve in this case is to be found by comparing s 1(6) with s 18(4) of the d Regulation of Investigatory Powers Act 2000. Section 1(2) of the Act creates a new offence, which is the unlawful interception of a communication in the course of its transmission by means of a private telecommunication system. With this in mind, s 1(6) provides:

> 'The circumstances in which a person makes an interception of a e communication in the course of its transmission by means of a private telecommunication system are such that his conduct is excluded from criminal liability under subsection (2) if—(a) he is a person with a right to control the operation or the use of the system; or (b) he has the express or implied consent of such a person to make the interception.'

f

Section 18(4) provides:

> 'Section 17(1)(a) shall not prohibit the disclosure of any of the contents of a communication if the interception of that communication was lawful by virtue of section 1(5)(c), 3 or 4.'

[34] Section 17(1)(b) of the Act provides that, subject to s 18, no evidence shall g be adduced, question asked, assertion or disclosure made or other thing done in, for the purposes of or in connection with any legal proceedings which tends to suggest that anything falling within sub-s (2) of that section has or may have occurred or be going to occur. The conduct referred to in s 17(2) includes conduct that was or would be an offence under s 1(2). Section 18 provides a list h of exceptions to the prohibitions that are set out in s 17(1). Absent from that list is a reference to s 1(6). As has been shown, s 1(6) is not mentioned in s 18(4). That is however where a reference to this subsection might have been expected. Nowhere else is it provided in terms by the Act that an interception of a communication without a warrant in the course of its transmission by a private j telecommunication system by a person with the right to control that system or with the express or implied consent of such a person is lawful. The furthest the Act goes is to provide in s 1(6) that an interception in these circumstances is excluded from criminal liability.

[35] Mr Roberts QC for the acquitted person submits that the Act is so carefully drawn that the list of exceptions in s 18 must be treated as

comprehensive. He points out that nowhere in the Act is the situation that has arisen in this case provided for. The place where one would expect that provision to have been made, he says, is s 18(4). But there is no reference there to s 1(6) and, when it is read on its own, all s 1(6) does is provide a defence to a criminal prosecution. It does not provide that an interception in the circumstances which it describes is to be regarded for all purposes as lawful. It could not, of course, go that far. That would be to preserve the defect in the pre-existing system of statutory control that was identified in *Halford v UK* (1997) 24 EHRR 523. That defect has been remedied by s 1(3). That subsection provides that an interception in the circumstances which it describes which is made without lawful authority shall be actionable at the suit or instance of the sender or recipient, or intended recipient, of the communication. The conclusion must be that it would not have been consistent with the way in which the Act has been drafted to include s 1(6) in the list of exceptions that s 18(4) sets out.

[36] The question then is whether what Steyn LJ helpfully described in *R v Effik* (1992) 95 Cr App R 427 at 432 as 'the forbidden territory' is drawn in this Act in such a fashion as to preclude any evidence being adduced or question asked in order to ascertain whether a telecommunication system which has been used to transmit a communication that has been intercepted is a public or a private telecommunication system. One has only to look at s 1(3)(a) to see that there can be only one answer to that question. As Mr Perry for the Attorney General was right to point out, the question whether the interception of the communication with the consent of a person having the right to control the operation or use of a private telecommunication system was made in the course of its transmission by means of the private system must be capable of being explored in the civil proceedings which are provided for by that subsection. Otherwise the mere assertion that the system was a public and not a private system would defeat the right of action. The Act does not say in terms that this is a question that can be explored in evidence in these proceedings, and the absence of a reference in s 18 to s 1(3) in its list of exceptions to s 17 might be said, if Mr Roberts is right, to indicate that this is prohibited. But it is plain that the question must be capable of being explored in evidence if effect is to be given to s 1(3).

[37] One answer to the problem which this case raises, therefore, might be to say that a rectifying construction should be given to the Act of the kind described by Lord Herschell LC in *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360, when he said:

> 'You have to try and reconcile [the provisions] as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other.'

But I do not think that it is necessary to go that far. The statute does not in terms prohibit the line of questioning that was sought to be developed in this case. On the contrary, s 1(3) opens the door to it in civil proceedings. And, if the door is open in civil proceedings, why should it not be open in criminal proceedings too in a case where the question whether the communication was by means of a public or a private telecommunication system is a relevant question?

[38] In *Morgans v DPP* [2000] 2 All ER 522, [2001] 1 AC 315 Lord Mackay of Clashfern explored the problem of reconciling the prohibition in s 9 of the Interception of Communications Act 1985 with the exception to the offence created by s 1(1) of that Act which was set out in s 1(3). He said ([2000] 2 All ER 522 at 525–526, [2001] 1 AC 315 at 319–320) that a construction of s 9 should be

sought which gave effect to the limits of the scheme of the Act described by Lord Mustill in *R v Preston* [1993] 4 All ER 638, [1994] 2 AC 130, namely that the scheme described did not apply except to situations in which a warrant was required and where, without it, the interception would be without statutory authority:

> 'The challenge is to find a construction of s 9 which would provide a workable boundary. The difficulty is that any discussion in evidence of the question whether a particular exception to s 1 applied would be in essence a discussion of whether or not the interception resulted from an offence under that section. I have reached the view that this is best dealt with by saying that in construing s 9, it should not apply where the proceedings are for the enforcement of any enactment relating to the use of postal or public telecommunications services or where the proceedings relate to a communication being transmitted by wireless telegraphy and the communication is intercepted by the authority of the Secretary of State.' (See [2000] 2 All ER 522 at 526, [2001] 1 AC 315 at 320.)

[39] The particular problem which Lord Mackay was discussing in *Morgans v DPP* has been dealt with expressly by s 18(4) of the 2000 Act, which provides that s 17(1)(a)—which has replaced s 9(1) of the 1985 Act—shall not prohibit the disclosure of any of the contents of a communication if the interception of that communication was lawful by virtue of ss 1(5)(c), 3 or 4. Section 3(3) authorises the interception when it takes place for a purpose associated with the provision or operation of a telecommunications service. It puts that material expressly into the permitted territory. But the way in which Lord Mackay solved the problem is, I believe, open to your Lordships in this case also. That was the view of the Court of Appeal, and I too would adopt it: see [2003] EWCA Crim 1632 at [93]–[95], [2003] 1 WLR 2902 at [93]–[95].

[40] The forbidden territory is now much more closely and carefully defined by the 2000 Act than it was by the 1985 Act. Nevertheless I think that a workable boundary between what is forbidden and what is not can be said to exist where the only questions to be explored in evidence are whether a telecommunication system is a public or a private telecommunication system and, if so, whether the interception was made by or with the consent of the person with the right to control the operation or use of that system: see s 1(6). These, plainly, are questions that can be explored as a defence to a prosecution under s 1(2) of the Act, and as has already been said the question whether the telecommunication system was a private system must be capable of being explored if effect is to be given in civil proceedings to the remedy which is provided by s 1(3). So it cannot be said to be contrary to the policy of the Act to hold that these questions are outside the forbidden territory. The policy of the Act, as the conduct referred to in s 17(2) and the list of the persons referred to in s 17(3) indicate, is to regulate and protect the surveillance process. It will not be impeded by permitting evidence to be adduced or questions asked and answered simply in order to ascertain whether a particular telecommunication system is a public or a private system in any proceedings in which an answer to that question is relevant.

[41] For these reasons, and those in the speech of my noble and learned friend Lord Bingham of Cornhill with which I am in full agreement, I too would answer the questions referred by the Attorney General as Lord Bingham proposes.

LORD WALKER OF GESTINGTHORPE.

[42] My Lords, I have had the privilege of reading in draft the opinion of my noble and learned friend Lord Bingham of Cornhill. I agree with it and for the reasons which Lord Bingham gives I would answer the Attorney General's questions as he proposes.

[43] I add one brief footnote to the problem of why s 17(2)(a) of the Regulation of Investigatory Powers Act 2000 refers to an offence under s 1(2) (as well to an offence under s 1(1)) of the Act. By s 5(1)(a) of the Act the Secretary of State may issue a warrant for interception of communications transmitted by means of a private telecommunication system (see the definitions in s 2(1)). The House was told that such action would be very unusual, if not unprecedented, but it is at least a theoretical possibility.

[44] The reference in s 17(2)(a) to s 1(2) may therefore have been included in order to avoid any possible gap in the protection which Parliament intended to extend to any form of warranted interception. The need for the conduct in question to be that of a person falling within s 17(3) does, as Lord Bingham points out, keep the focus of the prohibition on the warrant regime.

Opinion accordingly.

Kate O'Hanlon Barrister.

Halsey v Milton Keynes General NHS Trust
Steel v Joy and another

[2004] EWCA Civ 576

COURT OF APPEAL, CIVIL DIVISION

WARD, LAWS AND DYSON LJJ

30, 31 MARCH, 11 MAY 2004

Costs – Order for costs – Discretion – Disallowing costs of successful party – Alternative dispute resolution (ADR) – Costs consequences of successful party rejecting ADR – Guidance.

In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to alternative dispute resolution (ADR), it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. The court should bear in mind the advantages which mediation has over the court process in deciding whether a party has acted unreasonably in refusing ADR, but there is no presumption in favour of mediation. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. The factors which may be relevant to the question include, but are not limited to: (i) the nature of the dispute; (ii) the merits of the case—the fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR; (iii) whether other methods of settlement have been attempted; (iv) whether the costs of the ADR would be disproportionately high; (v) delay in suggesting mediation which may have the effect of delaying the trial of the action; (vi) whether the mediation had a reasonable prospect of success—this will often be relevant to the reasonableness of one party's refusal to accept the other's invitation to agree to it, but it is not necessarily determinative of the fundamental question of whether the successful party acted unreasonably in refusing to agree to ADR. It would not be right to stigmatise as unreasonable a refusal by the successful party to agree to a mediation unless he showed that a mediation has no reasonable prospect of success; a fairer balance is struck if the burden is placed on the unsuccessful party to show that there was a reasonable prospect that the mediation would have been successful. Where a successful party refuses to agree to ADR despite the encouragement of the court, that is a factor which the court will take into account when deciding whether his refusal was unreasonable. The stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable (see [13]–[29], below).

Dunnett v Railtrack plc (in railway administration) [2002] 2 All ER 850 considered.

Dicta of Lightman J in *Hurst v Leeming* [2003] 1 Lloyd's Rep 379 at 381 disapproved.

Dicta of Lewison J in *Royal Bank of Canada Trust Corp Ltd v Secretary of State for Defence* [2003] EWHC 1841 (Ch) at [12] disapproved.

Per curiam. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes are suitable for ADR (see [11], below).

Notes

For costs: circumstances to be taken into account when exercising court's discretion, see 10 *Halsbury's Laws* (4th edn reissue) para 17.

Cases referred to in judgment

Baker v Willoughby [1969] 3 All ER 1528, [1970] AC 467, [1970] 2 WLR 50, HL.

Deweer v Belgium (1980) 2 EHRR 439, [1980] ECHR 6903/75, ECt HR.

Dunnett v Railtrack plc (in railway administration) [2002] EWCA Civ 303, [2002] 2 All ER 850, [2002] 1 WLR 2434.

Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32, [2002] 3 WLR 89.

Hurst v Leeming [2002] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379.

Jobling v Associated Dairies [1981] 2 All ER 752, [1982] AC 794, [1981] 3 WLR 155, HL.

Performance Cars Ltd v Abraham [1961] 3 All ER 413, [1962] 1 QB 33, [1961] 3 WLR 749, CA.

R (on the application of Cowl) v Plymouth City Council [2001] EWCA Civ 1935, [2002] 1 WLR 803.

Rahman v Arearose Ltd (2000) 62 BMLR 84, [2001] QB 351, [2000] 3 WLR 1184, CA.

Royal Bank of Canada Trust Corp Ltd v Secretary of State for Defence [2003] EWHC 1841 (Ch).

Appeals

Halsey v Milton Keynes General NHS Trust

The claimant, Lilian Halsey, appealed from the decision of Judge Harris QC in the Milton Keynes County Court on 17 June 2003 awarding costs to the Milton Keynes General NHS Trust (the trust) in the claimant's unsuccessful action against the trust for damages under the Fatal Accidents Act 1976 in relation to the death of her husband at the Milton Keynes General Hospital on 27 June 1999. The Law Society and the ADR Group appeared as interested parties. The facts are set out in the judgment of the court.

Steel v Joy and another

Mr Anthony Joy, the first defendant in a consolidated action for damages for personal injury brought by Stephen Steel appealed from the decision of Mr Recorder Thomas QC in the Newcastle-upon-Tyne County Court on 3 July 2003 in favour of the second defendant, Gary Halliday and against the award of costs to the second defendant. Mr Steel did not appear. The Law Society and the ADR Group appeared as interested parties. The facts are set out in the judgment of the court.

Allan Gore QC (instructed by *Osborne Morris & Morgan*, Leighton Buzzard) for the claimant.

Christopher Purchas QC and *Huw Lloyd* (instructed by *Barlow Lyde & Gilbert*) for the trust.

Charles Foster (instructed by *Crutes Law Firm*, Newcastle-upon-Tyne) for the first defendant.

Christopher Purchas QC and *Howard Elgot* (instructed by *Ricksons*, Leeds) for the second defendant.

Lord Lester of Herne Hill QC (instructed by the *Law Society*) for the Law Society.

Michel Kallipetis QC and *Philip Bartle QC* (instructed by the *ADR Group*) for the ADR Group.

Cur adv vult

11 May 2004. The following judgment of the court was delivered.

DYSON LJ.

[1] This is the judgment of the court.

[2] These two appeals raise a question of some general importance: when should the court impose a costs sanction against a successful litigant on the grounds that he has refused to take part in an alternative dispute resolution (ADR)? There seems to be some uncertainty as to the approach that should be adopted in answering this question: it has been the subject of consideration by courts on a number of occasions. A measure of its significance is that we have received detailed and helpful submissions from no fewer than four interveners, namely the Law Society, the Civil Mediation Council, the ADR Group and the Centre for Effective Dispute Resolution.

[3] In the appeal of *Halsey v Milton Keynes General NHS Trust*, the only ground of appeal is that, notwithstanding that the claim was dismissed, the judge was wrong to award the defendant, the Milton Keynes General NHS Trust (the trust) its costs, since it had refused a number of invitations by the claimant to mediate. There are two grounds of appeal in the case of *Steel v Joy*. First, it is said that the judge reached the wrong conclusion on the causation issue that he tried in the CPR Pt 20 proceedings between the defendants (the causation issue). Secondly, it is submitted that the judge was wrong to award the successful second defendant his costs against the first defendant, since the second defendant had refused a number of invitations by the first defendant to mediate. We shall start by giving some guidance as to the general approach that should be adopted when dealing with the costs issue raised by these two appeals. We shall then turn to the facts of the two appeals.

GENERAL ENCOURAGEMENT OF THE USE OF ADR

[4] As was explained in Lord Woolf's *Access to Justice: Final Report to the Lord Chancellor on the Civil Justice System of England and Wales* (1996) p 11, for some time before the CPR came into force, resort by parties involved in litigation to ADR had been encouraged by the courts in various ways. The CPR, practice directions and pre-action protocols have built on these early developments. It is unnecessary to make extensive reference to demonstrate this. CPR 1.4(1) obliges the court to further the overriding objective of enabling the court to deal with cases justly by actively managing cases, and r 1.4(2)(e) defines 'active case management' as including 'encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure'. CPR 26.4(1) provides that—

> 'A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means.'

[5] The term 'alternative dispute resolution' is defined in the glossary to the CPR as a 'Collective description of methods of resolving disputes otherwise than through the normal trial process'. In practice, however, references to ADR are usually understood as being references to some form of mediation by a third party. The general rule is that the unsuccessful party is ordered to pay the costs of the successful party (see CPR 44.3(2)(a)). The cases in which the question of displacing this rule have been discussed have usually been concerned with the refusal of mediation by the successful party. The two appeals before this court fall into this category. In what follows we shall concentrate on the cost consequences of a refusal by the successful party to agree to mediation.

[6] There are those who believe that the virtues of mediation have not yet been sufficiently demonstrated. There is some reference to this by Professor Hazel Genn in her excellent report *Court-Based ADR Initiatives for Non-Family Civil Disputes: the Commercial Court and the Court of Appeal* (2002) pp 58–67. But we are in no doubt that we should proceed on the basis that there are many disputes which are suitable for mediation. This approach is consistent with, and (as we have seen) underpinned by, the Woolf reforms. It is also consistent with the fact there are now a number of court-based mediation schemes for civil non-matrimonial cases, which operate with varying degrees of success. The virtues of mediation in suitable cases are also recognised in the Chancery Guide (paras 17.1 and 17.3) (see *Civil Court Practice* (2004) vol 1, p 1922 (Green Book)), the Queen's Bench Guide (section 6.6) (see Green Book, vol 1, p 2051), the Admiralty and Commercial Court Guide (para D8.8) (see Green Book, vol 1, p 1759) and the Technology and Construction Court Guide (para 6.4) (see Green Book, vol 1, pp 2248–2249). Judges in the Commercial Court routinely make 'ADR orders' in the form set out in Appendix 7 to the Admiralty and Commercial Court Guide (see Green Book, vol 1, p 1825) (see further at [30], below).

[7] We are also mindful of the position which has been taken by government on this issue. Thus, in March 2001, the Lord Chancellor announced an 'ADR pledge' by which all government departments and agencies made a number of commitments including: 'Alternative Dispute Resolution will be considered and used in *all* suitable cases wherever the other party accepts it.' In July 2002, the Department for Constitutional Affairs published a report as to the effectiveness of the government's commitment to the ADR pledge (*Monitoring the Effectiveness of the Government's Commitment to Using ADR*). The report stated that the pledge had been taken very seriously, and identified a number of initiatives that had been introduced as a direct result of it. These included the following initiative on the part of the National Health Service Litigation Authority (NHSLA):

> 'The encouragement of greater use of mediation, and other forms of alternative dispute resolution, is one of the options considered by the NHSLA, who are responsible for handling clinical negligence claims made against the NHS. The NHSLA is working with the Legal Services Commission to develop a joint strategy for promoting greater use of mediation as an alternative to litigation in clinical negligence disputes. Since May 2000 the NHSLA has been requiring solicitors representing NHS bodies

in such claims to offer mediation in appropriate cases, and to provide clear reasons to the authority if a case is considered inappropriate.' a

[8] Strong support for the use of ADR in general, and mediation in particular, has been given by the courts in cases such as *R (on the application of Cowl) v Plymouth City Council* [2001] EWCA Civ 1935, [2002] 1 WLR 803, *Dunnett v Railtrack plc (in railway administration)* [2002] EWCA Civ 303, [2002] 2 All ER 850, [2002] 1 WLR 2434 and *Hurst v Leeming* [2001] EWHC 1051 (Ch), [2003] 1 Lloyd's Rep 379. b

[9] We heard argument on the question whether the court has power to order parties to submit their disputes to mediation against their will. It is one thing to encourage the parties to agree to mediation, even to encourage them in the strongest terms. It is another to order them to do so. It seems to us that to oblige truly unwilling parties to refer their disputes to mediation would be to impose an unacceptable obstruction on their right of access to the court. The European Court of Human Rights has said in relation to art 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) that the right of access to a court may be waived, for example by means of an arbitration agreement, but such waiver should be subjected to 'particularly careful review' to ensure that the claimant is not subject to 'constraint' (see *Deweer v Belgium* (1980) 2 EHRR 439 at 460–461 (para 49)). If that is the approach of the European Court of Human Rights to an *agreement* to arbitrate, it seems to us likely that *compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of art 6. Even if (contrary to our view) the court does have jurisdiction to order unwilling parties to refer their disputes to mediation, we find it difficult to conceive of circumstances in which it would be appropriate to exercise it. We would adopt what the editors of the White Book (*Civil Procedure* (2003 edn)) vol 1 say at p 27 (para 1.4.11): c d e f

> 'The hallmark of ADR procedures, and perhaps the key to their effectiveness in individual cases, is that they are processes voluntarily entered into by the parties in dispute with outcomes, if the parties so wish, which are non-binding. Consequently, the court cannot direct that such methods be used but may merely encourage and facilitate.' g

[10] If the court were to compel parties to enter into a mediation to which they objected, that would achieve nothing except to add to the costs to be borne by the parties, possibly postpone the time when the court determines the dispute and damage the perceived effectiveness of the ADR process. If a judge takes the view that the case is suitable for ADR, then he or she is not, of course, obliged to take at face value the expressed opposition of the parties. In such a case, the judge should explore the reasons for any resistance to ADR. But if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it. h

[11] Parties sometimes need to be encouraged by the court to embark on an ADR. The need for such encouragement should diminish in time if the virtue of ADR in suitable cases is demonstrated even more convincingly than it has been thus far. The value and importance of ADR have been established within a remarkably short time. All members of the legal profession who conduct litigation should now routinely consider with their clients whether their disputes j

are suitable for ADR. But we reiterate that the court's role is to encourage, not to compel. The form of encouragement may be robust (see [30], below).

THE COSTS ISSUE

[12] CPR 44.3(2) provides—

> 'If the court decides to make an order about costs—(a) the general rule is that the unsuccessful party will be ordered to pay the cost of the successful party; but (b) the court may make a different order.'

Rule 44.3(4) provides: 'In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—(a) the conduct of all the parties ...' Rule 44.3(5) provides that the conduct of the parties includes '(a) conduct before, as well as during, the proceedings, and in particular the extent to which the parties followed any relevant pre-action protocol'.

[13] In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR. We shall endeavour in this judgment to provide some guidance as to the factors that should be considered by the court in deciding whether a refusal to agree to ADR is unreasonable.

[14] We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.

[15] We recognise that mediation has a number of advantages over the court process. It is usually less expensive than litigation which goes all the way to judgment, although it should not be overlooked that most cases are settled by negotiation in the ordinary way. Mediation provides litigants with a wider range of solutions than those that are available in litigation: for example, an apology; an explanation; the continuation of an existing professional or business relationship perhaps on new terms; and an agreement by one party to do something without any existing legal obligation to do so. As Brooke LJ pointed out in *Dunnett*'s case [2002] 2 All ER 850 at [14]:

> 'Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the powers of the court to provide.'

[16] In deciding whether a party has acted unreasonably in refusing ADR, these considerations should be borne in mind. But we accept the submission made by the Law Society that mediation and other ADR processes do not offer a panacea, and can have disadvantages as well as advantages: they are not appropriate for every case. We do not, therefore, accept the submission made on behalf of the Civil Mediation Council that there should be a presumption in favour of mediation. The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success. We shall consider these in turn. We wish to emphasise that in many cases no single factor will be decisive, and that these factors should not be regarded as an exhaustive checklist.

[17] (a) The nature of the dispute. Even the most ardent supporters of ADR acknowledge that the subject matter of some disputes renders them intrinsically unsuitable for ADR. The Commercial Court working party on ADR stated in the *Second Report of Commercial Court Committee Working Party on ADR* (1999) para 5:

> 'The Working Party believes that there are many cases within the range of Commercial Court work which do not lend themselves to ADR procedures. The most obvious kind is where the parties wish the court to determine issues of law or construction which may be essential to the future trading relations of the parties, as under an on-going long term contract, or where the issues are generally important for those participating in a particular trade or market. There may also be issues which involve allegations of fraud or other commercially disreputable conduct against an individual or group which most probably could not be successfully mediated.'

Other examples falling within this category are cases where a party wants the court to resolve a point of law which arises from time to time, and it is considered that a binding precedent would be useful; or cases where injunctive or other relief is essential to protect the position of a party. But in our view, most cases are not by their very nature unsuitable for ADR.

[18] (b) The merits of the case. The fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR. If the position were otherwise, there would be considerable scope for a claimant to use the threat of costs sanctions to extract a settlement from the defendant even where the claim is without merit. Courts should be particularly astute to this danger. Large organisations, especially public bodies, are vulnerable to pressure from claimants who, having weak cases, invite mediation as a tactical ploy. They calculate that such a defendant may at least make a nuisance-value offer to buy off the cost of a mediation and the risk of being penalised in costs for refusing a mediation even if ultimately successful.

[19] Some cases are clear-cut. A good example is where a party would have succeeded in an application for summary judgment pursuant to CPR 24.2, but for some reason he did not make such an application. Other cases are more borderline. In truly borderline cases, the fact that a party refused to agree to ADR

because he thought that he would win should be given little or no weight by the court when considering whether the refusal to agree to ADR was reasonable. Borderline cases are likely to be suitable for ADR unless there are significant countervailing factors which tip the scales the other way. In *Hurst v Leeming* [2003] 1 Lloyd's Rep 379 at 381, Lightman J said: 'The fact that a party believes that he has a watertight case again is no justification for refusing mediation. That is the frame of mind of so many litigants.' In our judgment, this statement should be qualified. The fact that a party *unreasonably* believes that his case is watertight is no justification for refusing mediation. But the fact that a party *reasonably* believes that he has a watertight case may well be sufficient justification for a refusal to mediate.

[20] (c) Other settlement methods have been attempted. The fact that settlement offers have already been made, but rejected, is a relevant factor. It may show that one party is making efforts to settle, and that the other party has unrealistic views of the merits of the case. But it is also right to point out that mediation often succeeds where previous attempts to settle have failed. Although the fact that settlement offers have already been made is potentially relevant to the question whether a refusal to mediate is unreasonable, on analysis it is in truth no more than an aspect of factor (f).

[21] (d) The costs of mediation would be disproportionately high. This is a factor of particular importance where, on a realistic assessment, the sums at stake in the litigation are comparatively small. A mediation can sometimes be at least as expensive as a day in court. The parties will often have legal representation before the mediator, and the mediator's fees will usually be borne equally by the parties regardless of the outcome (although the costs of a mediation may be the subject of a costs order by the court after a trial). Since the prospects of a successful mediation cannot be predicted with confidence (see further at [27], below), the possibility of the ultimately successful party being required to incur the costs of an abortive mediation is a relevant factor that may be taken into account in deciding whether the successful party acted unreasonably in refusing to agree to ADR.

[22] (e) Delay. If mediation is suggested late in the day, acceptance of it may have the effect of delaying the trial of the action. This is a factor which it may be relevant to take into account in deciding whether a refusal to agree to ADR was unreasonable.

[23] (f) Whether the mediation had a reasonable prospect of success. In *Hurst*'s case [2003] 1 Lloyd's Rep 379 at 381, Lightman J said that he considered that the 'critical factor' in that case was whether 'objectively viewed' a mediation had any real prospect of success. He continued:

> 'If mediation can have no real prospect of success, a party may, with impunity, refuse to proceed to mediation on this ground. But refusal is a high risk course to take, for if the Court finds that there was a real prospect, the party refusing to proceed to mediation may, as I have said, be severely penalized. Further, the hurdle in the way of a party refusing to proceed to mediation on this ground is high, for in making this objective assessment of the prospects of mediation, the starting point must surely be the fact that the mediation process itself can and often does bring about a more sensible and more conciliatory attitude on the part of the parties than might otherwise be expected to prevail before the mediation, and may produce a recognition of the strengths and weaknesses by each party of his own case and of that of his

opponent, and a willingness to accept the give and take essential to a successful mediation. What appears to be incapable of mediation before the mediation process begins often proves capable of satisfactory resolution later.'

[24] Consistently with the view expressed in this passage, Lightman J said that on the facts of that case he was persuaded that 'quite exceptionally' the successful party was justified in taking the view that mediation was not appropriate because it had no realistic prospects of success.

[25] In our view, the question whether the mediation had a reasonable prospect of success will often be relevant to the reasonableness of A's refusal to accept B's invitation to agree to it. But it is not necessarily determinative of the fundamental question, which is whether the successful party acted unreasonably in refusing to agree to mediation. This can be illustrated by a consideration of two cases. In a situation where B has adopted a position of intransigence, A may reasonably take the view that a mediation has no reasonable prospect of success because B is most unlikely to accept a reasonable compromise. That would be a proper basis for concluding that a mediation would have no reasonable prospect of success, and that for this reason A's refusal to mediate was reasonable.

[26] On the other hand, if A has been unreasonably obdurate, the court might well decide, on that account, that a mediation would have had no reasonable prospect of success. But obviously this would not be a proper reason for concluding that A's refusal to mediate was reasonable. A successful party cannot rely on his own unreasonableness in such circumstances. We do not, therefore, accept that, as suggested by Lightman J, it is appropriate for the court to confine itself to a consideration of whether, viewed objectively, a mediation would have had a reasonable prospect of success. That is an unduly narrow approach: it focuses on the nature of the dispute, and leaves out of account the parties' willingness to compromise and the reasonableness of their attitudes.

[27] Nor should it be overlooked that the potential success of a mediation may not only depend on the willingness of the parties to compromise. Some disputes are inherently more intractable than others. Some mediators are more skilled than others. It may, therefore, sometimes be difficult for the court to decide whether the mediation would have had a reasonable prospect of success.

[28] The burden should not be on the refusing party to satisfy the court that mediation had no reasonable prospect of success. As we have already stated, the fundamental question is whether it has been shown by the unsuccessful party that the successful party unreasonably refused to agree to mediation. The question whether there was a reasonable prospect that a mediation would have been successful is but one of a number of potentially relevant factors which may need to be considered in determining the answer to that fundamental question. Since the burden of proving an unreasonable refusal is on the unsuccessful party, we see no reason why the burden of proof should lie on the successful party to show that mediation did not have any reasonable prospect of success. In most cases it would not be possible for the successful party to prove that a mediation had no reasonable prospect of success. In our judgment, it would not be right to stigmatise as unreasonable a refusal by the successful party to agree to a mediation unless he showed that a mediation had no reasonable prospect of success. That would be to tip the scales too heavily against the right of a successful party to refuse a mediation and insist on an adjudication of the dispute by the court. It seems to us that a fairer balance is struck if the burden is placed

on the unsuccessful party to show that there was a reasonable prospect that mediation would have been successful. This is not an unduly onerous burden to discharge: he does not have to prove that a mediation would *in fact* have succeeded. It is significantly easier for the unsuccessful party to prove that there was a reasonable prospect that a mediation would have succeeded than for the successful party to prove the contrary.

[29] So far we have been considering the question whether a successful party's refusal of ADR was unreasonable without regard to the impact of any encouragement that the court may have given in the particular case. Where a successful party refuses to agree to ADR despite the court's encouragement, that is a factor which the court will take into account when deciding whether his refusal was unreasonable. The court's encouragement may take different forms. The stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable.

[30] An ADR order made in the Admiralty and Commercial Court in the form set out in Appendix 7 to the Admiralty and Commercial Court Guide (see Green Book, vol 1, p 1825) is the strongest form of encouragement. It requires the parties to exchange lists of neutral individuals who are available to conduct 'ADR procedures' (see para 1), to endeavour in good faith to agree a neutral individual or panel and to take 'such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen' (para 4). The order also provides (para 5) that, if the case is not settled, 'the parties shall inform the Court ... what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed'. It is to be noted, however, that this form of order stops short of actually compelling the parties to undertake an ADR.

[31] Nevertheless, a party who, despite such an order, simply refuses to embark on the ADR process at all would run the risk that *for that reason alone* his refusal to agree to ADR would be held to have been unreasonable, and that he should therefore be penalised in costs. It is to be assumed that the court would not make such an order unless it was of the opinion that the dispute was suitable for ADR.

[32] A less strong form of encouragement is mentioned in the other court guides to which we have referred at [6], above. A particularly valuable example is the standard form of order now widely used in clinical negligence cases, and which was devised by Master Ungley. The material parts of this order provide:

> 'The parties shall by ... consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable.'

[33] This form of order has the merit that: (a) it recognises the importance of encouraging the parties to *consider* whether the case is suitable for ADR, and (b) it is calculated to bring home to them that, if they refuse even to consider that question, they may be at risk on costs even if they are ultimately held by the court

to be the successful party. We can see no reason why such an order should not also routinely be made at least in general personal injury litigation, and perhaps in other litigation too. A party who refuses even to consider whether a case is suitable for ADR is always at risk of an adverse finding at the costs stage of litigation, and particularly so where the court has made an order requiring the parties to consider ADR.

PUBLIC BODIES

[34] Another issue that has arisen is whether the court should be particularly disposed to make an adverse costs order against a successful public body on the grounds that it refused to agree to ADR. We can see no basis for the court discriminating against successful public bodies when deciding whether a refusal to agree to ADR should result in a costs penalty. The only reason for doing so that was suggested to us in the course of argument was that government departments and agencies (including NHSLA) should be held to the ADR pledge (see [7], above). We need, therefore, to consider whether the ADR pledge has any special significance. In *Royal Bank of Canada Trust Corp Ltd v Secretary of State for Defence* [2003] EWHC 1841 (Ch), the main issue was the true interpretation of a lease. Lewison J said that, although it concerned a question of law, this dispute was suitable for ADR. He considered that the ADR pledge given by government was something to which he ought to attach 'great weight'. He said (at [12]):

> 'As I have said, however, the most important feature to my mind is the formal pledge given on behalf of the government and its various departments to use ADR in appropriate cases. The government did not abide by that pledge in this case. I am not in a position to form any real view of whether a mediation would or would not have succeeded. It may well have done, but in my judgment a failure to abide by the formal pledge given on the part of government, coupled with the fact that ... justifies a decision that the defendant should not recover any further costs from the claimant.'

[35] In our judgment, the judge was wrong to attach such weight to the ADR pledge. The pledge was no more than an undertaking that ADR would be considered and used in all *suitable* cases. If a case is suitable for ADR, then it is likely that a party refusing to agree to it will be acting unreasonably, whether or not it is a public body to which the ADR pledge applies. If the case is not suitable for ADR, then a refusal to agree to ADR does not breach the pledge. It is, therefore, difficult to see in what circumstances it would be right to give great weight to the ADR pledge.

HALSEY v MILTON KEYNES GENERAL NHS TRUST

The facts

[36] This claim is brought by Lilian Halsey pursuant to the provisions of the Fatal Accidents Act 1976 (as amended) in relation to the death of her husband, Bert Halsey, on 27 June 1999 at the Milton Keynes General Hospital. At the date of his death, the deceased was 83 years of age. The claim arose out of the allegedly negligent treatment of him while he was a patient at that hospital.

[37] He was transferred to the hospital on 25 June 1999. At that time, he was suffering from several serious health problems. It was not in dispute that his life expectation was short. He was being fed by means of a nasogastric feeding tube. The basis of the claim was that his death was caused by the tube being incorrectly

fitted, so that, rather than directing liquid food into the deceased's stomach, it was directing it into his left lung. Following his death, a post-mortem examination was performed by Dr Mayers, a consultant histopathologist, employed by the defendant trust. She concluded that the cause of death was airway obstruction due to the introduction of nasogastric nutrition into the airway and lung as a result of the insertion of a nasogastric tube into the major airway.

[38] An inquest was held into the deceased's death. For this purpose, the coroner requested statements from the medical and nursing staff most closely involved in the deceased's care at the hospital. The claimant instructed Osborne Morris & Morgan (OMM) to attend the inquest on behalf of the family. The trust refused a request that it should meet the cost of OMM's preparation and attendance at the inquest. On 11 January 2000, OMM wrote to the trust's solicitors saying:

> 'We should perhaps point out that our clients would have agreed to limit their entire claim in this matter to the costs of the representation of the inquest. Indeed they would have been prepared to limit the preparation and attendance to £5000. No doubt your clients will bear this in mind when we issue proceedings against them following the inquest. The family have been forced to issue proceedings simply because of your clients refusal to meet the costs of the attendance.'

[39] The inquest was held on 14 January 2000. The coroner heard evidence from several nurses, Dr Mayers and Dr Lanzone Miller, a consultant physician and gastro-enterologist. Dr Miller disagreed with Dr Mayers' view that nutrition had entered the airway and lung due to the insertion of the nasogastric tube into the major airway. Dr Miller considered that the explanation for the presence of nutritional feed in the lung was regurgitation followed by aspiration of the stomach contents at or around the time of death. At the conclusion of the evidence, the coroner recorded the medical cause of death as:

> '1(a) airway obstruction;
>
> 1(b) introduction of nasogastric nutrition into airway and lungs;
>
> 2 chronic renal failure; old myocardial infarct; chronic obstructive pulmonary disease and fractured ribs ...'

[40] By a letter dated 18 January 2000, OMM informed the trust that the deceased's family would be prepared to accept a payment of £7,500 bereavement damages together with a contribution towards their costs. The trust's solicitors replied on 4 February 2000 saying that they were instructed 'to take all necessary steps to resist a claim, to trial if necessary, should one be forthcoming'. On 7 February 2000, OMM asked the trust whether they were prepared to refer the matter 'for alternative dispute resolution that is, mediation, again to ensure that unnecessary costs are incurred (sic). Our client wants to mediate this claim'.

[41] On 6 April 2000, OMM wrote to the Secretary of State for Health giving him early notice of the proceedings, and saying:

> 'You will see from the correspondence that I have at every juncture sought to meet, negotiate and mediate this claim with the least amount of cost to the NHS. Unfortunately all such attempts have been rejected. I want you to have this correspondence in mind when the final bill payable by the NHS for legal costs is in the region of £100,000.'

[42] By letter dated 14 March 2000, the trust's solicitors replied saying that they did not accept that there was any claim arising out of the care provided to the deceased, and that all necessary steps would be taken to resist a claim, to trial if necessary.

[43] On 25 April 2001, OMM wrote to the trust a letter of claim in accordance with the clinical negligence pre-action protocol. The letter included an offer to accept the sum of £12,500 together with reasonable costs pursuant to CPR Pt 36. This evoked a response on 1 May 2001 in which the trust said that it would be defending the claim. On 25 July 2001 the trust sent its protocol response denying liability, and asserting:

> 'As there is no negligence, the Trust will not be settling this claim. In view of this, I do not believe it is appropriate to meet with you and discuss this claim or refer this case to mediation as the Trust's stance will not change in this respect. Therefore, any such meeting or mediation will be unnecessary waste of both costs and resources.'

[44] On 5 November 2001, OMM wrote to the trust saying:

> 'We must make it clear to you at this stage that it was never our intention to issue proceedings since this was quite obviously a case that could have been resolved by mediation.'

[45] The claim form was issued on 13 May 2002, and served on 9 September 2002. On 10 September 2002, OMM wrote:

> 'Despite the fact that we have issued proceedings in this matter we are anxious to avoid unnecessary costs being incurred. We would therefore invite you to consider referring this case to mediation so that we can perhaps resolve it to the satisfaction of our client without unnecessary costs being incurred.'

[46] This request was repeated by OMM's letter of 13 September 2002. The trust replied on 16 September 2002:

> 'I have as yet been provided with no evidence that it would be an effective use of NHS resources to go to mediation on this small value claim, where liability is in dispute. What your costs are, are obviously a matter for you and your client, the Trust costs on this claim, even to trial will only be low.'

[47] On 3 April 2003, OMM wrote yet again urging the trust to consider either mediation or at least a meeting to discuss a possible settlement: 'We are certain agreement could be reached whereby further unnecessary costs would be avoided.'

[48] The trust replied on 4 April 2003, repeating its position that 'on such a low quantum claim, we do not consider this to be a cost effective use of NHS resources'. On 30 April 2003, OMM wrote again pointing out that they had made every attempt to try to avoid the costs of litigation, but all such attempts had been rejected out of hand. They referred to the decision of this court in *Dunnett v Railtrack plc (in railway administration)* [2002] 2 All ER 850, [2002] 1 WLR 2434 and that of Lightman J in *Hurst v Leeming* [2003] 1 Lloyd's Rep 379, and said that they would be relying on these decisions when the court came to consider the question of costs, since the trust had acted unreasonably. On 1 May 2003, the trust replied saying:

'In respect of your request that we clarify why "mediation is not a cost effective use of NHS resources on such a low cost claim", (a) it has little chance of success and (b) the costs of mediation would be as great, if not greater for such a low value claim than attending trial ... if you do not intend to consider a "drop hands" agreement, then I look forward to receiving your indexed trial bundle and summary in order that we may consider and amend/agree them.'

[49] The trial took place on 1 and 2 June 2003. The judge gave judgment on 17 June 2003, and dismissed the claim. He then heard argument on the question of costs. It was submitted by Mr Meakin on behalf of the claimant that there should be no order as to costs, and in support of his submission he relied on the refusal of the trust to agree to a mediation. The judge was referred to some, if not all, of the correspondence to which we have referred. He said that he had the feeling that the letters written by OMM had been 'somewhat tactical'. He also thought that it was unusual to commence litigation by writing to the Secretary of State for Health as occurred in this case. He said (para 32):

'I think that the question for me to decide is: was the defendant's attitude to ADR a reasonable one, or not a reasonable one or to use the words of Lightman J, were they justified in taking the view that mediation was not appropriate because it had no realistic prospect of success? Having considered and been taken through much of this correspondence, although, as I say, notably not the correspondence preceding the letter to the Health Secretary in 2000, it seems reasonably clear to me that although there are a number of tactical observations to the effect that the claimant would like ADR, it remains perfectly clear that this is not a case which they were disposed to compromise on any terms which could possibly be reasonable to the defendants. The defendants took the view, legitimately as I have found, that this was a case in which there simply was no negligence. It is significant that I have been told that on 4 March of this year, fairly shortly before trial, an offer was made by the defendant to the claimant that the matter should be settled on the basis that both parties simply walked away from the litigation and neither paid their costs, but that did not attract the advisers to the claimant or the claimant herself. She started off asking for £12,000, towards the end was offering to accept £7,500 and funeral expenses. It seems perfectly clear that it would only have been by the payment of some significant, albeit modest by the standards of this type of litigation, sum of money that the defendants would have been able to buy off the claim, whether by ADR or in any other way. I do not think that the CPR is designed to make parties which have a good defence settle claims which they do not wish to settle, when they ultimately end up winning and are vindicated in the view that they have taken, I do not think it proper, at least not in a run-of-the-mill case, to say that they should then suffer by being denied their costs. This was a perfectly straightforward case of a kind which the defendants were justified in defending and justified in saying that they did not want to pay any money to the claimant in respect of. The claimant was only prepared to settle on the basis that she was going to be paid some money, and therefore there was not much point in talking to any greater extent than they did. It is to be observed that the correspondence from the defendant was both full and reasonable.'

The costs issue

[50] In the light of our exposition of what we conceive to be the correct approach, we have no difficulty in concluding that the judge was correct to decide that the trust should not be deprived of any of its costs on the grounds that it had refused to accept the claimant's invitations to agree to a mediation. In our view, the claimant has come nowhere near showing that the trust acted unreasonably in refusing to agree to a mediation. We start by noting that this is not a case where the court made any order encouraging mediation. We accept that the subject matter of this dispute was not by its nature unsuitable for ADR. But the trust believed that it had a strong defence, and had reasonable grounds for that belief. Moreover, the judge was justified in saying that the letters written by the claimant's solicitors were 'somewhat tactical'. We think that, if anything, this was an understatement. The extraordinary letter written to the Secretary of State very early on was an attempt to extort a sum (plus costs) in settlement of a very small claim which, at best, was speculative. The writing of no fewer than five letters asking the trust to agree to mediation was of a piece with this early letter. The requirement that the trust should pay the claimant's costs is of particular significance, since she had entered into a conditional fee agreement with her solicitors, with a 100% success fee.

[51] Another highly relevant feature of this case was that the trust reasonably took the view that the costs of a mediation would be disproportionately high when compared with (a) the value of the claim if liability were to be established and (b) the trust's costs of a trial. The trust was entitled to regard this as a factor strongly militating against mediation.

[52] Nor did the claimant discharge the burden of proving that mediation had a reasonable prospect of success. The trust had taken the view that the claim would not succeed, and had decided not to make any payment to the claimant. Mr Allan Gore QC submits that the claimant might have been persuaded in the course of the mediation to drop her claim: all she really wanted was an explanation of how her husband had died in hospital. This possibility cannot be dismissed as fanciful, although there is no evidence to support it. But, in our judgment, the claimant comes nowhere near proving that there was a reasonable prospect that the mediation would have been successful. In the circumstances of this case, the stance adopted by the trust cannot fairly be said to have been unreasonable.

[53] The final point urged by Mr Gore is the ADR pledge. But as we have already said, this pledge adds nothing. If the case was suitable for ADR, the claimant does not need the pledge; and if the case was not suitable for ADR, the pledge did not require the trust to agree to mediation. The same applies to the initiative of NHSLA referred to at [7], above: the statement merely says that NHS bodies offer mediation in 'appropriate' cases.

[54] For all these reasons, we dismiss the appeal.

STEEL v JOY AND HALLIDAY

The causation issue

[55] On 15 December 1996, the claimant was injured in an accident involving the first defendant. On 13 March 1999, he was injured in an accident involving the second defendant. The claimant brought separate actions against the two defendants. These were subsequently consolidated. The first defendant instituted CPR Pt 20 proceedings against the second defendant, seeking a

contribution in respect of any damages found payable to the claimant. Both defendants admitted liability to the claimant. The claimant and first defendant jointly instructed Mr MJ Gibson FRCS, a consultant spinal surgeon. Mr Gibson advised that the claimant suffers from a congenital spinal stenosis, and that, as a result of the first accident, symptoms of the claimant's pre-existing stenosis were accelerated by seven to ten years. Of the second accident, Mr Gibson said:

> 'He aggravated the pre-existing problems producing an exacerbation of these which would have lasted for in the order of 3 to 6 months. Thereafter persistence of symptoms primarily relates to his pre-existing problem that started after the injury on 15 December 1996.'

[56] Mr Gibson was asked whether the second accident would have had a similar effect to the first accident had the claimant been free of symptoms immediately prior to the second accident. He replied by letter dated 25 June 2002 that 'on the balance of probabilities, this second accident would have exacerbated Mr Steel's condition by 7 to 10 years'. Mr Recorder Thomas QC summarised the effect of the agreed medical evidence in these terms (at para 10):

> 'So what it comes to, in very simple terms, is that as a result of the first accident, the claimant's already existing problems were accelerated by a period of years, in the order of seven to ten years. In the second accident, two-and-a-quarter years later, Mr Gibson makes it clear that there was an exacerbation of three to six months by reason of the second accident, and we understand (and when I say "we understand" this is raised by me in argument with counsel today), we understand that really what he is meaning by the three to six months' aggravation from the second accident is that there was a flare-up of conditions for that limited period of time as a result of the second accident. He says in the report and the correspondence I have referred to that, effectively, if the first accident had not happened, then the second accident would have had the same effect as the first accident if the first accident had not already occurred. However, save for the three to six months' aggravation, the second accident did not in fact affect the claimant's existing medical condition which had already been arrived at by then as a result of his pre-existing condition and the first accident.'

[57] The trial took place on 3 July 2003. It was agreed that the recorder should determine the causation issue that had been raised on the pleadings, namely whether the second defendant had caused the claimant to suffer any more damage than three to six months' aggravation of his symptoms of stenosis. On behalf of the first defendant, it was submitted that the second defendant had also caused or contributed to the seven to ten years' acceleration of the claimant's symptoms. The second defendant contested this. The recorder found in favour of the second defendant. He held (at para 19) that the second accident 'did not affect the long-term prognosis that there already was from the first accident', and derived support for his conclusion from the decision of this court in *Performance Cars Ltd v Abraham* [1961] 3 All ER 413, [1962] 1 QB 33. The first defendant appeals against this decision.

[58] Mr Charles Foster's primary submission is that, since there was an 'exact overlap of damage', the second accident damage can be said to have overtaken the first accident damage, so that the first defendant is only liable for the damage which was suffered during the period between the dates of the two accidents. His alternative submission is that the two defendants should be regarded as

concurrent tortfeasors who, as regards the acceleration of the stenosis symptoms, both caused the same damage, and between whom there would be rights of contribution under s 1 of the Civil Liability (Contribution) Act 1978.

[59] The first of these submissions is completely unsustainable. The phrase 'exact overlap of damage' is not apt on the facts of this case. The damage attributable to the first accident (acceleration of symptoms by seven to ten years) had already occurred by the date of the second accident. That historical fact cannot be expunged simply because that same damage would have been caused by the second accident if the first accident had not occurred. In these circumstances, it is a misuse of language to describe the acceleration of symptoms by seven to ten years as 'exactly overlapping damage', and plainly wrong to say that the second accident damage overtook and extinguished the first accident damage.

[60] Nor can we accept the alternative submission. In our judgment, this case cannot be distinguished from the *Performance Cars* case. Mr Foster implicitly accepts this, because he contends that the *Performance Cars* case was wrongly decided and should not be followed. In that case, the defendant negligently caused his car to collide with the plaintiff's car and damaged its front wing. It was agreed that, to make good the damage, the whole of the lower part of the car would have to be resprayed at a cost of £75. The plaintiff had previously been involved in another collision in which his car had suffered damage to the rear wing which had not been made good. This damage also required a similar respray. The plaintiff had sued the person responsible for the first damage and recovered judgment for £75, the cost of the respray. That judgment had not been satisfied. This court held that the plaintiff was not entitled to recover the cost of the respray from the defendant, since he had damaged a car which was at the time of the accident in need of respraying, with the result that the need for respraying did not flow from the defendant's wrongdoing. Accordingly, the claim against the defendant failed. Lord Evershed MR said ([1961] 3 All ER 413 at 416, [1962] 1 QB 33 at 39) that 'the necessity for respraying was not the result of the defendant's wrongdoing because that necessity already existed'. He said ([1961] 3 All ER 413 at 416, [1962] 1 QB 33 at 40):

> 'In my judgment in the present case the defendant should be taken to have injured a motor car that was already injured in certain respects, that is, in respect of the need for respraying; and the result is that to the extent of that need or injury the damage claimed did not flow from the defendant's wrongdoing. It may no doubt be unfortunate for the plaintiffs that the collisions took place in the order in which they did.'

[61] Donovan LJ said ([1961] 3 All ER 413 at 417, [1962] 1 QB 33 at 42):

> 'The question, as I see it, is this: What extra burden in the matter of respraying was put upon the plaintiff company by the second collision? To my mind the answer must be: None, for the earlier collision had already imposed the burden of respraying upon them.'

[62] Mr Foster submits that the law has moved on since the *Performance Cars* case was decided and that the court is now required to apply what he calls 'equitable pragmatism' in a case such as this. He says that justice requires the court to hold that the two defendants were concurrent tortfeasors who were both responsible for the same damage. The analysis adopted by the judge in the present case would mean that, if the first defendant had not been before the court

or had been insolvent, the claimant would not have been compensated for his loss: such an unjust conclusion can, and should, be avoided. Justice requires the court to hold that both defendants caused the damage, and that, as between themselves, the court should assess the contribution that is just and equitable having regard to their respective responsibilities for the damage in question (see s 2(1) of the 1978 Act).

[63] In support of these submissions, Mr Foster relies in particular on *Rahman v Arearose Ltd* (2000) 62 BMLR 84, [2001] QB 351. In that case, the claimant who was employed by D1 was assaulted at work and suffered an injury to his right eye. As a result of medical negligence committed by D2 in the course of an operation, he later lost the sight in his eye entirely. He also suffered post-traumatic stress disorder and depression. Laws LJ rejected ((2000) 62 BMLR 84 at 96, [2001] QB 351 at 364 (para 23)) the submission that the case was one of 'concurrent torts', since on the evidence the respective torts committed by the defendants were the causes of distinct aspects of the claimant's psychiatric condition. He discussed ((2000) 62 BMLR 84 at 97–99, [2001] QB 351 at 365–368 (paras 26–33)) the issue of causation, and said ((2000) 62 BMLR 84 at 99, [2001] QB 351 at 367 (para 32)):

> 'Once it is recognised that the first principle is that every tortfeasor should compensate the injured claimant in respect of that loss and damage for which he should justly be held responsible, the metaphysics of causation can be kept in their proper place …'

It is this passage on which Mr Foster places particular reliance. But it is important to point out that Laws LJ also said ((2000) 62 BMLR 84 at 99, [2001] QB 351 at 368 (para 34)):

> 'Once one leaves behind, as for reasons I have given one should, the dogmas of novus actus and eggshell skulls, there is nothing in the way of a sensible finding that while the second defendants obviously (and exclusively) caused the right-eye blindness, thereafter each tort had its part to play in the claimant's suffering.'

[64] And he said ((2000) 62 BMLR 84 at 100, [2001] QB 351 at 368 (para 36)):

> 'Here, the question what would the position have been if the second tort had not been committed is highly material: the second defendants are not to be held responsible for damage the whole of which had already been inflicted on the claimant by the first defendants.'

[65] It seems to us that there is nothing in the decision in *Rahman*'s case which supports Mr Foster's alternative submission.

[66] Reference was made during the course of argument to *Baker v Willoughby* [1969] 3 All ER 1528, [1970] AC 467. In that case, the plaintiff's leg, which was injured in a car accident caused by the negligence of the defendant, was later shot by some robbers. The House of Lords held that the defendant was liable for the full consequences of the injury he caused regardless of the second incident, and had to pay damages based on the plaintiff's losses beyond the time when his leg was amputated as a result of the second incident. This decision was criticised by some of their Lordships in the House of Lords in *Jobling v Associated Dairies* [1981] 2 All ER 752, [1982] AC 794. It is unnecessary to consider the speeches in *Jobling*'s case. For present purposes, it is sufficient to state that *Baker*'s case should be regarded as an exception to the general 'but-for' test, which was justified by the

principle of fully compensating the plaintiff for damage tortiously inflicted. It was recognised that, if the defendant's argument were accepted, namely that he had no liability in respect of the period after the plaintiff's leg had been amputated, the plaintiff would fall between two defendants, and not be entitled to full compensation.

[67] This point was most clearly articulated by Lord Pearson who said of the defendant's argument ([1969] 3 All ER 1528 at 1535, [1970] AC 467 at 495):

> 'That is the argument, and it is formidable. But it must not be allowed to succeed, because it produces manifest injustice. The supervening event has not made the appellant less lame nor less disabled nor less deprived of amenities. It has not shortened the period over which he will be suffering. It has made him more lame, more disabled, more deprived of amenities. He should not have less damages through being worse off than might have been expected. The nature of the injustice becomes apparent if the supervening event is treated as a tort (as indeed it was) and if one envisages the appellant suing the robbers who shot him. They would be entitled, as the saying is, to "take the plaintiff as they find him". (*Performance Cars, Ltd. v. Abraham* ([1961] 3 All ER 413, [1962] 1 QB 33).) They have not injured and disabled a previously fit and able-bodied man. They have only made an already lame and disabled man more lame and more disabled.'

[68] Lord Reid had also referred ([1969] 3 All ER 1528 at 1533, [1970] AC 467 at 493) to the *Performance Cars* case, and said:

> 'These cases exemplify the general rule that a wrongdoer must take the plaintiff (or his property) as he finds him; that may be to his advantage or disadvantage. In the present case the robber is not responsible or liable for the damage caused by the respondent; he would only have to pay for additional loss to the appellant by reason of his now having an artificial limb instead of a stiff leg.'

[69] The importance of *Baker*'s case for present purposes is that their Lordships recognised that the *Performance Cars* case was good law. Both Lord Reid and Lord Pearson explicitly stated that the robbers would not have been liable for the plaintiff's loss of a good leg. It was precisely because the *Performance Cars* case was good law that under-compensation of the plaintiff could only be avoided by making the defendant liable for the loss attributable to the leg injury even after the amputation. Accordingly, the 'but-for' test could not be applied, just as it has not been applied in cases involving multiple tortfeasors such as *Fairchild v Glenhaven Funeral Services Ltd, Fox v Spousal (Midlands) Ltd, Matthews v Associated Portland Cement Manufacturers (1978) Ltd* [2002] UKHL 22, [2002] 3 All ER 305, [2003] 1 AC 32.

[70] In our judgment, the *Performance Cars* case is still good law. It has been frequently referred to in the textbooks and, so far as we know, without disapproval. As a matter of logic and common sense, it is clearly correct. We do not consider that it produces an unjust result. The claimant is entitled to recover damages from the first defendant for the losses inflicted by him; and from the second defendant for any additional losses inflicted by him. It is true that, if the first defendant is not before the court or is insolvent, the claimant will not be fully compensated for all the losses that he has suffered as a result of the two accidents. But that is not a reason for making each defendant liable for the total loss. In *Baker*'s case, the issue was whether the tortfeasor who had caused the first injury

was liable for its consequences after they had arguably become merged in the consequences of the second injury. In the present case, the question is whether the second tortfeasor is responsible for the consequences of the first injury. To that question, the answer can only be No. It is true that, but for the first accident, the second accident would have caused the same damage as the first accident. But that is irrelevant. Since the claimant had already suffered that damage, the second defendant did not cause it. This is not a case of concurrent tortfeasors.

The costs issue

[71] Proceedings against the first defendant were started by the issue of a claim form on 14 September 1999. Proceedings against the second defendant were commenced by the issue of a claim form on 12 March 2002. On 29 July 2002, an order was made consolidating the two claims. On 9 May 2003, the first defendant's solicitors wrote to the second defendant's solicitors:

> 'To dispose of all issues as between defendants/claimant, our clients offer to mediate the issues in this case. We have no trial date yet but the trial window envisages a trial within the first three weeks of July. Mediation should take place as soon as possible and certainly by early June. This letter is being copied to the claimant's solicitors on an equal invitation. We have also taken the step of asking the ADR Group to liase with all parties with a view to proposing potentially suitable mediators and agreeing a date for mediation if the parties agree mediation. Please let us know immediately if you have any objection to seeking a mediator through the ADR Group. In the event that any party refuses this offer of mediation, this letter will be drawn to the attention of the trial judge and you will note that this is an open offer to mediate the case. We shall ask the judge to make a ruling as to costs in the event that any party refuses a mediation. We believe that this case is eminently capable of being resolved by mediation.'

[72] This offer was repeated to the claimant. By letter dated 20 May 2002, the first defendant's solicitors replied:

> 'After giving very careful thought to the proposal, our insurance principals have come to the conclusion that this would not be an appropriate case for mediation. The issue between the defendants is one of law and therefore is requiring of a decision of the court. In such circumstances we cannot see there is any benefit to either side in mediation. So as to make our position perfectly clear, our insurance principals would have no objection to mediation taking place between yourself and the claimant with a view to resolving the claimant's claim.'

[73] By their letter dated 27 May 2002, the first defendant's solicitors responded, stating that they did not accept that the dispute was incapable of resolution, although it related to a point of law. They added:

> 'If your clients persist in refusing to mediate this case, then we will have no option but to place this and our earlier correspondence before the court. When the court comes to consider the question of costs and conduct in particular in refusing mediation.'

[74] The second defendant's solicitors replied on 28 May 2002, saying: 'We are not prepared to compromise on the point of law and therefore mediation would be pointless.'

[75] Having decided the causation issue in favour of the second defendant, the recorder turned to the question of costs. He decided that costs should follow the event. His reasoning is set out in the following passage of his judgment:

> 'Well I am going to come to the same final view in relation to this case as it now arises before me. The possibility of ADR was raised fairly late in the day here as far as the chronology of this case was concerned. That is not to say that simply because it is raised late on means that it is of no consequence, far in fact from it, but it is a factor in the equation. But here, where the issue that has arisen is the one that I identified earlier today, which Mr Elgot goes as far as to describe as quite exceptional, using the language that arises in that case of *Hurst v Leeming* [2003] 1 Lloyd's Rep 379, it seems to me that ADR would have been likely to achieve very little. I do accept Mr Foster's general point, although it is not of application I think in the facts of this particular case, that ADR brings to bear a different set of "tools" than formal litigation in open court such as this, and who knows what ADR can achieve in some cases. However here in this case, when Mr Elgot poses for me the question what could ADR really have achieved at this particular late stage of the litigation as far as this particular topic was concerned, I must say I wonder really what could have been achieved.'

[76] In considering whether the first defendant has shown that the second defendant acted unreasonably in refusing the offer of mediation, a number of points need to be borne in mind. The full value of the claim was agreed by the parties at £195,000. The second defendant made a CPR Pt 36 offer of £3,500 before proceedings started on the footing that this was a generous assessment of the value of the three to six months' exacerbation of the symptoms caused by the second accident. It can be seen, therefore, that almost £200,000 turned on the causation issue that was eventually tried by the recorder.

[77] As in *Halsey v Milton Keynes General NHS Trust*, so in this case, the court did not make any order encouraging the use of ADR. This is not, therefore, a case where a party refused even to consider ADR despite a court order that it should do so.

[78] This case raised the question whether the *Performance Cars Ltd* case is still good law, or whether it could be distinguished. Put like that, the claim against the second defendant, therefore, raised a question of law. In our judgment, the second defendant did not act unreasonably in saying that he (or more realistically his insurers) wanted to have that question resolved by the court. In these circumstances, the nature of the dispute was one which was towards the 'intrinsically unsuitable' end of the spectrum. It is a far cry from a typical road traffic claim which raises no disputes of law, and where disputed facts are intrinsically suitable for resolution by ADR.

[79] The second defendant reasonably believed that the claim against him had no merit. We hope that we have not done injustice to Mr Foster's submissions, but like the recorder we think that the answer to the question raised by the causation issue was plain. It follows that the first defendant has not shown that there was a reasonable prospect that a mediation would have succeeded. The second defendant had decided to take a stand on the point of law. In doing so, he was not acting unreasonably.

[80] There are yet further factors which the second defendant was entitled to pray in aid in support of the reasonableness of his refusal to agree to mediation. First, the costs of the mediation would have been excessive in comparison with

the costs of litigating the issue at trial. The issue was disposed of by the recorder in about two hours. Mr Christopher Purchas QC has suggested that the total costs of a mediation involving all three parties would have been of the order of £20,000. That figure (which was not investigated before us) does look surprisingly high. But on any view this is a case where a mediation would have been unlikely to be successful, and would probably have been relatively expensive when compared with the cost of a trial which, in the event, lasted about two hours. Secondly, as the recorder pointed out, the offer of mediation came comparatively late in the litigation after substantial costs had already been incurred.

[81] Taking all these factors together, we are in no doubt that the first defendant has not proved that the second defendant acted unreasonably in refusing to agree to mediation in this case.

[82] It follows that the first defendant's appeal is dismissed on both issues.

Appeals dismissed.

Melanie Martyn Barrister.

Reed Executive plc and another v Reed Business Information Ltd and others

[2004] EWCA Civ 887

COURT OF APPEAL, CIVIL DIVISION
AULD, RIX AND JACOB LJJ
15 JUNE, 14 JULY 2004

Costs – Order for costs – Discretion – Disallowing costs of successful party – Alternative dispute resolution (ADR) – Whether court having power to order disclosure of 'without prejudice' communications for purposes of determining whether party unreasonable in rejecting ADR.

The defendants brought a successful appeal to the Court of Appeal against first instance judgments in proceedings brought against them by the claimants. Although the claimants lost the appeal and, in the ultimate result, achieved only very limited success, they argued that they should have 70% of the costs before the judge and of the appeal. They relied on the defendants' refusal to take the dispute to alternative dispute resolution (ADR), alleging that that refusal had been unreasonable. In order to support that allegation, the claimants sought an order for the disclosure of 'without prejudice' communications between the parties on the grounds that they were relevant and admissible on the question of costs.

Held – The court could not order disclosure of 'without prejudice' negotiations against the wishes of one of the parties to the negotiations. That meant that in some cases, when it came to the question of costs, the court could not decide whether one side or the other had been unreasonable in refusing mediation. Such a conclusion was not disastrous or damaging from the point of view of encouraging ADR. It was open to either side to make open offers of ADR or offers that were 'without prejudice save as to costs'. The opposite party could respond to such offers, either openly or in the 'without prejudice save as to costs' form. It followed in the instant case that the court had no power to order any disclosure of the detail of the 'without prejudice' negotiations for the purposes of deciding the question of costs. Moreover, on the open materials before the court it had not been shown that the defendants had been unreasonable in refusing ADR. Accordingly, the possibility of ADR was not a relevant factor to be taken into account for the court's decision on costs, but there remained for debate other factors referred to in the parties' skeleton arguments. There would therefore have to be a further short hearing concerning that matter and any other matters still in contention (see [43], [35], [37], [40], [43], [45]–[50], below).

Walker v Wilsher (1889) 23 QBD 335 applied

Halsey v Milton Keynes General NHS Trust, Steel v Joy [2004] 4 All ER 920 considered.

Notes

For communications 'without prejudice', see 17(1) *Halsbury's Laws* (4th edn reissue) para 887.

Cases referred to in the judgment

Calderbank v Calderbank [1975] 3 All ER 333, [1976] Fam 93, [1975] 3 WLR 586, CA.

Cutts v Head [1984] 1 All ER 597, [1984] Ch 290, CA.

Family Housing Association (Manchester) Ltd v Michael Hyde & Partners (a firm) [1993] 2 All ER 567, [1993] 1 WLR 354, CA.

Halsey v Milton Keynes General NHS Trust, Steel v Joy [2004] EWCA Civ 576, [2004] 4 All ER 920.

Muller v Linsley & Mortimer (a firm) [1996] PNLR 74, CA.

Rush & Tompkins Ltd v Greater London Council [1988] 3 All ER 737, [1989] AC 1280, [1988] 3 WLR 939, HL.

Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No 2) [1990] 3 All ER 723.

Unilever plc v The Procter & Gamble Co [2001] 1 All ER 783, [2000] 1 WLR 2436, CA.

Walker v Wilsher (1889) 23 QBD 335, CA.

Argument as to consequential order of judgment on appeal

On 3 March 2004 the Court of Appeal ([2004] EWCA Civ 159, [2004] IP & T 1049) allowed an appeal by the defendants, Reed Business Information Ltd, Reed Elsevier (UK) Ltd and Totaljobs.com Ltd (collectively RBI), from parts of the decisions of Pumfrey J on 20 May 2002 ([2002] EWHC 1015 (Ch), [2003] IP & T 220) and 19 December 2002 ([2002] EWHC 2772 (Ch), [2002] All ER (D) 296 (Dec)) in proceedings for passing off and trade mark infringement brought against the defendants by the claimants, Reed Executive plc and Reed Solutions plc (collectively Reed Employment). The parties were unable to agree the order consequential on the Court of Appeal's decision, and a further hearing was therefore required to deal with the matters in dispute. The facts are set out in the judgment of Jacob LJ.

Geoffrey Hobbs QC (instructed by *Slaughter & May*) for Reed Employment.

Martin Howe QC and *Amanda Michaels* (instructed by *Olswang*) for RBI.

Cur adv vult

14 July 2004. The following judgments were delivered.

JACOB LJ.

[1] Following our judgment given on 3 March 2004 ([2004] EWCA Civ 159, [2004] IP & T 1049) the parties were unable to agree the consequential order. The principal disagreement was on the question of costs but there were some minor disagreements on other points too.

THE MINOR POINTS

[2] The first of these was whether the recital before the operative part of the order should include a statement to the effect that the court did not consider a reference to the Court of Justice of the European Communities (ECJ) necessary. Reed Employment wanted this, but I could not understand why. It is true that the question of whether an own-name defence could apply under art 6(1) (of First Council Directive (EEC) 89/104 (to approximate the laws of the member states relating to trade marks) (OJ 1989 L40 p 1)) entered into the debate, but in the end nothing turned on it. Neither side asked for a reference nor did we rule on the question. I see no point in the recital. It could have no legal effect whatever.

[3] Next there is the form of declaration. Reed Employment's proposal read as follows:

> 'That prior to 27th June 2000 the First and Second Defendants have by visibly using the word "reed" on Version 1 of the totaljobs.com website home page and visibly using the Reed Business Information logos containing the word "Reed" on Versions 3 and 4 of the totaljobs.com website home page: (i) infringed Registered Trade Mark number 1296450: and (ii) passed off the totaljobs business and services as and for those of the Claimants and the companies represented by the First Claimant herein.'

[4] There were two differences in RBI's counter-proposal. First the word 'visibly' was not in it, and secondly it included the words 'but not otherwise'. Mr Howe QC accepted that the addition of 'visibly' was appropriate. As regards 'but not otherwise' the difference between the parties was not great. Mr Hobbs QC submitted that the words suggested that the court had considered some other matter when it had not done so. Mr Howe did not press his point greatly. I think it is appropriate to leave the words out. The order should simply specify the manners in which there was infringement. It need not go on to deal with those that do not.

[5] The third point related to the terms of a stay pending attempts to settle by alternative dispute resolution (ADR). It was not in dispute that there should be such a stay. The dispute was as to the scope of any proposed ADR. The present case is only one of a number of proceedings between the parties concerning the word 'Reed'. There are proceedings in the Trade Mark Registry in the United Kingdom, in the European Trade Mark Office (the Office for the Harmonisation of the Internal Market) and in at least two Commonwealth jurisdictions. In the end the dispute seemed to be more about the form of words than anything else. It was common ground that this court could not dictate to the parties the terms, or scope of, any ADR process. Following a suggestion of Rix LJ a form of words which was agreeable to both parties emerged during the course of the hearing. So there was nothing for us to resolve. It is perhaps worth recording that what was agreed includes an agreement that the parties, if they cannot agree upon a mediator, will ask Pumfrey J to appoint one from a panel of ADR Chambers or CEDR (the Centre for Dispute Resolution).

[6] The remaining minor matter relates to the sum of £350,000 paid by RBI to Reed Employment by way of an interim payment of costs pursuant to the order of Pumfrey J. If there is to be an order for repayment of this sum with interest what should the rate of interest be, the statutory judgment rate (currently 8%) or the commercial rate (normally 1% above base rate, but variable on appropriate evidence: see *Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No 2)* [1990] 3 All ER 723)? Base rates have fallen a lot since the judgment rate was last fixed (in 1993 by the Judgment Debts (Rate of Interest) Order, SI 1993/564). So it is RBI who want the judgment rate, and Reed Employment who want the commercial rate.

[7] I think the appropriate rate is the commercial rate. The judgment rate is purely artificial. I can see no reason for an artificial rate being imposed by the court save in those cases where it must, ie where there has been a judgment for a sum. Besides, a judgment debtor can avoid paying any interest by paying the debt so it is in a sense, a voluntary rate of interest.

COSTS

[8] I turn to costs. The difference between the parties is substantial. Although Reed Employment lost the appeal and, in the ultimate result, achieved only very limited success, Mr Hobbs, subject to a minor (now agreed) point about the evidence of a Mr Roche, suggests it should have 70% of the costs before Pumfrey J and of the appeal. Mr Howe asks for 70% of the costs of the action down to the second judgment of Pumfrey J, and all of the appeal. This dispute has given rise to two preliminary issues.

[9] The main issue is whether the court, following judgment on liability can, in relation to the question of costs, compel the parties to disclose the detail of 'without prejudice' negotiations. The other issue is whether or not the court's order as to costs should reflect the fact that RBI were not willing to take part in an alternative dispute resolution (ADR) process after it was proposed by Reed Employment. That issue arises even if disclosure is refused.

[10] The main issue—disclosure for the purposes of costs only—is posed here largely in the context of an allegedly unreasonable refusal to go to ADR, but, I think it is inextricably mixed up also with all other types of 'without prejudice' negotiations including those which are and will remain much more common than ADR, namely direct inter-party negotiation, written, oral or a combination of both.

[11] I begin with the Civil Procedure Rules, setting out all those which may bear on the problem.

'**1.1 The overriding objective**

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable ... (b) saving expense; (c) dealing with the case in ways which are proportionate—(i) to the amount of money involved; (ii) to the importance of the case; (iii) to the complexity of the issues ...

1.2 Application by the court of the overriding objective

The court must seek to give effect to the overriding objective when it—(a) exercises any power given to it by the Rules ...

1.3 Duty of the parties

The parties are required to help the court to further the overriding objective.

1.4 Court's duty to manage cases

(1) The court must further the overriding objective by actively managing cases.

(2) Active case management includes ... (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure; (f) helping the parties to settle the whole or part of the case ...

Part 26 Case Management—Preliminary Stage

26.4 Stay to allow for settlement of the case

(1) A party may, when filing the completed allocation questionnaire, make a written request for the proceedings to be stayed while the parties try to settle the case by alternative dispute resolution or other means ...'

The allocation questionnaire (Form N150, see PD 2.1) asks:

'Do you wish there to be a one month stay to attempt to settle the claim, either by informal discussion or by ADR?' a

'**Part 44 General Rules about Costs**

44.3 Court's discretion and circumstances to be taken into account when exercising its discretion as to costs

(1) The court has discretion as to—(a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid. b

(2) If the court decides to make an order about costs—(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party; but (b) the court may make a different order ...

(4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including—(a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36). (Part 36 contains further provisions about how the court's discretion is to be exercised where a payment into court or an offer to settle is made under that Part). c d

(5) The conduct of the parties includes—(a) conduct before, as well as during, the proceedings and in particular the extent to which the parties followed any relevant pre-action protocol; (b) whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue; (c) the manner in which a party has pursued or defended his case or a particular allegation or issue; and (d) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his claim ...' e

[12] It is particularly to be observed that there is nothing in these rules which purports to touch the existing law as to 'without prejudice' negotiations. By implication at least some of that is assumed to continue—r 44.3(4)(c) clearly assumes that some offers to settle are inadmissible. f

[13] In the main judgment I said ([2004] IP & T 1049 at [167]):

'... we will have to hear fresh submissions on costs. Those submissions ought to deal with two matters raised before us during the course of argument. First, by the time the letter before action was sent, RBI had decided to reduce the amount of use of Reed considerably, yet so far as we can see, Reed Employment were not told that and the action was allowed to start essentially on a false basis. Second, RBI refused a number of offers to go to mediation. Mr Howe told us there were serious settlement discussions, but they are not the same as mediation. A good and tough mediator can bring about a sense of commercial reality to both sides which their own lawyers, however good, may not be able to convey.' g h

[14] Since then the Court of Appeal has considered further the question of the effect of a refusal to mediate in *Halsey v Milton Keynes General NHS Trust, Steel v Joy* [2004] EWCA Civ 576, [2004] 4 All ER 920. That decision has made it clear that: j

'[10] ... if the parties (or at least one of them) remain intransigently opposed to ADR, then it would be wrong for the court to compel them to embrace it.

[11] ... the court's role is to encourage, not to compel ...'

[15] *Halsey*'s case has also established that:

> '[13] In deciding whether to deprive a successful party of some or all of his costs on the grounds that he has refused to agree to ADR, it must be borne in mind that such an order is an exception to the general rule that costs should follow the event. In our view, the burden is on the unsuccessful party to show why there should be a departure from the general rule. The fundamental principle is that such departure is not justified unless it is shown (the burden being on the unsuccessful party) that the successful party acted unreasonably in refusing to agree to ADR ...'

[16] Mr Hobbs seeks to invoke that principle here. [He did not agree with the burden being on the unsuccessful party and reserved his position on this, should this case go further]. He says that Reed Employment has shown a willingness to go to ADR which (until shortly before this last hearing) has been rejected out of hand by RBI and that such conduct was unreasonable. RBI say that their attitude to mediation cannot be fully justified without making reference to the content of 'without prejudice' communications. Reed Employment riposte by submitting that evidence of those negotiations is relevant and admissible on the question of costs. Hence it submits the court should make an order providing for disclosure of those negotiations. The detail of the order has not been formulated, but it would obviously cover not only all written exchanges of 'without prejudice' proposals but also evidence of all meetings at which settlement was discussed. It is entirely possible that there could be disputes about this, given that each side says it can show it was reasonable at the relevant time(s). The consequence might be a mini-trial. RBI resist all this. Their position is that given the fact of substantial 'without prejudice' negotiation, both before and after trial, Reed Employment are not in a position to prove that they (RBI) were unreasonable in refusing mediation when they did. RBI say the whole exercise of disclosure and what might be a mini-trial is unnecessary. They are confident they would win it if it came to that, but there is no point in the expense of it all. They accept that the existence of and dates and times of 'without prejudice' negotiations are admissible, but not their content. They say the court can only go on open material. So that if there is doubt left as to whether a party was unreasonable, that doubt cannot count against it.

[17] Rule 44.3(4) says the court is to have regard to 'all the circumstances'. Inherent in that is a difficulty—that 'without prejudice' negotiations, including offers and counter-offers, whether there should be an ADR, what form an ADR should take or what actually happens in an ADR (eg one or other side being recalcitrant) are all in principle relevant. Yet the 'without prejudice' rule apparently makes them inadmissible on the question of costs. Mr Hobbs challenges that and says that all of these are admissible on the question of costs.

[18] He does not go so far as to submit that legal advice to a party about negotiations or the strength of its case is admissible. Yet this too could form part of 'all the circumstances'—whether a party is given legal advice that it has a strong or watertight case is clearly a relevant matter to its attitude to mediation, as was recognised in *Halsey*'s case from which I quote two sentences:

> '[18] ... The fact that a party reasonably believes that he has a strong case is relevant to the question whether he has acted reasonably in refusing ADR ...
>
> [19] ... The fact that a party *unreasonably* believes that his case is watertight is no justification for refusing mediation. But the fact that a party *reasonably*

> believes that he has a watertight case may well be sufficient justification for a refusal to mediate.' *a*

[19] Mr Hobbs begins his argument by submitting that the exclusion of 'without prejudice' negotiations is a rule of evidence not a privilege, relying on *Rush & Tompkins Ltd v Greater London Council* [1988] 3 All ER 737, [1989] AC 1280. That case was not actually concerned with the difference. Nor, as I see, does it matter what label is attached to it. It is a rule of law. Normally 'privilege' attaches to the rights of a single party, for instance a party has, and can waive, legal professional privilege. The detail of 'without prejudice' negotiations has some analogy, the difference being that it is admissible if both parties 'waive' their rights to non-disclosure. But none of that matters here. Whatever the label, as it seems to me, Mr Hobbs must show that the rule of law permits the court to order the disclosure of 'without prejudice' negotiations on the question of costs. *b c*

[20] Negotiations or offers which have taken place expressly on the 'without prejudice save as to costs' basis are of course admissible on that question. So much was decided in the family law context in *Calderbank v Calderbank* [1975] 3 All ER 333, [1976] Fam 93 and in the general civil litigation context by *Cutts v Head* [1984] 1 All ER 597, [1984] Ch 290. Such offers go by the name '*Calderbank* offers'. *d*

[21] But generally, parties who have negotiated on a wholly 'without prejudice' basis have always done so in the faith and expectation that what they say cannot be used against them even on the question of costs. As long ago as 1889 this court held, in *Walker v Wilsher* (1889) 23 QBD 335 that, in the words of the headnote: *e*

> 'Letters or conversations written or declared to be "without prejudice" cannot be taken into consideration in determining whether there is good cause for depriving a successful litigant of costs.'

I shall call that the rule in *Walker v Wilsher*. Bowen LJ reasoned this way (at 339): *f*

> 'In my opinion it would be a bad thing and lead to serious consequences if the Courts allowed the action of litigants, on letters written to them without prejudice, to be given in evidence against them or to be used as material for depriving them of costs. It is most important that the door should not be shut against compromises, as would certainly be the case if letters written *g* without prejudice and suggesting methods of compromise were liable to be read when a question of costs arose.'

[22] There are exceptions to the general rule of non-admissibility of 'without prejudice' negotiations. Robert Walker LJ conveniently listed the most important instances in *Unilever plc v The Procter & Gamble Co* [2001] 1 All ER 783 at 791–793, [2000] 1 WLR 2436 at 2444–2445. What is not included in that list is a general exception of non-admissibility when it comes to the question of costs. Indeed, it is implicit that he thought there was no such general exception, as appears from the passage where he discusses *Calderbank* offers ([2001] 1 All ER 783 at 792, [2000] 1 WLR 2436 at 2445): *h j*

> '(7) The exception (or apparent exception) for an offer expressly made "without prejudice except as to costs" was clearly recognised by this court in *Cutts v Head*, and by the House of Lords in the *Rush & Tompkins* case, as based on an express or implied agreement between the parties. It stands apart from the principle of public policy (a point emphasised by the

a importance which the new Civil Procedure Rules, Pt 44.3(4), attach to the conduct of the parties in deciding questions of costs) ...'

[23] Mr Hobbs submitted that the inadmissibility of 'without prejudice' negotiations is based on public policy and that there was no public policy favouring exclusion solely on the question of costs—quite the reverse. He b pointed to r 44.3(4) ('all the circumstances') and to what was said about the rule in *Walker v Wilsher* by Oliver and Fox LJJ in *Cutts v Head*. Oliver LJ said ([1984] 1 All ER 597 at 605–606, [1984] Ch 290 at 306):

> 'If, however, the protection against disclosure rested solely on a public policy to encourage out-of-court settlement of disputes, *Walker v Wilsher* is c not readily intelligible, for, although the court, and in particular Bowen LJ, seem to have been prepared to assume that an inability to refer to the correspondence on a question of costs, after judgment, would encourage settlement, it is difficult to see, if one thinks about it practically, how that could do so. As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement, whilst, on the d other hand, it is hard to imagine anything more calculated to encourage obstinancy and unreasonableness than the comfortable knowledge that a litigant can refuse with impunity whatever may be offered to him even if it is as much as or more than everything to which he is entitled in the action. The public policy justification, in truth, essentially rests on the desirability of e preventing statements or offers made in the course of negotiations for settlement being brought before the court of trial as admissions on the question of liability.'

And ([1984] 1 All ER 597 at 606, [1984] Ch 290 at 307):

> f 'Whatever may have been the position in 1889, it is, I think, clear that there can now no longer be said to be any reason in public policy why, where offers have been made and refused of everything which could be obtained by the proceedings, that fact should not be brought to the court's attention in the argument as to costs.'

g Fox LJ said ([1984] 1 All ER 597 at 612, [1984] Ch 290 at 315):

> 'If a party is exposed to a risk as to costs if a reasonable offer is refused, he is more rather than less likely to accept the terms and put an end to the litigation. On the other hand, if he can refuse reasonable offers with no additional risk as to costs, it is more rather than less likely to encourage mere h stubborn resistance.'

[24] That public policy is no longer (if it ever was) the foundation of the rule in *Walker v Wilsher* was reaffirmed by Hoffmann LJ in *Muller v Linsley & Mortimer (a firm)* [1996] PNLR 74 at 77 where he said:

> j 'So, in *Cutts v. Head* the rule that one could not rely upon a without prejudice offer on the question of costs after judgment was held not to be based upon any public policy. It did not promote the policy of encouraging settlements because as Oliver L.J. said: "As a practical matter, a consciousness of a risk as to costs if reasonable offers are refused can only encourage settlement ..."'

[25] It is noteworthy that Hoffmann LJ plainly accepted that the rule was still good law. It is simply that its justification is only an implied agreement 'arising out of what is commonly understood to be the consequences of offering or agreeing to negotiate without prejudice', not the public policy of encouraging parties to negotiate and settle.

[26] It is also important to record that *Walker v Wilsher* was referred to ([1988] 3 All ER 737 at 740, [1989] AC 1280 at 1300) by Lord Griffiths giving the leading speech in the *Rush & Tompkins* case. He stated the rule it decided without any adverse comment on it.

[27] So, until the decision in *Halsey*'s case, the rule in *Walker v Wilsher* was the law: evidence of the detail of 'without prejudice' negotiations could not be given on the question of costs unless both sides agreed. Its application could be avoided by the simple expedient of using the *Calderbank* formula of negotiating 'without prejudice save as to costs'.

[28] Has *Halsey*'s case changed that position? Is the *Calderbank* formula now redundant? I think not. *Halsey*'s case certainly does not expressly abrogate the rule in *Walker v Wilsher*. Indeed it does not refer expressly to the rule at all, still less *Walker v Wilsher* itself.

[29] So far as what actually happens in an ADR, *Halsey*'s case clearly assumes and states that the rule applies. The court said ([2004] 4 All ER 920):

> '[14] We make it clear at the outset that it was common ground before us (and we accept) that parties are entitled in an ADR to adopt whatever position they wish, and if as a result the dispute is not settled, that is not a matter for the court. As is submitted by the Law Society, if the integrity and confidentiality of the process is to be respected, the court should not know, and therefore should not investigate, why the process did not result in agreement.'

[30] I can think of no rational reason why party-to-party negotiations should not be treated on the same basis. Indeed sometimes the line between a third party-assisted ADR and party-to-party negotiations may be fuzzy. Just because there is a mediator is no reason for the parties not to talk to each other if that is found to be helpful at some point in the process.

[31] Mr Hobbs suggested it was implicit that *Halsey*'s case pointed in a different direction from the rule in *Walker v Wilsher*. He particularly referred us to the following passages:

> '[16] ... The question whether a party has acted unreasonably in refusing ADR must be determined having regard to all the circumstances of the particular case. We accept the submission of the Law Society that factors which may be relevant to the question whether a party has unreasonably refused ADR will include (but are not limited to) the following: (a) the nature of the dispute; (b) the merits of the case; (c) the extent to which other settlement methods have been attempted; (d) whether the costs of the ADR would be disproportionately high; (e) whether any delay in setting up and attending the ADR would have been prejudicial; and (f) whether the ADR had a reasonable prospect of success.'

Mr Hobbs relies on the reference to 'all the circumstances'. But I read that as 'all admissible circumstances' not as abrogating the rule in *Walker v Wilsher*.

[32] There are other paragraphs of *Halsey*'s case which to my mind make it clear that the court considered that the rule was still good law. These occur in the passages about court encouraged ADR:

> '[29] So far we have been considering the question whether a successful party's refusal of ADR was unreasonable without regard to the impact of any encouragement that the court may have given in the particular case. Where a successful party refuses to agree to ADR despite the court's encouragement, that is a factor which the court will take into account when deciding whether his refusal was unreasonable. The court's encouragement may take different forms. The stronger the encouragement, the easier it will be for the unsuccessful party to discharge the burden of showing that the successful party's refusal was unreasonable.
>
> [30] An ADR order made in the Admiralty and Commercial Court in the form set out in Appendix 7 to the Admiralty and Commercial Court Guide (see Green Book, vol 1, p 1825) is the strongest form of encouragement. It requires the parties to exchange lists of neutral individuals who are available to conduct "ADR procedures" (see para 1), to endeavour in good faith to agree a neutral individual or panel and to take (para 4) "such serious steps as they may be advised to resolve their disputes by ADR procedures before the neutral individual or panel so chosen". The order also provides (para 5) that, if the case is not settled, "the parties shall inform the Court what steps towards ADR have been taken and (without prejudice to matters of privilege) why such steps have failed". It is to be noted, however, that this form of order stops short of actually compelling the parties to undertake an ADR.
>
> [31] Nevertheless, a party who, despite such an order, simply refuses to embark on the ADR process at all would run the risk that *for that reason alone* his refusal to agree to ADR would be held to have been unreasonable, and that he should therefore be penalised in costs. It is to be assumed that the court would not make such an order unless it was of the opinion that the dispute was suitable for ADR.
>
> [32] A less strong form of encouragement is mentioned in the other court guides to which we have referred at [6], above. A particularly valuable example is the standard form of order now widely used in clinical negligence cases, and which was devised by Master Ungley. The material parts of this order provide:
>
> > "The parties shall by ... consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement without prejudice save as to costs, giving reasons upon which they rely for saying that the case was unsuitable."'

[33] Both forms of court approved order, themselves approved in *Halsey*'s case, refer to the 'without prejudice' rule. This would be wholly unnecessary if it did not apply when the question of costs was being considered after the determination of liability.

[34] I therefore conclude that the rule in *Walker v Wilsher* remains good law and that the court cannot order disclosure of 'without prejudice' negotiations against the wishes of one of the parties to those negotiations. This may (indeed does) mean that in some cases the court when it comes to the question of costs cannot decide whether one side or the other was unreasonable in refusing mediation.

[35] I do not regard such a conclusion as disastrous or damaging from the point of view of encouraging ADR. Far from it. Everyone knows the *Calderbank* rules. It is open to either side to make open or *Calderbank* offers of ADR. These days there is no shame or sign of weakness in so doing. The opposite party can respond to such offers, either openly or in *Calderbank* form. If it does so and gives good reason(s) why it thinks ADR will not serve a useful purpose, then that is one thing. If it fails to do so, then that is a matter the court may consider relevant (not decisive, of course) in exercising its discretion as to costs. The reasonableness or otherwise of going to ADR may be fairly and squarely debated between the parties and, under the *Calderbank* procedure, made available to the court but only when it comes to consider costs.

[36] Before parting with the general question there is one other matter I should mention. Suppose one party is prepared for the 'without prejudice' negotiations to be disclosed and the other not. Is that a matter that can be taken into account in deciding costs—with some sort of adverse inference to be drawn against the party refusing disclosure? Mr Hobbs did not advance such a case, though the point was raised by the court prior to the hearing. He was right and realistic not to do so. The rule, based on convention, is that the negotiations cannot be used. If an adverse inference were to be drawn against a party refusing disclosure there would be clear indirect pressure on it to permit disclosure. That would be contrary to the basis of the completely without prejudice negotiations.

[37] Accordingly I do not think the court has power to order any disclosure of the detail of the 'without prejudice' negotiations for the purposes of deciding the question of costs.

[38] Further, even if there were a discretion in the matter (which I do not think there is) all questions of liability in this case are not over. Determination of 'liability' can mean two things: final determination of all the matters in dispute, or determination of only some matters in dispute. *Walker v Wilsher* and the other cases cited were instances where there had been a final determination of the dispute as a whole—they were not split trial cases. Here disclosure of the 'without prejudice' negotiations would include disclosure of the undecided contentious point of quantum of damage. It would also involve disclosure in advance of decision in all the trade mark registry and foreign litigation. Disclosure is being sought after a battle, not the war.

[39] Mr Hobbs recognised that. He said these matters could be covered by an appropriate order restricting any use of the disclosure in relation to these ongoing disputes. That may be so in an appropriate case—it was done in *Family Housing Association (Manchester) Ltd v Michael Hyde & Partners (a firm)* [1993] 2 All ER 567, [1993] 1 WLR 354 (a case involving disclosure of affidavit evidence of 'without prejudice' material for the limited purpose of defeating an application to strike out for want of prosecution). But there is always a danger of leakage and more so where the disclosure may go beyond mere documents and may perhaps be a prelude to a mini-trial about who was unreasonable and when. So the fact that the war is not fully over may also be a reason for the court maintaining the confidentiality of the without prejudice negotiations. I think there is enough

undecided matter in this case, that even if there were a discretion, disclosure ought to be refused.

[40] I turn to whether, on the open materials, it is shown that RBI were unreasonable in refusing to go to ADR. It is important here to summarise the facts concerning the proposals for mediation. Neither side asked for a stay for settlement or ADR on the allocation questionnaire even though that questionnaire positively raises the question. Each was positively saying 'no point' to such a procedure up to and including trial.

[41] The first mention of ADR was by Pumfrey J on 14 October 2002, the first day of the hearing about the form of order. This was well after the first judgment by which Reed Employment had achieved a substantial measure of success—practically all uses of Reed by RBI were held to amount to passing off or infringement or both. By then also both sides had spent a large amount of costs.

[42] In open court Reed Employment then suggested a stay of any inquiry as to damages (but not the finalisation of the order) pending ADR. The hearing continued, the second judgment was given and the order finalised.

[43] I cannot see any room for any special order for costs arising from a failure to mediate down to that point. By the time of the judge's suggestion, most of the costs had been spent, and in any event neither side proposed a mediation to take place prior to finalisation of the order.

[44] What then about the costs of the appeal? Mr Hobbs relies upon the fact that Reed Employment openly invited RBI to make use of the Court of Appeal's mediation scheme, an invitation rejected by RBI. That is the high-water mark of his case that RBI were unreasonable in refusing mediation. He submits that pursuit of the overriding objective in effect required RBI to go to ADR and that by its failure to do so it was in breach of its duty under r 1.3.

[45] I do not think refusal at that stage remotely shows that RBI were unreasonable. Reed Employment by then would have been negotiating from a position of considerable strength—they had got a decision which might put RBI in difficulties over the use of its name, a wide meaning given to 'employment agency services' which could well be used in other jurisdictions, a very substantial order for costs, and they were claiming very substantial damages. Mr Hugh Laddie (as he then was) used to say when he was at the Bar: 'Always try to negotiate with your foot on the other man's neck.' That would have been the starting point of any negotiation or any ADR process. Lateness in proposing ADR is itself a relevant factor and the proposal was very late here.

[46] Far from being unreasonable I think it was entirely reasonable for RBI to pursue the appeal. They had at least a reasonable (and as it turned out justified) belief in their prospects. For all I know they had been advised they had a very good or even watertight case. They had ongoing disputes in other jurisdictions to consider. It may be that an ADR process would have worked, but the prospects did not look good given the wide disparity between the parties. Moreover the case was full of novel points (metatag use, art 5(1)(a) or (b), own name used as a trade mark and so on)—this would have made it much trickier to formulate any deal.

[47] Accordingly I conclude that the possibility of ADR is not a relevant factor to be taken into account for the court's decision on costs. That leaves over for debate the other factors referred to in the parties' several skeleton arguments, particularly those relating to allocation of issues and whether the action was allowed to start on a false basis (see the main judgment [2004] IP & T 1049 at [167] quoted at [13], above).

[48] There must be a further short hearing concerning this matter and any other matters (which include leave to appeal) still in contention. That date has already been fixed. I propose that the parties should submit a fresh draft order indicating their agreements and disagreements seven days before that hearing together with new skeleton arguments gathering together all their submissions on the points still in issue.

RIX LJ.

[49] I agree.

AULD LJ.

[50] I also agree.

Order accordingly.

Kate O'Hanlon Barrister.

R v Jones and others

[2004] EWCA Crim 1981

COURT OF APPEAL, CRIMINAL DIVISION

LATHAM LJ, GIBBS J AND JUDGE RICHARD BROWN

29, 30 JUNE, 21 JULY 2004

Criminal law – Damage to property – Defence – Reasonable force in the prevention of crime – Meaning of 'crime' – Criminal Law Act 1967, s 3.

Criminal law – Damage to property – Defence – Lawful excuse – Protection of property belonging to another – Whether damage defendant seeking to prevent necessarily result of illegal act – Criminal Damage Act 1971, s 5(2)(b).

The five defendants had been discovered, on three separate occasions in March 2003, within the perimeter of a Royal Air Force base which at that time was an operational military airbase, a NATO stand-by base, and home to allied United States visiting forces. They were prosecuted under, inter alia, the Criminal Damage Act 1971, for offences, inter alia, of criminal damage, conspiring to cause criminal damage or having articles in their custody intending that they should be used to destroy or damage property in a way which they knew was likely to endanger the lives of others. Their defence statements for the purposes of their trials were based on the assertion that they had been attempting to prevent the attack by the United Kingdom and the United States on Iraq, which attack was an unlawful act, so that they were entitled to rely upon the defences of: (i) the prevention of crime under s 3[a] of the Criminal Law Act 1967, which provided that a person 'may use such force as is reasonable in the circumstances in the prevention of crime'; (ii) lawful excuse under s 5(2)(b)[b] of the 1971 Act, which provided that a person was to be treated as having a lawful excuse if he, inter alia, did the damage or intended damage in order to protect property belonging to another believing that the property was in immediate need of protection and that the means of protection were reasonable having regard to all the circumstances, and the belief was honestly held whether justified or not; and (iii) duress of circumstance/necessity. At a preparatory hearing the judge held: (i) that the issue of the legality of the war was not justiciable in domestic courts; (ii) that s 3 of the 1967 Act applied only to a 'crime' under domestic law; (iii) that the only matters relevant to a defence under s 5 of the 1971 Act were those expressly set out, so that a defendant had a lawful excuse if he acted in order to protect property, and at the time he so acted he believed that the property was in immediate need of protection and that means adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances as the defendants believed them to be, so that there was no requirement that the damage which the defendants had been seeking to prevent was the result of an illegal act; and (iv) that for a defence of necessity to be available, a defendant had to show, inter alia, that he

a Section 3 is set out at [3], below

b Section 5, so far as material, is set out at [3], below

had committed what otherwise would be an offence of criminal damage to prevent an act of greater evil (which act was neither required to be unlawful nor to take place within the jurisdiction), and that that greater evil was directed to those whom the defendant reasonably believed he had responsibility. The judge therefore concluded that the legality or illegality of the war against Iraq was not a relevant issue in the trial. The defendants appealed against his rulings on justiciability and s 3 of the 1967 Act, contending, inter alia, that there was a crime of aggression in international law recognised in domestic law. The Crown appealed against the ruling relating to s 5 of the 1971 Act.

Held – (1) The international rules as to the crime of aggression could not constitute a crime for the purposes of s 3 of the 1967 Act. Section 3, which gave protection in domestic law to those acting to prevent crime, can only have intended that protection to apply where a criminal offence in domestic law was involved. The question as to whether or not a rule of international law formed part of English law was governed by the principle of certainty, and the question as to whether or not it constituted a crime depended on an analysis of whether or not a breach of the rule could properly result in penal consequences. But there was no consensus as to an essential element of the crime of aggression and accordingly, it could not be said that there was a firmly established rule of international law which established a crime of aggression which could be translated into domestic law as a crime in domestic law, (see [18], [24], [30], [34], [42], [43], below); *Re Piracy Jure Gentium* [1934] All ER Rep 506, *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97, *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499, and *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] 3 All ER 209 considered.

(2) Section 5 of the 1971 Act did not require that the facts honestly believed by a defendant had to establish the threat of unlawful damage to his or another's property (see [46], [47], below).

(3) Necessity was potentially a domestic defence to a domestic offence. The executive's action in declaring and waging war was, in itself, a lawful exercise of its powers under the prerogative. At trial, in the instant cases, the court would accordingly have to consider the extent to which necessity might afford a defence to the defendants in the light of their beliefs on that basis. It followed that (save to that limited extent) the question of the legality of the war in Iraq was not a matter which arose in the instant cases and it was not therefore necessary to consider whether that issue was non-justiciable (see [54]–[56], below); *R v Martin* [1989] 1 All ER 652, *R v Abdul-Hussain* [1999] Crim LR 570 and *R v Shayler* [2001] 1 WLR 2206 considered.

Notes

For the defences of necessity, reasonable force and lawful excuse, see 11(1) *Halsbury's Laws* (4th edn reissue) paras 26, 451, 598.

For the Criminal Law Act 1967, s 3, see 12 *Halsbury's Laws* (4th edn) (2002 reissue) 313.

For the Criminal Damage Act 1971, s 5, see 12 *Halsbury's Laws* (4th edn) (2002 reissue) 524.

Cases referred to in judgment

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.

Hutchinson v Newbury Magistrates' Court (2000) 122 ILR 499, DC.

Kuwait Airways Corp v Iraqi Airways Co (No 3) [2002] UKHL 19, [2002] 3 All ER 209, [2002] 2 AC 883, [2002] 2 WLR 1353.

Legality of the Threat or Use of Nuclear Weapons, Case Concerning the (1996) 110 ILR 163, Int Ct of Just.

Maclaine Watson & Co Ltd v Dept of Trade and Industry [1988] 3 All ER 257, sub nom *J H Rayner (Mincing Lane) Ltd v Dept of Trade and Industry*, [1989] Ch 72, [1988] 3 WLR 1033, CA; *affd* [1989] 3 All ER 523, [1990] 2 AC 418, [1989] 3 WLR 969, HL.

Piracy Jure Gentium, Re [1934] AC 586, [1934] All ER Rep 506, PC.

Proprietary Articles Trade Association v A-G for Canada [1931] AC 310, [1931] All ER Rep 277, PC.

R (on the application of Campaign for Nuclear Disarmament) v Prime Minister [2002] EWHC 2777 (Admin), [2003] 3 LRC 335, DC.

R v Abdul-Hussain [1999] Crim LR 570, CA.

R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3) [1999] 2 All ER 97, [2000] 1 AC 147, [1999] 2 WLR 827, HL.

R v Hill, R v Hall (1989) 89 Cr App R 74, CA.

R v Hunt (1977) 66 Cr App R 105, CA.

R v Martin [1989] 1 All ER 652, CA.

R v Shayler [2001] EWCA Crim 1977, [2001] 1 WLR 2206; *affd* [2002] UKHL 11, [2002] 2 All ER 477, [2003] 1 AC 247, [2002] 2 WLR 754.

Sandrock, Re (1945) 13 ILR 297, British Military Ct in Holland.

Trendtex Trading Corp v Central Bank of Nigeria [1977] 1 All ER 881, [1977] QB 529, [1977] 2 WLR 356, CA.

West Rand Central Gold Mining Co Ltd v R [1905] 2 KB 391, DC.

Appeals

Margaret Jones and Paul Milling were charged with conspiring together to cause criminal damage on 13 March 2003, contrary to s 1(1) of the Criminal Law Act 1997. Toby Olditch and Philip Pritchard, were charged: (i) with conspiring together to cause criminal damage, contrary to s 1(1) of the 1997 Act, between 16 and 19 March 2003, and (ii) with having articles in their custody or control on 18 March 2003 intending to destroy or damage property in a way in which they knew was likely to endanger the lives of others contrary to s 3(b) of the Criminal Damage Act 1971. Josh Richards was charged: (i) with attempted arson on 18 March 2003 being reckless as to whether the life of another would thereby be endangered, (ii) with having articles in his custody or control on 18 March 2003 intending to destroy or damage property in a way in which he knew was likely to endanger the lives of others contrary to s 3(b) of the 1971 Act, and (iii) with criminal damage contrary to s 1(1) of the 1971 Act. Each of the defendants, and the Crown, appealed with leave of the judge from rulings on the questions set out at [4], below given by Grigson J at a preparatory hearing in the Bristol Crown Court under s 29 of the Criminal Procedure and Investigation Act 1996 on 12 May 2004. The facts are set out in the judgment.

James Lewis QC and *James Hines* (instructed by *The Stokoe Partnership*) for Jones and Milling.

Vaughan Lowe and *Alison Macdonald* (instructed by *Bindman & Partners*) for Olditch and Pritchard.

Keir Starmer QC and *Hugo Charlton* (instructed by *The Stokoe Partnership*) for Richards.

Professor Malcolm Shaw QC, Mark Ellison and *Peter Blair* (instructed by the *Crown Prosecution Service*, Gloucestershire) for the Crown.

Cur adv vult

21 July 2004. The following judgment of the court was delivered.

LATHAM LJ.

INTRODUCTION

[1] These appeals arise out of rulings given by Grigson J at a preparatory hearing under the provisions of s 29 of the Criminal Procedure and Investigations Act 1996 on 12 May 2004. Those rulings relate to a common issue raised in the three prosecutions with which we are concerned, namely the extent to which the defendants in the proceedings can rely on their beliefs as to the lawfulness of the United Kingdom's actions in preparing for, declaring, and waging war in Iraq in 2003.

THE BACKGROUND FACTS

[2] (i) *R v Jones and Milling*

These defendants are jointly indicted with conspiring together, contrary to s 1(1) of the Criminal Law Act 1977 on 13 March 2003, to cause criminal damage. At about 21.45 hrs on that day, the defendants were discovered together by a senior USAF airman in the secure fuel installation complex inside the perimeter fence of RAF Fairford, which was at the time a 24-hour operational military airbase and NATO stand-by base, as well as being home to allied United States visiting forces. They were in possession of tools which had enabled them to enter the airbase, and which they intended to use to cause damage to equipment on the airbase. By the time that they were apprehended, they had damaged three refuelling trucks, two munitions trailers and their tractor units. When arrested they both stated that it was their intention to prevent the United States and the United Kingdom from using the base for what they described as a launching pad for war crimes.

(ii) *R v Olditch and Pritchard*

These defendants are charged with two counts. The first count is conspiracy contrary to s 1(1) of the 1977 Act between 16 and 19 March 2003 to cause criminal damage. The second is having articles in their custody or control on 18 March 2003 intending to destroy or damage property in a way which they knew was likely to endanger the lives of others contrary to s 3(b) of the Criminal Damage Act 1971. At about 5.25 am on 18 March 2003, the defendants were discovered lying in the grass inside the perimeter of RAF Fairford. They both had rucksacks in their possession containing items which were clearly intended to cause damage, although no damage had in fact been

occasioned before they were arrested. Each of them asserted in prepared typed statements that they were intending to take action against the bombers on the airbase in such way as to immobilise them if possible on the grounds that the United Kingdom and the United States were acting unlawfully.

(iii) *R v Richards*

This defendant is charged with three counts. The first count is attempted arson on 18 March 2003 being reckless as to whether the life of another would thereby be endangered. The second is having articles in his custody or under his control on the same date intending that they should be used to destroy or damage property in a way which he knew was likely to endanger the lives of others contrary to s 3(b) of the 1971 Act. And the third is criminal damage contrary to s 1(1) of the 1971 Act. The defendant was discovered at 02.10 hrs on 18 March 2003 just outside the perimeter fence of RAF Fairford close to where a section of the perimeter fence had recently been cut. He was in possession of a rucksack in which petrol and washing-up liquid was found mixed together, which he said were intended to set fire to the wheels of a bomber. He stated that he had intended to take this action in order to stop a crime in that the bombers were taking part in an illegal war.

THE PREPARATORY HEARING

[3] The defence statements for the purposes of the trials were based on the assertion that the attack on Iraq was an unlawful act which they were attempting to prevent. As a result, each submitted that they were entitled to rely upon three defences: (a) duress of circumstance/necessity; (b) the defence of lawful excuse under s 5(2)(b) of the 1971 Act, which provides as follows:

> 'A person charged with an offence to which this section applies shall ... be treated ... as having a lawful excuse ... (b) if he destroyed or damaged or threatened to destroy or damage the property in question or, in the case of a charge of an offence under section 3 above, intended to use or cause or permit the use of something to destroy or damage it, in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, at the time of the act or acts alleged to constitute the offence he believed—(i) that the property, right or interest was in immediate need of protection; and (ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.
>
> (3) For the purpose of this section it is immaterial whether a belief is justified or not if it is honestly held.'

(c) The prevention of crime under s 3(1) of the Criminal Law Act 1967, which provides: 'A person may use such force as is reasonable in the circumstances in the prevention of crime ...'

[4] The prosecution sought rulings from the judge in relation to the following questions:

> '(i) Can a defendant facing criminal proceedings in an English court challenge the legality of the use of force by the United Kingdom government and/or the government of the USA and other states, against

Iraq in March 2003 in reliance upon UN Security Council Resolutions? (justiciability) (a) If the answer to question (i) is "No", is the defence of necessity available to the defendant as a matter of law, on the most favourable view to him on the material available and likely to be available? (b) If the answer to question (i) is "No", is the defence of use of reasonable force in the prevention of crime under Section 3 of the Criminal Law Act 1967 available to either of the defendants on the most favourable view to them on the material available or likely to be available?

(ii) Is the defence of lawful excuse under s 5 of the Criminal Damage Act 1971 available to the defendant on the most favourable view to him of the material available or likely to become available?

(iii) Does the defence provided by s 3 of the 1967 Act extend to the reasonable use of force by them against the person?'

[5] The judge declined to give a ruling on the basis of any assumptions as to the facts. No one suggests that he was wrong to take that course. As far as the question relating to s 3 of the 1967 Act was concerned, that confined itself in argument to an issue of what, if any, crime or crimes could be relied upon by the defence.

THE JUDGE'S DECISION

[6] The judge concluded that the issue of the legality of the war was not justiciable in domestic courts on the basis that the United Kingdom government was exercising its prerogative powers in relation to foreign policy and the deployment of the armed forces, which were issues into which the courts would not inquire. As far as the defence under s 5 of the 1971 Act was concerned, he concluded that the only matters which were relevant were those expressly set out in the subsection, so that a defendant had a lawful excuse if he acted in order to protect property, and at the time he so acted he believed that the property was in immediate need of protection and that the means adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances as the defendants believed them to be. He ruled that there was no requirement that the damage to the property which the defendants sought to prevent was the result of an illegal act. As far as s 3 of the 1967 Act was concerned, he ruled that this must mean a crime in domestic law. He rejected the defendants' submissions that there was an international crime of aggression which was triable in domestic courts. But he ruled that under the International Criminal Court Act 2001, certain war crimes committed by individuals were triable in domestic courts, so that the defendants were entitled to argue that they had not acted unlawfully in so far as they were able to establish that they believed that any force they used was reasonable force to prevent such offences from being committed. As to necessity or duress of circumstance, he said as follows:

'49. As it seems to me, for the defence of necessity to be available, a defendant must show: (i) that he committed what would otherwise be an offence of criminal damage in order to prevent an act of greater evil. There is no requirement that the act of greater evil should be unlawful, nor that it take place within the jurisdiction. (ii) That the greater evil was directed at those for whom the defendant reasonably believed he had

responsibility or for whom the situation made him responsible. It would be a matter for the jury to decide whether a defendant could reasonably believe he was responsible for the citizens of Iraq against whom his own government had decided or might decide (in the exercise of prerogative power) to use force. (iii) That the actions were reasonable and proportionate to the evil to be avoided. (iv) That on the facts as the defendant reasonably believed them to be he was driven to act as and when he did to avert harm that was about to happen ...'

[7] He concluded that the actual legality or illegality of the war against Iraq was accordingly not a relevant issue in the trial. He gave leave to each of the defendants to appeal against his ruling on justiciability, and gave leave to both the prosecution and the defence to appeal his rulings on the specific defences.

THE APPEALS

[8] The defendants have appealed against the judge's ruling on justiciability and his conclusion that the alleged crime of aggression is not a crime for the purposes of s 3 of the 1967 Act. The prosecution has appealed against his ruling in relation to the defences of duress of circumstance and lawful excuse under s 5 of the 1971 Act in so far as that permitted the jury to take into account in determining the reasonableness of the defendants actions the inevitable consequences of a declaration of war. The prosecution do not appeal against the judge's ruling that the jury is entitled to consider a defence based upon the prevention of alleged offences under the 2001 Act.

THE ISSUES

[9] We have heard extensive argument on domestic and international law, a substantial proportion of which has been directed to the issue of justiciability. That is a difficult and controversial topic which has already been the subject of a decision of this court in relation to what was then the threatened war in Iraq in *R (on the application of Campaign for Nuclear Disarmament) v Prime Minister* [2002] EWHC 2777 (Admin), [2003] 3 LRC 335. The Campaign for Nuclear Disarmament sought to obtain in judicial review proceedings a declaration as to the true meaning of Resolution 1441 adopted by the United Nations Security Council on 8 November 2002 and a declaration as to whether or not it authorised states to take military action in the event of non-compliance by Iraq with its terms. A Divisional Court of three, presided over by Simon Brown LJ, dismissed the application. The court held that the questions raised by the allegation were non-justiciable. Simon Brown LJ gave as his reasons, firstly that the court had no jurisdiction to declare the true interpretation of an international instrument which had not been incorporated into English domestic law and which it was unnecessary to interpret for the purposes of determining an individual's rights or duties under domestic law; secondly that the court would in any event decline to embark upon the determination of an issue if to do so would be damaging to the public interest in the field of international security or defence.

[10] Maurice Kay J gave as his principal reason for rejecting the claim the fact that the subject matter of the application was one which was within forbidden area for the courts, citing a passage from the speech of Lord Fraser of Tullybelton

in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 942, [1985] AC 374 at 398:

> '... many of the most important prerogative powers which are concerned with control of the armed forces and with foreign policy and with matters which are unsuitable for discussion or review in the law courts.'

[11] Richards J considered that the claim was an attempt to limit the government's freedom of movement in relation to the actual use of military force, so that took it squarely into the fields of foreign affairs and defence. He said ([2003] 3 LRC 335 at [59]):

> 'In my view it is unthinkable that the national courts would entertain a challenge to a government decision to declare war or to authorise the use of armed force against a third country. That is a classic example of a non-justiciable decision.'

[12] This echoes a comment by Simon Brown LJ (at [15]): 'CND must inevitably recognise that any future decision to take military action would plainly be beyond the court's purview ...'

[13] These passages neatly identify the respective arguments put before us. The defendants submit that unlike CND, they are not asking for a declaratory judgment, but are seeking to obtain the court's ruling on matters which affect their rights or duties under domestic law. It is accordingly necessary for the court to inquire into the lawfulness of the government's actions in declaring war; or to be more exact, it will be necessary for the judge to direct the jury as to the ingredients of the international crime of aggression, which is the basis of the defendants' contention that the government's action was unlawful, so as to enable the jury to determine whether or not the defendants' beliefs as to the facts justify the conclusion that that crime was about to be committed. It is further submitted that to assert that that inquiry was non-justiciable on the grounds that it related to the exercise of the executive's undoubted prerogative powers in relation to foreign affairs and the disposition of armed forces would be, in effect, to grant the executive immunity from the criminal law. The prosecution on the other hand submit that this would involve the court through the respective roles of the judge and the jury in the trial, in inquiring into subject matter which is quintessentially incapable of being explored by the courts for the reasons given by the judges in the *CND* case.

[14] There is, it seems to us, considerable force in the argument that the *CND* case does not, in itself, provide the answer to the issue of justiciability in the present case for both of the fundamental reasons advanced by the defendants. But that issue simply does not arise if the judge's other rulings are correct. If he is right that under s 3 of the 1967 Act, a crime must be a crime in domestic law and the alleged international crime of aggression was not part of domestic law, that answers the question in relation to the proposed defence under s 3. If he is right that the lawfulness or otherwise of the executive's actions were irrelevant to the jury's considerations under s 5 of the 1971 Act, and in relation to the defence of duress of circumstance, again the issue simply does not arise. It seems to us, therefore, that it is essential to determine the correctness of those parts of the ruling by the judge in order to determine

whether the issue of justiciability is one which needs to be addressed, and if so its context.

SECTION 3 OF THE CRIMINAL LAW ACT 1967

[15] The first question is whether or not the word 'crime' in s 3 means a crime in domestic law, or has some wider meaning. Mr Lewis QC on behalf of Jones and Milling submits that we should give a broad meaning to the word. He has referred us to *Smith & Hogan: Criminal Law* (10th edn, 2002) p 19, in which Sir John Smith cites from the judgment of Lord Atkin in *Proprietary Articles Trade Association v A-G for Canada* [1931] AC 310 at 324, [1931] All ER Rep 277 at 283:

> 'The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: is the act prohibited with penal consequences?'

[16] Further on (p 22), Sir John Smith says that when asking the question how, in effect, is a judge to determine whether or not any actions are criminal; the answer must be:

> 'Surely, only by ascertaining whether the legislature (or the courts in the case of a common law crime) have prescribed that the proceedings shall be criminal; and this must depend, primarily, upon whether it is intended to be punitive.'

[17] It seems to us that the citation from *Smith & Hogan: Criminal Law* begs the question. Whilst accepting that an international crime may exist independently of any procedure proscribed by general consent or treaty for their trial and punishment, it can only be a crime if the consequences to the perpetrator amount to punishment, which can only be the case if what is described as the international crime is, in the absence of any international tribunal given jurisdiction in relation to that crime, triable and punishable in domestic law.

[18] There is no definition of 'crime' in the 1967 Act. But it seems clear to us that the section which gives protection in domestic law to those acting to prevent crime can only have intended that protection to apply where a criminal offence in domestic law is involved. If it were otherwise, it is difficult to see how any satisfactory definition of the word 'crime' could be arrived at. It could not be intended to refer to something which would amount to a crime in another jurisdiction, for that would give extra-territorial effect in England to the criminal laws in another jurisdiction. In the case of an alleged international crime, it could only amount to a crime on Sir John Smith's formulation if it were punishable somewhere. If it was punishable in another jurisdiction but not in the United Kingdom, this would give rise to the same objection.

[19] Whether the alleged international crime of aggression is a crime in domestic law depends upon the effect of public international law rules in English law. Sir William Blackstone in his *Commentaries on the Laws of England* (1769) Bk 4, ch V, pp 66–67 deals with what he describes as 'Offences against the Law of Nations':

'The law of nations is a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world; in order to decide all disputes to regulate all ceremonies and civilities, and to ensure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can; and, in time of war, as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree: or they depend upon mutual contact or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject. In arbitrary states this law, wherever it contradicts, or is not provided for by the municipal law of the country, is enforced by the royal power: but since in England no royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be part of the law of the land.'

[20] In *West Rand Central Gold Mining Co Ltd v R* [1905] 2 KB 391 at 406–407, Lord Alverstone CJ said:

'The second proposition urged by Lord Robert Cecil, that international law forms part of the law of England, requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilized nations must have received the assent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to try questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilized State would repudiate it.'

[21] In *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 All ER 881, [1977] QB 529 it was accepted that the principles of international law relating to sovereign immunity were part of English law. The debate was over the extent to which that was a static concept.

[22] In that context, Lord Denning MR said ([1977] 1 All ER 881 at 889–890, [1977] QB 529 at 554):

> 'Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law.'

[23] And finally, if any further citation on this were necessary, Nourse LJ said in *Maclaine Watson & Co Ltd v Dept of Trade and Industry* [1988] 3 All ER 257 at 324, [1989] Ch 72 at 207:

> 'For up to two and a half centuries it has been generally accepted amongst English judges and jurists that international law forms part of the law of this country, at all events if it can be shown that there is an established rule which, first, is derived from one or more of the recognised sources of international law and, second, has already been carried into English law by statute, judicial decision or ancient custom.'

[24] There is no doubt, therefore, that a rule of international law is capable of being incorporated into English law if it is an established rule derived from one or more of the recognised sources, that is a clear consensus, evidenced by the writings of scholars or otherwise, or by treaty. The second requirement referred to by Nourse LJ, namely that it has been carried into English law by statute, judicial decision or ancient custom is, it seems to us, more doubtful. Whilst clearly its recognition by statute will ipso facto, give it effect, in so far as it is suggested that there must be either a previous judicial decision or ancient custom, in other words, in effect, some clear acceptance by the court of the existence of the rule as part of English law, that would emasculate the principle. It would in effect prevent any clearly established rule of international law becoming part of English law other than by statute. In our view, the question as to whether or not a rule of international law forms part of English law is governed by the principle of certainty; and the question as to whether or not it constitutes a crime depends upon an analysis of whether or not a breach of the rule can properly result in penal consequences. The mere fact that an act can clearly be established to be proscribed by international law, and is described as 'a crime' does not necessarily of itself determine its character in domestic law unless its characteristics are such that it can be translated into domestic law in a way which would entitle domestic courts to impose punishment.

[25] The defendants submit that there are essentially five recognised international law crimes which fall into that category. These are war crimes, crimes against humanity, crimes against peace, which include the crime of aggression, piracy and torture. It is submitted that these are all crimes which are recognised in domestic law and are, accordingly, crimes for the purposes of s 3 of the 1967 Act.

[26] The defendants have only, however, been able to identify one case as support for the proposition that any of those 'crimes' is, merely by virtue of international law, a crime in English law. That is *Re Piracy Jure Gentium* [1934] AC 586, [1934] All ER Rep 506. That case arose out of charges of piracy brought against Chinese nationals who had pursued and attacked a cargo junk. They were indicted in Hong Kong for the crime of piracy and found

guilty subject to the following question of law: 'Whether an accused person may be convicted of piracy in circumstances where no robbery has occurred.' a

[27] The Full Court of Hong Kong came to the conclusion that robbery was a necessary ingredient of the offence of piracy and the accused were acquitted. The question of the correctness of that order was submitted to the Privy Council, which concluded that a frustrated attempt to commit piratical robbery was equally piracy jure gentium. b

[28] In considering that question, the Board approached the question on the basis that the offence that was charged was not the domestic offence of piracy as defined in domestic law, that is the statutory laws applying to Hong Kong, but was the international law of piracy. Viscount Sankey LC stated that the question therefore had to be determined by reference to the principles of international law. He said ([1934] AC 586 at 589, [1934] All ER Rep 506 at 507): c

> 'With regard to crimes as defined by international law, that law has no means of trying or punishing them. The recognition of them as constituting crimes, and the trial and punishment of criminals, are left to the municipal law of each country.' d

[29] And later, having considered domestic authorities in relation to the definition of piracy, he said ([1934] AC 586 at 594, [1934] All ER Rep 506 at 510): e

> 'These, however, are immaterial for the purpose of the case, because it must always be remembered that the matter under present discussion is not what is piracy under any municipal Act of any particular country, but what is piracy jure gentium.' f

[30] We accept that this case is authority for the proposition that a rule of international law is capable of being incorporated into domestic law so as to found an indictment which, if proved, can result in punishment. To that extent we accept the submission that international law is capable of being incorporated into English law so as to create a crime punishable in domestic law. That is clearly so in relation to piracy, which has a history of proscription in international law which was established as early as the sixteenth century. For our purposes it is important to note that the decision of the Board was based upon the analysis and development of the concept of piracy over the centuries, so that early statements of the law which suggested that an actual robbery should be proved were no longer valid. Viscount Sankey LC said ([1934] AC 586 at 600, [1934] All ER Rep 506 at 514): g h

> 'A careful examination of the subject shows a gradual widening of the earlier definition of piracy to bring it from time to time more in consonance with situations either not thought of or not in existence when the older jurisconsults were addressing their opinions.' j

[31] This is an example of the principle which Lord Denning MR affirmed in the *Trendtex* case, namely that English law reflects the state of international law from time to time, and does not apply the principle of binding precedent to a determination of its content.

[32] On the basis of that authority, the defendants submit that the English courts can and should recognise the international crime of aggression as a crime in domestic law. They submit that it is clearly established as a crime, above all by the proceedings of the Nuremberg Tribunal which was established by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal (London, 8 August 1945; TS 27(1946); Cmd 6903) which was the exercise of the sovereign and legislative power of the countries to which the German Reich unconditionally surrendered. In the decision as to jurisdiction given by the Nuremburg Tribunal, reported in (1947) 41 AJIL 172, the tribunal, having set out the provisions of the Kellogg-Briand Pact which was binding on the 63 signatories, including Germany, Italy and Japan, and renounced war as an instrument of national policy, said (at 218):

> 'In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.'

[33] There was debate before us as to the extent to which the tribunals which were set up thereafter to try individuals were exercising jurisdiction as courts exercising jurisdiction under the Agreement and Charter, or were domestic courts applying international law principles. We were referred, for example, to the decision of the British Military Court in Holland in *Re Sandrock* (1945) 13 ILR 297. It was submitted that this was a court constituted under an Order in Council and was accordingly a domestic court.

[34] We do not consider that we need to resolve that issue for the purposes of the present case. For there is no doubt that international law has moved on from the position immediately following the 1939–45 war. The legal landscape is now very different. Pursuant to the Rome Statute of the International Criminal Court (1998), that court has jurisdiction under art 5 over the crime of genocide, crimes against humanity, war crimes and the crime of aggression. Genocide, crimes against humanity and war crimes are defined. The crime of aggression is not. An introductory note to a press release from the court dated 16 July 2003 states:

> 'The court cannot exercise jurisdiction over alleged crimes of aggression until the crime is defined and the conditions for the exercise of jurisdiction are set out.'

[35] This reflects the position which had been reached in September 2003 when the report of the second session of the Assembly of States Parties to the Rome Statute of the International Criminal Court set out in Annexe II a discussion paper on the definition and elements of the crime of aggression prepared by a working group. The definition of the crime of aggression was put forward for debate in the following terms:

> '1. For the purpose of the present Statute, a person commits a "crime of aggression" when, being in a position effectively to exercise control over or to direct the political or military action of a State, that person intentionally and knowingly orders or participates actively in the planning, preparation

and initiation or execution of an act of aggression which, by its character, gravity and scale, constitutes a flagrant violation of the Charter of the United Nations.

Option 1: Add "such as, in particular, a war of aggression or an act which has the object or result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

Option 2: Add "and amounts to a war of aggression or constitutes an act which has the object or the result of establishing a military occupation of, or annexing, the territory of another State or part thereof".

Option 3: Neither of the above.

2. For the purpose of paragraph 1, "act of aggression" means an act referred to in United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, which is determined to have been committed by the State concerned,

Option 1: Add "in accordance with paragraphs 4 and 5".

Option 2: Add "subject to a prior determination by the Security Council of the United Nations" ...'

[36] The present position in domestic law, so far as statutory provisions are concerned, is that the International Criminal Court Act 2001 has brought into effect in the United Kingdom the offences defined under the Rome Statute. This Act, accordingly, gives a statutory basis for the incorporation of those three crimes in domestic law in the same way as the Geneva Conventions Act 1957 did in relation to breaches of the Geneva Convention relating to the Status of Refugees (Geneva, 28 July 1951; TS 39 (1953); Cmnd 9171), and the Criminal Justice Act 1988, ss 134, and 135 did in relation to the international crime of torture.

[37] We were referred by both the defendants and the prosecution to the decision of the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate, ex p Pinochet Ugarte (Amnesty International intervening) (No 3)* [1999] 2 All ER 97, [2000] 1 AC 147, sometimes described as *Pinochet (No 3)*, in the context of the crime of torture. The defendants submitted that properly understood, the decision in this case depended on the extra-territorial provisions of the 1988 Act which was the basis for the recognition that charges relating to matters after the passing of that Act laid in Spain were capable of constituting offences under domestic law. The House recognised at least implicitly that torture was an international crime capable of constituting a crime under domestic law, albeit subject to common law jurisdiction or limits. In fact only Lord Millett expressly asserted that torture was always an international crime having effect in domestic law.

[38] We accept entirely that the majority of their Lordships in *Pinochet (No 3)* decided the issue with which we are concerned on the basis that it was only when the 1988 Act came into force that domestic law had extra-territorial effect. And we also accept that Lord Hope of Craighead, with whose speech Lord Hutton agreed, appeared in a passage ([1999] 2 All ER 97 at 143, [2000] 1 AC 147 at 237) to accept that the international crime of torture was a crime in domestic law albeit without extra-territorial effect prior to the 1988 Act. The decision did not, however, answer the question as to the status of the international crime of aggression, or its effect in domestic law.

[39] The only modern domestic law decision to which we have been referred which deals with the effect of a rule of international customary law

in this context is *Hutchinson v Newbury Magistrates' Court* (2000) 122 ILR 499. In that case the appellant was convicted of criminal damage to a fence at the Atomic Weapons Establishment at Aldermaston. Her conviction was upheld on appeal by the Crown Court; and she appealed by way of case stated to the Divisional Court. She maintained that she had acted in order to halt the production of Trident nuclear warheads at Aldermaston and contended that the threat or use of nuclear weapons was contrary to customary international law as reflected in the advisory opinion of the International Court of Justice in the *Case Concerning the Legality of the Threat or Use of Nuclear Weapons* (1996) 110 ILR 163.

[40] In giving the judgment of the Divisional Court, Buxton LJ, having set out the relevant parts of the advisory opinion, concluded that there was no clearly established rule, but none the less went on to discuss what would have been the effect in domestic law had such a rule been capable of identification. He said ((2000) ILR 499 at 506):

> 'The English Rule
>
> It is agreed that a rule of international customary law, if it is sufficiently agreed in international law to be such, is translated automatically into English domestic law. The question however is how it should be characterised once it arrives here? Mr Mercer contended, after some hesitation, that the rule that he had formulated was in English law a rule of substantive criminal law, making conduct by the Crown or British Government in contravention of it a criminal act. That is a very striking submission in view of the contents of the rule and its terms. I say nothing in passing as to susceptibility of the Crown to criminal process. It is also in my view impossible to reconcile that contention with the debate in *Pinochet No 3* which concluded, illuminatingly subject to the specific dissent on this point of Lord Millet, that although State torture had long been an international crime in the highest sense (to adopt the formulation of Lord Browne-Wilkinson ([1999] 2 All ER 97 at 108–109, [2000] 1 AC 147 at 198)) and therefore a crime universally in whatsoever territory it occurred, it was only with the passing of Section 134 of the Criminal Justice Act 1988 that the English criminal courts acquired jurisdiction over "international", that is to say extra territorial, torture. I hold, therefore, that Mr Mercer is wrong on this point, and that the unlawfulness of the United Kingdom Government's conduct that is established in English law by the transformation of the rule of international law is unlawfulness of a more elusive nature than is to be found in the substantive criminal law. What exactly that nature is was never satisfactorily explained to us, despite the court's efforts to seek elucidation.'

[41] Domestic courts have, however considered the effect of a gross breach of international law in English civil law in *Kuwait Airways Corp v Iraqi Airways Co (No 3)* [2002] UKHL 19, [2002] 3 All ER 209, [2002] 2 AC 883. The English courts were there concerned with the effect in English law of an Iraq decree after the annexation of Kuwait by Iraq as to the ownership of certain assets of the Kuwait Airways Corp in an action for conversion. The question arose in the context of the public policy rule as to the recognition of the provisions of foreign law. It was accepted that the courts of this country

could take into account infringements of human rights as an exception to the general rule that the courts of this country would not inquire into the legality of decrees of a foreign state. But it was submitted that that did not extend to breaches of international law. The House of Lords held that the English court could do so where there had been a breach of an established principle of international law committed by one state against another when the breach was plain, and indeed acknowledged: see the speech of Lord Nicholls of Birkenhead ([2002] 3 All ER 209 at [26]). In determining that question, the House had regard to the fact that the Iraqi invasion of Kuwait was a clear breach of the United Nations Charter and that the actions of the Iraqi government in passing the relevant decree were clear breaches of a number of resolutions of the United Nations Security Council. The House therefore held that it was entitled to conclude that to give effect to the decree would be contrary to public policy.

[42] Although not spelt out expressly as being justified on the grounds that Iraq had been guilty of the international crime of aggression, that was the effect of the decision. It seems to us that this case is therefore authority for the proposition that the rule of international law underlying the concept of the international crime of aggression is capable of having effect in domestic law. But the case does not, it seems to us, go further than acknowledge in accordance with the principles that we have already discussed, that the rules of international law have effect in domestic law. The question that we have to determine is whether or not the relevant rules have effect so as to create a crime of aggression in English law. That requires us to consider the extent to which the rule or rules in question can be said to have been recognised in such a way as to give rise to criminal liability in circumstances such as the present. In determining that question, it seems to us that we have to have regard to the way in which the international community has approached the issue in the context of an individual's responsibility for breaches of such rules and his or her amenability to criminal sanctions.

[43] In that context it is necessary to return to the discussion paper to which we have referred in [35], above. As we have already noted, this is the paper which identified some of the problems which prevent the International Criminal Court from having jurisdiction over the crime of aggression. One of the preconditions to the exercise of the court's jurisdiction in the definition is, by para 4, that the prosecutor has to ascertain whether the Security Council has made a determination of an act of aggression committed by the state concerned. By para 5, one option for discussion inquires whether or not the court can proceed with the case in the absence of any determination by the Security Council or whether it has to dismiss the case. It is difficult to see in these circumstances how it can be said that there is, accordingly, a firmly established rule of international law which establishes a crime of aggression which can be translated into domestic law as a crime in domestic law, where there is no consensus as to an essential element of the crime. It follows that, whatever other effects the international rules as to the crime of aggression may have, they cannot constitute a crime for the purposes of s 3 of the 1967 Act, and the judge was right to rule accordingly.

SECTION 5(2)(b) OF THE CRIMINAL DAMAGE ACT 1971

[44] The relevant provisions of this subsection have been set out by us in [3], above. The effect of the provisions is that a person is treated as having a

lawful excuse if: (i) he acted to prevent damage to property, whether his own or another's. This test requires an answer to the question: 'Could the act done be said to be done in order to protect property?' (see *R v Hunt* (1977) 66 Cr App R 105); (ii) at the time he acted, he believed that property was in immediate need of protection; and (iii) he believed that the means adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances. (iv) In determining the answers to (ii) and (iii), it is immaterial whether the belief was justified, provided that it was honestly held.

[45] It is self-evident that this provision, on its face, gives considerable latitude to those who are minded to take direct action in the honestly held belief that in so doing they are protecting the property of others. As we have indicated in (i) above, the only objective element which the jury would have to consider is whether it could be said that on the facts, as believed by the defendant, the criminal damage alleged could amount to something done to protect another's property: see the judgment of Lord Lane CJ, approving this court's judgment in *R v Hunt* in *R v Hill, R v Hall* (1989) 89 Cr App R 74 at 79.

[46] Professor Shaw QC on behalf of the prosecution has sought to persuade us that there is a further objective requirement, namely that, on the facts as believed by the defendant, those facts would establish that the threat was of unlawful damage to his or another's property. He submits that the defendant would not be entitled to take action to prevent damage which would be the inevitable consequences of warfare, provided always that that damage did not amount to a war crime. If it were otherwise, he submits the person could invoke the defence under s 5 of the 1971 Act if he damaged or attempted to damage any equipment being used by, for example, a local authority in order to exercise its lawful powers to abate a public nuisance.

[47] Whilst there are clearly strong policy arguments for imposing such a further restriction on the availability of the defence, the fact is that the statute does not so provide. Subject to the one objective element to which we have referred, the court and the jury are concerned simply with the question of a defendant's honestly held beliefs. It follows that no issue can arise in relation to this defence which involves consideration of the legality of the war in Iraq.

NECESSITY

[48] This defence has consistently given rise to difficulties in its application. As Professor Glanville Williams said in *Criminal Law: The General Part* (2nd edn, 1961) ch 17, p 728: 'The peculiarity of necessity as a doctrine of law is the difficulty or impossibility of formulating it with any approach to precision.'

[49] Despite that difficulty, it is a long-established defence; and the court has to grapple with the problem of how its essential elements are to be applied in any given case. One of the difficulties for us is that Grigson J declined to give his rulings on the basis of any assumed facts; and neither the prosecution nor the defendants have sought to appeal against his decision on the basis that that approach was wrong. It follows that the argument must, of necessity, be at the level of generalities, which will need to be applied by the judge at the trial to the facts as they emerge.

[50] The general principles were stated by Simon Brown J giving the judgment in the Court of Appeal in *R v Martin* [1989] 1 All ER 652 at 653–654:

> '... first, English law does, in extreme circumstances, recognises a defence of necessity. Most commonly this defence arises as duress, that

is pressure on the accused's will from the wrongful threats or violence of another. Equally however it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called "duress of circumstances". Second, the defence is available only if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury. Third, assuming the defence to be open to the accused on his account of the facts, the issue should be left to the jury, who should be directed to determine these two questions: first, was the accused, or may he have been, impelled to act as he did because as a result of what he reasonably believed to be the situation he had good cause to fear that otherwise death or serious physical injury would result; second, if so, would a sober person of reasonable firmness, showing the characteristics of the accused, have responded to that situation by acting as the accused acted? If the answer to both those questions was Yes, then the jury would acquit; the defence of necessity would have been established.'

[51] This definition was adopted by Rose LJ in *R v Abdul-Hussain* [1999] Crim LR 570. In that case, the court identified 11 propositions. These were that: (i) unless Parliament provides otherwise, the defence of duress, whether by threats or from circumstances is generally available in relation to all substantive crimes except murder, attempted murder and some forms of treason. (ii) The courts have developed the defence on a case-by-case basis and its scope remains imprecise. (iii) Imminent peril of death or serious injury to the defendant, or those to whom he has responsibility, is an essential element of both types of duress. (iv) The peril must operate on the mind of the defendant at the time when he commits the otherwise criminal act, so as to overbear his will, and this essentially is a question for the jury. (v) But the execution of the threat need not be immediately in prospect. (vi) The period of time which elapses between the inception of the peril and the defendant's act, and between that act and execution of the threat, are relevant but not determinative factors. (vii) All the circumstances of the peril including the number, identity and status of those creating it, and the opportunities (if any) which exist to avoid it are relevant, initially for the judge and, in appropriate cases, for the jury, when assessing whether the defendant's mind was affected as in (iv) above. (viii) As to (vi) and (vii), if Anne Frank had stolen a car to escape from Amsterdam and had been charged with theft, the tenets of English law would not have denied her a defence of duress of circumstances, on the ground that she should have waited for the Gestapo's knock on the door. (ix) There is no reason of principle or authority for distinguishing the two forms of duress in relation to the elements of the defence which have been identified. (x) The judgment in *R v Martin* [1989] 1 All ER 652 affords the clearest and most authoritative guide to the relevant principles and appropriate direction in relation to both forms of duress. (xi) Clauses 25 and 26 of the Law Commission's draft Criminal Law Bill do not represent the present law (see *Criminal Law: Legislating the Criminal Code: Offences against the Person and General Principles* (Law Com no 218 (1993) (Cm 2370) App A)). Accordingly reference to those provisions is potentially misleading.

[52] In *R v Shayler* [2001] EWCA Crim 1977, [2001] 1 WLR 2206, Lord Woolf CJ giving the judgment of the court, approved the statements of the law

set out in both the judgments to which we have referred. The court held (at [49]) that from those two decisions—

> 'we extract the following ingredients as being required if the defence of necessity to be relied on: (i) the act must be done only to prevent an act of greater evil; (ii) the evil must be directed towards the defendant or a person or persons for whom he has responsibility or, we would add, persons for whom the situation makes him responsible; (iii) the act must be reasonable and proportionate to the evil avoided. We make the addition to (ii) to cover, by way of example, the situation where the threat is made to set off a bomb unless the defendant performs the unlawful act. The defendant may have not have [sic] had any previous connection with those who would be injured by the bomb but the threat itself creates the defendant's responsibility for those who will be at risk if he does not give way to the threat.'

[53] After discussing the question of whether or not there is any distinction between the concept of duress and necessity, which the court considered (at [55]) had 'correctly, been by and large ignored or blurred by the courts', the court said (at [63]):

> 'So in our judgment the way to reconcile the authorities to which we have referred is to regard the defence as being available when a defendant commits an otherwise criminal act to avoid an imminent peril of danger to life or serious injury to himself or towards somebody for whom he reasonably regards himself as being responsible. That person may not be ascertained and may not be identifiable. However, if it is not possible to name the individuals beforehand, it has at least to be possible to describe the individuals by reference to the action which is threatened would be taken which would make them victims absent avoiding action being taken by the defendant. The defendant has responsibility for them because he is placed in a position where he is required to make a choice whether to take or not to take the action which it is said will avoid them being injured. Thus if the threat is to explode a bomb in a building if [the] defendant does not accede to what is demanded the defendant owes [a] responsibility to those who would be in the building if the bomb exploded.'

[54] The question that we have to determine is whether or not on the basis of these decisions, the court will have to grapple with the question of the legality of the government's decision to declare war on Iraq. The defendants say that it is necessary because that is the 'evil' which they felt impelled to do their best to obviate by their actions. Alternatively, using the terminology of Simon Brown J in *R v Martin*, it is only available to them if from an objective standpoint, they could be said to be acting reasonably or proportionately; and a determination of the legality of the war would be necessary in order to answer that question.

[55] It seems to us, however, that this approach fails to put the defence in its proper context. Necessity is potentially a domestic defence to a domestic offence. We have already held that no domestic crime is engaged. The executive's action in declaring and waging war is, in itself, a lawful exercise

of its powers under the prerogative. The court will accordingly have to consider the extent to which necessity might afford a defence to the defendants in the light of their beliefs on that basis. The extent to which their beliefs as to the facts will enable the defendants to establish any of the elements of the defence, in particular the requirement that they should be so acting in relation to people for whom they could reasonably regard themselves as being responsible is not a question we are called upon to answer.

CONCLUSION

[56] For the reasons we have given and save to the limited extent to which we have referred in the last paragraph, the question of the legality of the war in Iraq is not therefore a matter which arises in these cases. It is not, therefore necessary in order to deal with the rulings, to consider whether or not that issue is non-justiciable. We will hear counsel as to what the consequential orders, if any, should be.

Appeals dismissed.

On the defendants' applications, the court refused leave to appeal to the House of Lords, but certified that the following point of law of general public importance was involved in its decision: Whether the crime against peace and/or a crime of aggression is a 'crime' within the meaning of section 3 of the Criminal Law Act 1967 and, if so, is the issue justiciable in a criminal trial?

On the Crown's applications, the court refused leave to appeal to the House of Lords, but certified that the following point of law of general public importance was involved in its decision: Whether the defence of lawful excuse under section 5 of the Criminal Damage Act 1971 is available to a defendant who acts to protect the property of another abroad from damage that will be caused by the executive's lawful exercise of prerogative power to wage war?

Stephen Leake Barrister.

British Telecommunications plc v Gwynedd Council

[2004] EWCA Civ 942

COURT OF APPEAL, CIVIL DIVISION

AULD, JACOB AND WALL LJJ

16 JUNE, 16 JULY 2004

Highway – Street works – Execution of works by highway authority affecting apparatus of utility undertaker – Costs of measures needing to be taken in relation to apparatus in consequence of works – Costs of measures allowable except those incurred in preparing initial set of plans and estimates – Undertaking preparing preliminary estimates and detailed client estimates following approved code of practice – Whether costs of detailed client estimates allowable – New Roads and Street Works Act 1991, ss 84(1), 85(1) – Street Works (Sharing of Costs of Works) Regulations 1992, SI 1992/169, reg 2(2).

The defendant local authority proposed to undertake major bridge works which potentially involved moving part of the claimant utility undertaker's apparatus. In such circumstances s 84(1)[a] of the New Roads and Street Works Act 1991 imposed a duty on the authority and the undertaker inter alia to take such steps as were reasonably required to identify any measures needing to be taken in relation to the apparatus in consequence of the execution of the authority's works, and to settle a specification of the necessary measures. Section 85(1)[b] of the 1991 Act provided that the 'allowable costs' of measures needing to be taken in relation to the undertaker's apparatus affected by major works were to be borne by the authority and the undertaker in such manner as might be prescribed, and reg 2(2)[c] of the Street Works (Sharing of Costs of Works) Regulations 1992 defined 'allowable costs' as all the reasonable costs of the measures needed to be taken for the purpose specified in s 84(1) of the 1991 Act, except costs incurred 'in preparing the initial set of plans and estimates in relation to those measures (but not in preparing any further plans and estimates which the authority may require)'. In the procedures for the necessary measures in relation to the undertaker's apparatus, the parties followed the code of practice approved by the relevant Secretaries of State under the 1991 Act. Appendix C of the code of practice identified seven basic stages in the procedures for necessary measures in relation to undertakers' apparatus. Stage C2 was preliminary inquiries. Stage C3 dealt with draft schemes and budget estimates and stage C4 dealt with the final detailed scheme and detailed estimates. At stage C3 the authority wrote to the undertaker with copies of the draft scheme plans and sought preliminary details of the effect on the undertaker's apparatus and budget estimates. Those the undertaker provided. The authority then produced its final detailed scheme and detailed estimates, stated to be pursuant to C4, and the undertaker produced its stage C4 'detailed client estimate'. It also sent its invoice for the preparation of the C4 estimate,

a Section 84, so far as material, is set out at [7], [8], below
b Section 85, so far as material, is set out at [9], below
c Regulation 2, so far as material, is set out at [12], below

but the authority refused to pay its share, on the basis that the cost of the estimate was not an allowable cost under reg 2(2) of the 1992 regulations, being still part of the preliminary planning and liaison stages. The undertaker was successful in proceedings it brought against the authority in the county court and the authority appealed, contending, inter alia, that 'allowable costs' related only to the costs of the execution of the physical work required to move or otherwise protect the undertaker's apparatus and the C4 'detailed client estimate' therefore represented costs incurred in preparing the initial set of plans and estimates.

Held – The phrase 'all the reasonable costs of the measures' in reg 2(2) of the 1992 regulations was not limited to the cost of the physical execution of those measures. In the context of ss 84 and 85 of the 1991 Act, 'measures' meant the works needed to protect the undertaker's apparatus. Measures designed to protect the equipment of an undertaker had to be planned. Regulation 2(2) excluded costs incurred in preparing the initial set of plans and estimates in relation to those measures. Where an undertaker prepared an estimate in accordance with stage C3 of appendix C to the code of practice, the costs were not allowable costs within reg 2(2), and were to be borne solely by the undertaker because they were costs incurred in preparing the 'initial set of plans and estimates'. However, except in a case where stage C3 was omitted by agreement, a detailed estimate under C4 was a 'further' estimate, and the costs of preparing it were allowable costs which fell to be shared. If by agreement the parties proceeded straight to stage C4, then the C4 detailed estimate would be the 'initial' estimate and the undertaker alone bore those costs. In the instant case the initial set of plans and estimates was the C3 document. It followed that the 'detailed client estimate' was a further estimate and thus an allowable cost, as would have been any additional plans which the authority might have required following receipt of the C4 plans. The appeal would, accordingly, be dismissed (see [68]–[84], [90], [91], below).

Notes

For apparatus affected by highway, bridge or transport work: costs of necessary measures, see 21 *Halsbury's Laws* (4th edn) (2004 reissue) para 475.

For the New Roads and Street Works Act 1991, ss 84, 85, see 20 *Halsbury's Statutes* (4th edn) (2003 reissue) 645, 646.

The Street Works (Sharing of Costs of Works) Regulations 1992, SI 1992/169, were revoked and replaced, in relation to England, with effect from 15 January 2001, by the Street Works (Sharing of Costs of Works) (England) Regulations 2000, SI 2000/3314.

For the Street Works (Sharing of Costs of Works) Regulations 2000, see 10 *Halsbury's Statutory Instruments* (2004 issue) 104.

Appeal

Gwynedd Council appealed with permission of Judge Holman from his decision in the Manchester County Court on 12 December 2003 (i) giving judgment for British Telecommunications plc (BT) in its claim against Gwynedd for non-payment of a sum representing the cost of preparation of a detailed client estimate for proposed alterations to BT's equipment arising out of road works undertaken by Gwynedd and in relation to which it was necessary for steps to be taken to protect apparatus belonging to BT which was affected or likely to be

affected by the works under ss 84, 85 of the New Roads and Street Works Act 1991; and (ii) making the declaration set out at [4], below. The facts are set out in the judgment.

Stephen Sauvain QC and *Ruth Stockley* (instructed by *Dilys Ann Phillips*, Caernarfon) for Gwynedd.

Ian Mayes QC and *Niran de Silva* (instructed by *Miles Jobling*, Sheffield) for BT.

Cur adv vult

16 July 2004. The following judgments were delivered.

WALL LJ (giving the first judgment at the invitation of Auld LJ).

INTRODUCTION

[1] This appeal, from a decision of Judge Holman given in the Manchester County Court on 12 December 2003, raises a short but difficult point of construction relating to the combined effect of ss 84 and 85 of the New Roads and Street Works Act 1991 and reg 2(2) of the Street Works (Sharing of Costs of Works) Regulations 1992, SI 1992/1690.

[2] Also necessary for an understanding of the case, although not part of the primary or secondary legislation, is the code of practice dated June 1992 entitled *Measures Necessary where Apparatus is Affected by Major Works (Diversionary Works)* and approved by the Secretaries of State for Transport, Wales, and Scotland under ss 84(2) and 143 of the 1991 Act. We were also referred to the *Manual of Contract Documents for Highway Works* (the manual) issued by the Highways Agency, the Scottish Executive Development Department and the National Assembly for Wales dated August 2001, which also provides guidance for the implementation of s 84 of the 1991 Act and the code of practice.

[3] The context in which the appeal arises is a claim by British Telecommunications plc (BT) against Gwynedd Council (Gwynedd) for what the judge described as 'the princely sum of £684·14' representing non-payment for what is identified in the claim form as 'preparation of detailed client estimate for proposed alterations to the claimant's equipment' arising out of road works undertaken by Gwynedd and in relation to which it was necessary for steps to be taken to protect apparatus belonging to BT which was affected or likely to be affected by the works.

[4] Gwynedd denied its liability to make the payment, and a two-day trial, with leading counsel instructed on both sides ensued. As will be apparent, a point of wide application was at stake. The judge gave judgment for BT, although he left the precise amount to be decided at a later date in default of agreement. He also made a declaration in the following terms (the references in brackets to the parties are my additions):

> '... except in a case where, as described in para C1.2 of the code of practice, by agreement between the authority [here Gwynedd] and the undertaker [here BT], the procedures set out in App C to the code can be foreshortened and the draft scheme and budget estimate stage omitted, an authority is required to meet its share of an undertaker's reasonable costs of providing a detailed estimate under App C4 of the code.'

[5] The judge was told, as indeed we have been, that the point is of considerable importance, not only to these particular parties but also to other highway authorities and utilities. He accordingly gave permission to appeal, and the appeal has been ably argued on both sides in this court by the same leading and junior counsel who appeared before the judge.

THE PRACTICAL QUESTION RAISED BY THE CASE

[6] As identified by Mr Stephen Sauvain QC and Ms Ruth Stockley for Gwynedd in their skeleton argument, the practical question raised by the case is whether or not utility undertakers such as BT in the instant case are entitled to charge for the preparation of a detailed estimate and specification relating to measures for the diversion or protection of their apparatus that may be required during major road works carried out by the local highway authority. The answer to this question requires a somewhat tortuous trawl through the 1991 Act, the 1992 regulations and the code of practice. Like the judge, I start with the 1991 Act. It is I think helpful, as with the declaration made by the judge, to bear in mind that wherever the word 'undertaker' is used, that is the role fulfilled by BT in the instant case: similarly, the word 'authority' describes Gwynedd.

THE 1991 ACT

[7] The general statutory scheme for major highway, bridge or transport works, which are likely to affect an undertaker's apparatus, is contained in ss 84 and 85 of the 1991 Act. Section 84(1) of the 1991 Act imposes on both highway authority and the undertaker a duty to take such steps as are reasonably required—

> '(a) to identify any measures needing to be taken in relation to the apparatus in consequence of, or in order to facilitate, the execution of the authority's works, (b) to settle a specification of the necessary measures and determine by whom they are to be taken, and (c) to co-ordinate the taking of those measures and the execution of the authority's works, so as to secure the efficient implementation of the necessary work and the avoidance of unnecessary delay.'

[8] Section 84(2) of the 1991 Act empowers the Secretary of State to issue or approve a code of practice 'giving practical guidance as to the matters mentioned in subsection (1) and the steps to be taken by the authority and the undertaker'. Section 84(3) provides for arbitration in relation to any dispute over the matters identified in s 84(1); and s 84(4) provides for compensation to be payable by either the authority or the undertaker in the event of a failure to comply with an agreement between them or the decision of the arbitrator.

[9] Section 85(1) of the 1991 Act introduces the concept of 'allowable costs'. It provides:

> 'Where an undertaker's apparatus in a street is affected by major highway works, major bridge works or major transport works, the allowable costs of the measures needing to be taken in relation to the apparatus in consequence of the works, or in order to facilitate their execution, shall be borne by the highway, bridge or transport authority concerned and the undertaker in such manner as may be prescribed.'

[10] Section 85(2) delegates to the 1992 regulations the power to make provision as to the costs allowable for this purpose; s 85(4) provides that the regulations shall provide for the allowable costs to be borne by the authority and the undertaker in such proportions as may be just; and s 85(6) empowers the regulations to make provision as to the time and manner of making any payment required under the section. The balance of s 85 is immaterial for current purposes.

THE 1992 REGULATIONS

[11] Regulation 3 provides that, in broad terms, the authority pays the undertaker 82% of the allowable costs incurred by the undertaker in executing measures which need to be taken in respect of its apparatus because of the works, leaving the undertaker to bear the remaining 18%, provided that the authority pays in advance 75% of the estimate of the 82%. If it does not make such a payment, it meets all the allowable costs. We were told that in practice authorities always make the advance payment.

[12] The term 'allowable costs' is defined in reg 2(2), which provides:

> 'For the purposes of these Regulations "allowable costs" means all the reasonable costs of the measures needed to be taken for the purpose specified in section 84(1) of the Act except costs incurred:—(a) in preparing the initial set of plans and estimates in relation to those measures (but not in preparing any further plans and estimates which the authority may require); (b) [does not apply here].'

THE CODE OF PRACTICE

[13] The code of practice, as the judge pointed out, is a lengthy document running to some 91 pages. It is dated June 1992, and pre-dates the 1992 regulations, which were made on 15 July 1992, laid before Parliament the same day and came into force on 1 January 1993. Chapter 9 of the code of practice is headed 'General Statement of Financial Agreement'. Paragraph 9.2 deals with what is called 'The Standard Cost Sharing Principle'. It identifies the 82%/18% division of the 'allowable costs' and then defines that term in the following way:

> 'The "allowable costs" are the costs of the works described in Appendix C section C4 and do not include financing charges, nor the costs of either party in respect of that part of the work (described in Appendix C sections C2, C3 and C4) which consists of preliminary planning and liaison.'

[14] We therefore go to App C to the code of practice, which is headed 'PROCEDURES FOR NECESSARY MEASURES IN RELATION TO UNDERTAKERS' APPARATUS' and in para C1.1 states its intention to set out 'the recommended procedures to be adopted for consultation, planning and the execution of any undertakers' works that may be required as the result of the relevant authority's works'. Under the heading 'Outline of Procedure', para C1.2 contains an important qualification. It states:

> 'While the procedures set out in this Appendix represent those which would normally be followed for larger-scale works, they may, depending on

local circumstances and agreement, be foreshortened by the omission of certain of the following stages.' a

[15] With that proviso, para C1.2 of the code of practice identifies seven basic stages. We are concerned with the first three. The stages are: (i) preliminary inquiries; (ii) draft scheme and budget estimates; (iii) detailed scheme and detailed estimates; (iv) formal notices and advance orders; (v) selection of contractor and issue of main orders; (vi) construction; and (vii) financial monitoring and payment. b

[16] The text of the code of practice deals with items (i)–(iii), above in sections C2, C3 and C4 of App C. Section C2, which deals with preliminary inquiries is short. It reads:

'At this stage the highway authority would seek from the undertakers details of their apparatus within a specific section of the scheme which is being considered for improvement without making any commitment to the scheme. Undertakers should provide such information as they have available from records and draw attention to any likely special problems, which could arise from the authority's works ... Information should be provided normally within 10 ... days.' c d

[17] Pausing here, it is clear from reg 2(2) of the 1992 regulations, and common ground between the parties, that the undertaker's response to the authority's preliminary inquiries is not part of the 'allowable costs'.

[18] Similar considerations apply to section C3 of App C, which deals with draft schemes and budget estimates. The code of practice envisages the authority submitting details of the proposed scheme to undertakers, and the latter responding with preliminary details of the effects on their apparatus together with budget estimates for the necessary works and an indication of any special requirements involved, a number of examples of which are given. The code of practice goes on to state that— e f

'Budget estimates provided by undertakers should include all costs likely to arise from the necessary measures in consequence of the authority's works as far as can ... be assessed at the draft design stage, including administration and supervision charges, and specifying a base date. These estimates should be provided normally within 20 working days. Where undertakers are not aware of the general position in line and depth of their apparatus, they should at this stage take any necessary steps to determine this information ... This stage may be followed by discussions between the authority and undertakers, either separately or jointly, to consider any modifications to the scheme which may assist in facilitating the programming of the works and/or reducing the cost of diversionary works.' g h

[19] Once again, it is common ground that the draft schemes and budget estimates envisaged by App C3 of the code of practice fall within the exception to reg 2(2)(a) of the 1992 regulations and are not 'allowable costs'. j

[20] Section C4 of App C deals with the final detailed scheme and detailed estimates. It is at this point that the dispute between the parties crystallises. Section C4 begins with these words:

'Following joint discussions, the authority should submit to each undertaker details of the final design with working drawings and an outline

programme. The undertaker should respond, normally within 25 working days, by providing details of their requirements (if there is a requirement to provide more than one detailed estimate, the utility may charge for such additional estimates) as follows:

(i) Description of the necessary measures, clearly stating the reason for diversion or protection and giving details of the existing apparatus affected, such as lengths and sizes of pipes/cables/ducts, depths of cover and ages ...

(ii) A 'detailed specification of the works required as appropriate—[11 examples are given]

(iii) A detailed estimate with itemised costs also to include: [four particular items are identified]

(iv) Provisional programmes and timescales for works including as appropriate: [five particular examples are given].'

[21] Section C4 concludes with a sub-para (v) suggesting that it may be advantageous for the civil engineering element of the undertaker's works to be undertaken by the authority's contractor as part of the main works, and a suggestion that stage C4 may be followed by further discussions between the authority and undertaker to consider modifications to the works in order to minimise costs.

[22] It is common ground that the 'detailed client estimate for proposed alterations to the claimant's equipment' for which BT seeks to charge is what might be called an 'App C4' document. In other words, it was produced at the stage envisaged in App C4 to the code of practice in response to Gwynedd's submission to BT of the details of its final design with working drawings and an outline programme (see [20], above). In short, BT's case is that the preparation of this estimate at the C4 stage is part of the allowable costs: Gwynedd says that it is not.

[23] The question for the judge, accordingly, and for this court is whether or not the cost to BT of preparing an estimate at the C4 stage falls within reg 2(2) of the 1992 regulations as part of BT's allowable costs, or whether it is excluded under reg 2(2)(a) because it represents costs incurred 'in preparing the initial set of plans and estimates in relation to [the] measures' which Gwynedd intended to carry out.

THE MANUAL

[24] The guidance contained in the manual derived from consultation with the National Joint Utilities Group (NJUG). Paragraph 1.1.3 of the manual states that NJUG, representing all its membership, has agreed to follow the procedures embodied in the guidance during the implementation of diversionary works.

[25] In its commentary on the code of practice, the manual confirms at para 2.1.6 that undertakers should not charge, and that authorities' project sponsors should not pay for 'Preliminary Inquiry Information' (App C2). At C3 stage—

> 'Budget estimates from the undertakers should include all costs likely to arise from the necessary measures in consequence of the [authority's] works as far as can be reasonably assessed at preliminary design stage, including administration and supervision charges and specifying a base date.'

[26] In relation to App C4, the manual makes the point that when undertaking diversionary works under the terms of the 1991 Act, the Act imposes a statutory relationship between the parties. Paragraphs 4.1.4 and 4.1.5 of the manual read as follows:

> '4.1.4. The [Highway Authority] will accept the cost of the preparation of initial C4 estimates. The exception to this rule is smaller-scale works when the preliminary or draft scheme stages could be omitted and the process could commence with the submission of a detailed scheme to the Undertakers. In cases when no C3 budget estimate has been prepared the Undertaker should prepare the C4 estimates *free of charge*. Payment for C4 estimates should only be made when the estimate has been received in full and all clarifications have been resolved with the Undertaker ...
>
> 4.1.5 The Code of Practice states that Undertakers are entitled to charge for additional C4 estimates requested after the initial C4 estimate. When amendments are required, the [Highway Authority] will only pay for the costs of the necessary revisions to the initial estimate. The [Highway Authority's] agent shall verify when amendments are made, that costs are for "revisions" only.'

[27] Mr Sauvain accepted that the terms of the guidance set out in the manual supported BT's case. He made the point, however, which was accepted by the judge (see [40], below) and which is plainly correct, that the manual, whilst possibly representing how the 1991 Act and the 1992 regulations were implemented in practice, could not be any more an aid to statutory construction than the code of practice.

THE FACTS AS FOUND BY THE JUDGE

[28] Given the issue which falls for determination, the facts of the case, which are not in issue, recede in importance and I can summarise them, from the judgment, quite shortly. Gwynedd, acting as agent for the National Assembly for Wales, proposed to undertake major bridge works on three bridges on the A494 near Bala—Pont Llafar, Llafar Cattle Creep and Pont Llanfor. These works potentially involved moving part of BT's apparatus.

[29] It is plain that in undertaking the procedures for the necessary measures in relation to BT's equipment, the parties followed the code of practice. The preliminary inquiries (the C2 stage) were undertaken by what is described as 'map by email'. BT allowed Gwynedd to enter its website in order to obtain the relevant extract from an Ordnance Survey map showing the approximate line of the cables and of the junction boxes.

[30] On 10 July 2001 Gwynedd wrote to BT initiating the App C3 stage (to which specific reference is made at the head of the letter). The letter enclosed two copies of the draft scheme plans and sought from BT 'preliminary details of the effects on your apparatus together with budget estimates for the necessary works and an indication of any special requirements involved'. There followed a lengthy list of information requested. The judge cites two further extracts from this letter namely:

> 'If you are not confident or aware of the general position in line and depth of your apparatus you would take any necessary steps to determine this information at your own expense ...

> Detailed discussions should follow in order to consider any modifications to the scheme which may assist in facilitating the programming of the works and/or reducing the costs of diversionary works. Following the consultation period, the Authority will submit details of the final design scheme with working drawings and an outline programme.'

[31] BT responded on 24 July 2001. Its engineer, Mr Hughes, identified the relevant junction boxes and cables. He drew attention to the existence of fibre optic cables, which are particularly sensitive. Mr Hughes concluded that it would not be necessary for the cables to be diverted, but that they would need to be 'slewed', a process involving securing the ducts to a rigid brace and moving them sideways. It was not appropriate, he concluded, to leave the matter of the protection of the apparatus to Gwynedd and its contractors. Mr Hughes used a computer model to calculate the estimated costs.

[32] The judge commented that despite the code of practice envisaging discussions at this point, none appears to have taken place before Gwynedd produced its 'FINAL DETAILED SCHEME AND DETAILED ESTIMATES' (FDSDE) on 27 July, stated to be pursuant to App C4 of the code of practice.

[33] Following receipt of the FDSDE from Gwynedd on 30 July 2001, Mr Hughes visited the site. On 3 August he acknowledged receipt of Gwynedd's FDSDE and added:

> 'BT will accept your letter as an order to produce the detailed specification and will invoice you on completion of this work whether or not your scheme progresses to the execution stage.'

[34] As it happened, the site visit caused Mr Hughes to change his mind about slewing the ducts, which he concluded would not be possible. He also concluded that BT could entrust appropriate protection work to Gwynedd's contractor. Accordingly, when BT's App C4 estimate was sent to Gwynedd under cover of a letter dated 4 August 2001, the figures proposed were much lower, because much less work was involved. The judge found on the facts that Mr Hughes explained the changed position to his opposite number at Gwynedd before sending the letter of 4 August.

[35] BT put in its invoice for the preparation of the C4 estimates in December 2001. Correspondence ensued, but Gwynedd refused to pay.

[36] By way of background to the dispute, the judge noted BT's evidence that it received about 30,000–33,000 App C3 budget notices each year. Each inquiry took on average 4·5 hours to deal with. BT said it received about 3,500 App C4 requests per year. Each one took on average 16 hours to deal with. In the year ended 31 March 2003, 33,202 App C3 notices were received requiring on average 4·4 hours each: in the same year 3,497 App C4 notices were received, requiring an average of 13 hours each.

THE ARGUMENTS ADDRESSED TO THE JUDGE

[37] The judge helpfully summarised the arguments addressed to him in the following way. For BT they were: (1) the word 'initial' in reg 2(2)(a) may embrace more than just a first set of plans/estimates, but it is far removed from 'final' and App C4 is concerned with the final detailed scheme and detailed estimates. (2) The wording in brackets near the start of App C4 '(If there is a requirement to provide more than one detailed estimate, the utility may charge for such additional estimates)' does not mean that BT may not

charge for the first detailed C4 estimate. (3) The plain meaning of para 9.2 of the code of practice is that such costs incurred at App C4 stage as represent preliminary planning and liaison are not recoverable. That stage is at an end once joint discussions have taken place and the final design is submitted. The dividing line comes after the words '[f]ollowing joint discussion' at the start of App C4. (4) The definitions in the *Oxford English Dictionary* (2nd edn, 1989) (OED) are of assistance. The primary definition of 'initial' (vol VII, p 976) is: 'Of or pertaining to a beginning; existing at, or constituting, the beginning of some action or process; existing at the outset; primary; sometimes = elementary, rudimentary.' Of 'preliminary' (vol XII, p 359) it is: 'A subordinate step, measure, statement, etc., that precedes another to which it is introductory or preparatory. Chiefly in *pl.* = preparatory measures or arrangements.' (5) The words 'set of plans' are directly analogous with the word 'scheme'. The initial set is the draft scheme. (6) There is no valid distinction to be drawn between the cost of implementing measures to safeguard apparatus and the cost of providing plans and estimates. Section 85 of the 1991 Act is simply the money aspect. Section 84 deals with the taking of the measures. This is in accordance with the title given to each section.

[38] The judge summarised the arguments for Gwynedd in the following way. (1) The 1991 Act draws a distinction between: (i) the identification and planning of measures which may need to be taken to protect apparatus—addressed in s 84; and (ii) the measures themselves and who is to meet the costs of those measures—addressed in s 85 and the 1992 regulations. (2) The 1992 regulations follow this distinction between, on the one hand, identifying, settling and co-ordinating the measures i e planning and, on the other hand, the measures themselves. The allowable costs are the costs of the works themselves, not the preparation. (3) Appendix C4 is the final part not of the process but of the planning aspect. By reference to the word 'initial' the specification produced at C4 is BT's plan for dealing with their apparatus and is provided at the beginning of the works. By reference to the word 'preliminary' the C4 plans are preparatory to the works that are to be carried out. (4) The words in reg 2(2) 'but not in preparing any further plans and estimates which the authority may require' (the reasonable cost of which is allowable) are remarkably similar to the words in brackets near the start of App C4. Those words in App C4 would be unnecessary if the first C4 estimate was chargeable, since it would inevitably follow, if the first was chargeable, that subsequent ones would be as well. (5) This interpretation is consistent with the objectives set out in s 84. It would be contrary to the purpose, spirit and intent of the legislation if an authority got all the information it needed at the C4 stage (for which it had to pay) and then, in the light of that information, had to change its final plans (so that it would have to pay again).

THE JUDGE'S DECISION

[39] The judge identified the issue succinctly in these terms (para 33): 'In cases where stages C2 and C3 are used, is the cost of the preparation of the first C4 estimate an allowable cost under s 85(2) and reg 2(2)?' He reminded himself, correctly, that his task was to interpret the legislation. Thus whilst it was impossible to understand the workings of the legislation without reference to the code of practice, the code was not legislation, and in the event of a conflict between the two, the legislation must prevail.

[40] The judge also directed himself, again correctly, that although the paragraphs from the manual cited in [24]–[26], above supported BT's case, and whilst they represented a considered view of an official nature, it was but a view, and could not absolve the court from its interpretative duty.

[41] The judge also pointed out that in a number of places the code of practice did not use the same language as the 1992 regulations. He gave as an example the fact that, under the 1992 regulations, BT could not 'recover the cost incurred in preparing *the initial set of plans and estimates*' whereas under the code of practice at App C3 BT was required to 'respond with *preliminary details of the effects on their apparatus together with budget estimates for the necessary works*', and section 9.2 of the code referred to '*preliminary planning and liaison*' (para 37; Judge Holman's emphases).

[42] Having carefully summarised the submissions made to him in the terms set out at [37] and [38], above, the judge reached his conclusion by means of the following process of reasoning:

> '40. I do not find my task particularly easy. As is not uncommon, the 1992 regulations and code of practice are not a model of clarity. However, applying what I believe to be a commonsense, everyday approach to the word "initial", if one looks at the various stages in the process, C3 is the initial stage. C4 may not be the end of the process, but it cannot properly be categorised as initial. I agree also with Mr Mayes QC (for BT) that "set of plans" can properly be equated with "scheme". The draft scheme is the initial step. It is difficult to think of a final scheme being an initial stage, when it has been preceded by a draft scheme, and where it is also plainly contemplated that there will be discussions after the draft, which may result in changes to the scheme. Since the word in the 1992 regulations is "initial", I do not strictly need to address the word "preliminary" but, even if I do, C4 can hardly be described as introductory or preparatory. The process has gone beyond that by this stage. Some assistance can be derived from the wording of the headings to the sections in the code of practice. C3 concerns the *draft* scheme—plainly initial. C4 concerns the *final* scheme, and consistently with that a detailed specification and estimate is required in contrast with C3, which calls only for preliminary details of effects and budget estimates. The word preliminary appears in C3 but not C4.
>
> 41. Section 9.2 of the code of practice does not undermine this view. It excludes from allowable costs only those parts of the C4, which consist of preliminary planning and liaison. Joint discussions prior to the issuing of the final scheme are an obvious example and self-evidently this preliminary planning and liaison element will be greater, if stages C2 and C3 have been omitted. It may be a small point, but if the detailed estimate is part of the preliminary process, but the specification is part of the works, it seems a little odd that the requirements for the detailed estimate appear as (iii) in C4 *after* the requirements for the specification which appear as (ii).
>
> 42. In the pre-litigation correspondence [Gwynedd] repeatedly based its position on the wording in brackets near the start of C4—"If there is a requirement [for] more than one detailed estimate, the utility may charge for such additional estimates." This is point 4 in my summary of Mr Sauvain's submissions [for Gwynedd]. Whilst it is certainly a possible interpretation that it means you cannot charge for the first C4 estimate

that view is, as I see it, inconsistent with the proper interpretation of reg 2(2). Where there is inconsistency, the regulation prevails.' (Judge Holman's emphases.)

The judge accordingly found for BT.

THE GROUNDS OF APPEAL

[43] The appellant's notice advances eight grounds of appeal. Paragraph 1 repeats the argument that on a correct interpretation of reg 2(2) the sum claimed by BT was not an 'allowable cost' but fell within the 'initial set of plans and estimates' for which BT had to bear its own costs. Paragraph 2 asserts that the judge had erred in law by failing to look at the full wording of reg 2(2) and ss 84 and 85 of the 1991 Act, with the consequence that he failed to appreciate the distinction drawn between the 'measures' required to be taken in relation to undertakers' apparatus (to which the cost-sharing regulations generally applied) and the planning of those measures (to which the cost-sharing regulations did not apply).

[44] Paragraph 3 of the grounds asserts that the judge erred in his interpretation of the code of practice, which similarly distinguished between the preliminary planning and liaison process and the actual measures required to be taken in relation to undertakers' apparatus. Paragraph 9.2 of the code, properly construed, indicated that the sum claimed by BT was not recoverable.

[45] Paragraph 4 of the grounds asserts that the judge also erred in his interpretation of the word 'initial' in reg 2(2). 'Initial' referred to the planning work done at the beginning of the process. It also distinguished between the plans and estimates produced at the C4 stage of the code of practice and any further plans or estimates which may later be required, and which both the 1992 regulations and App C4 itself recognised were chargeable.

[46] Paragraph 5 of the grounds asserts that the judge failed to take into account that the C4 stage was the first point at which plans and estimates were prepared by BT in response to a committed scheme from Gwynedd. Similarly, para 6 of the grounds asserts that the judge erred in his interpretation of the word 'preliminary' in para 9.2 of the code. The C4 'plans and estimates' were preparatory to the works, which were to be carried out. It did not make any sense to distinguish (in the C2–C4 regime) between planning that was preliminary and planning that was not preliminary. There was no conflict between the use of this word and the proper meaning of 'initial set of plans and estimates' in the 1992 regulations.

[47] Paragraph 7 of the grounds asserts that, in accepting that the reference in the 1992 regulations to 'set of plans' could properly be equated with the word 'scheme' as used in the code of practice, the judge had failed to observe that the word 'scheme' when used in the code related to Gwynedd's scheme, and not to anything produced by BT.

[48] Finally, the grounds assert the judge erred by rejecting Gwynedd's argument in relation to the words in the first paragraph of App C4, namely: 'If there is a requirement to provide more than one detailed estimate, the utility may charge for such additional estimates.' The grounds repeat the argument that these words are otiose if BT could charge for the first detailed estimate.

THE ARGUMENT FOR THE APPELLANT IN THIS COURT

[49] The grounds of appeal were skilfully developed in oral argument before us by Mr Sauvain, who laid particular emphasis on the point, which he argued the judge had failed properly to grasp, that the 1992 regulations made it clear that the term 'allowable costs' meant all the reasonable costs of the 'measures' needed to be taken for the purpose specified in s 84(1) of the 1991 Act. The 'measures' identified in s 84(1) were 'any measures needing to be taken in relation to the apparatus in consequence of, or in order to facilitate, the execution of the authority's works'; that is to say the works that the undertaker may require. Section 85, which is the provision that deals with cost-sharing specifically relates allowable costs to the 'measures' needing to be taken in relation to the apparatus in consequence of the works, or in order to facilitate their execution.

[50] Thus, Mr Sauvain submitted, the 1991 Act and the 1992 regulations read together, drew a distinction between the 'measures' themselves (ie the works which were required) and the identification of those measures, the settling of a specification of those measures and the co-ordinating of those measures (ie the preliminary, planning and liaison stages). This meant, he argued, that the detailed estimate to be provided by the undertaker at the App C4 stage in response to the authority's 'details of the final design, with ... drawings and an outline programme' was not an allowable cost, although any additional estimates later required by the authority would be. Thus the 1992 regulations did draw the line at cases where authorities, having put the undertaker to the expense of responding to the scheme and preparing a set of plans and estimates, then require undertakers to carry out further work—for example where the authority changes the scheme after it has commenced, or when it goes beyond what the code of practice may require. Mr Sauvain gave as an example extra trial holing, identified at para C1.4 of the code, and the additional estimates envisaged at App C4.

[51] Mr Sauvain also submitted that the judge had misinterpreted the somewhat inelegantly expressed para 9.2 of the code of practice (set out at [13], above). That paragraph, he argued, distinguished between 'the works described in Appendix C section C4' (which are allowable) and 'the costs of either party in respect of that part of the work (described in Appendix ... C2, C3 and C4) which consists of preliminary planning and liaison' (which are not allowable). On any reading of this paragraph, he argued, the view taken in the code of practice was that some part of what is contained in App C4 was not allowable because it consisted of preliminary planning and liaison.

[52] Moreover, Mr Sauvain argued, the 'works' (plural) described in para 9.2 were both the 'measures' referred to in App C4(i) and the 'works' described in App C4(ii)—ie the works that are needed to be undertaken in relation to the apparatus in consequence of the undertaker's works, or in order to facilitate the execution of the highway authority's works (see s 85 and reg 2(2)). The 'work' (singular) involved in determining those measures or in preparing a specification of those measures (ie everything done up to and including the C4 stage) was, he argued, preliminary planning and liaison work, and thus not an allowable charge.

[53] Mr Sauvain also criticised the judge's interpretation of the word 'initial' in reg 2(2). He argued that the word 'initial' in the 1992 regulations referred to a 'set of plans and estimates', and that there was no reference in the code of practice to an undertaker ever being required to produce a 'plan' per se, although plans

might be prepared and produced at the C2, C3 or C4 stages. Estimates, he accepted, may be produced at both the C3 and C4 stages. Appendix C4 contemplated that there may be additional estimates for which the utility may charge. There was, however, he submitted, no commonsense reason why the second plan (produced at the C3 stage) should be part of an 'initial set of plans' but the second estimate (at the C4 stage) should not be part of an 'initial set of ... estimates'. Furthermore, the reference to a 'set of plans and estimates' could be related to the planning stage of identifying and specifying the undertakers' required works. All the information contained at C4 stage could be said to be part of such a plan or set of plans—as could the information to be supplied at C2 and C3. Mr Sauvain saw no difficulty in using the OED definition of 'initial' in the 1992 regulations to refer to the specification and other documents produced at the C4 stage. The specification, he submitted, would be BT's 'plan' for dealing with their apparatus within Gwynedd's scheme. It would be the plan that had been provided at the beginning or outset of the works themselves. Finally on this point, Mr Sauvain submitted that the word 'initial' also distinguished between the C4 plans and estimates and any further plans or estimates that may later be required and which both the 1992 regulations and App C4 itself recognised were chargeable.

[54] Mr Sauvain criticised the judge for failing to take into account that the C4 stage was the first point at which plans and estimates were prepared by the undertaker in response to a committed scheme from the highway authority. The C3 stage was in respect of a draft scheme, which may or may not be firmed up into a final scheme. Mr Sauvain pointed to the evidence given by BT's witness and set out in [36], above, that BT receives many times more C3 requests than they do C4 requests.

[55] Mr Sauvain was similarly critical of the judge's interpretation of the word 'preliminary' in para 9.2 of the code of practice. He submitted that there was no difficulty with the use of the word 'preliminary' in the code of practice. Once again he was content to adopt the definition of 'preliminary' in the OED. The App C4 'plans and estimates', he argued, were preparatory to the works that are to be carried out. There was, accordingly, no conflict between the use of this word and the proper meaning of 'initial set of plans and estimates' in the 1992 regulations.

[56] Furthermore, in holding that the reference in the 1992 regulations to 'set of plans' could properly be equated with 'scheme' as used in the code of practice, Mr Sauvain argued that the judge had failed to observe that the word 'scheme' when used in the code related to the local authority's scheme and not to the 'measures needing to be taken in relation to the apparatus in consequence of, or in order to facilitate, the execution of the authority's works' referred to in ss 84 and 85 of the 1991 Act and cross-referred to in reg 2(2). The word 'plans' in the 1992 regulations, he submitted, referred to something being produced by the undertaker.

[57] Mr Sauvain also placed reliance on the wording at the end of the first paragraph in App C4 namely: 'If there is a requirement to provide more than one detailed estimate, the utility may charge for such additional estimates ...' Those words, Mr Sauvain argued, were otiose if BT could charge for the first detailed estimate.

[58] Mr Sauvain also pointed out that the reference in the 1992 regulations to 'any further plans and estimates which the authority may require' (see reg 2(2)(a))—for which a charge may be made—was, as he put it 'uncannily

similar to' (and consistent with) the wording in App C4. This statement in App C4, he argued, would have been quite unnecessary if the initial C4 estimate was subject to a charge—in such a case later estimates would necessarily also be chargeable. The need for the reference in the code of practice was to point out that Gwynedd had only one bite at the free-estimate cherry once they had produced their final plans.

[59] In relation to the argument that C4 is only the initial stage where the App C procedures have been foreshortened and stages C2 and C3 omitted, Mr Sauvain argued that there was no obvious reason why the preparation of a detailed estimate and specification should fall outside the 'allowable costs' where the foreshortened procedure in para C1.2 was adopted if that work was otherwise usually allowable. BT had to accept that in such a case the work was not allowable because on their dictionary interpretation of the word 'initial' such an estimate and specification would obviously be the first and only document provided by the undertaker to the authority. Curiously, in such a case they would be required to pay for the higher level of work involved in a detailed estimate specification when in the usual case (as argued by BT) they would only have to pay for the lesser preliminary work.

[60] Finally, and for the avoidance of doubt, Mr Sauvain argued that not only could the provisions of the manual have no relevance to the interpretation of the statute or regulations: the interpretation therein contained was also incorrect.

THE ARGUMENT FOR BT

[61] For BT, Mr Ian Mayes QC analysed the position in the following way. The 1992 regulations provided for certain of the costs of work done pursuant to the 1991 Act to be borne solely by the highway authority or the utility undertaker and other costs to be shared in prescribed proportions. Among the costs to be borne solely by the utility undertaker were those incurred in preparing the initial set of plans and estimates in relation to measures needed to be taken for the purposes specified in s 84(1) of the 1991 Act. The costs of preparing any further plans and estimates which the highway authority may require are 'allowable costs' (see reg 2(2)(a)) and are to be shared.

[62] It followed, Mr Mayes argued, that where a utility undertaker prepared a budget estimate in accordance with App C3 of the code of practice, the costs were not allowable costs and were to be borne solely by the utility undertaker because they were costs incurred in preparing the 'initial set of plans and estimates'. However, he argued, except in a case where, as described in para C1.2 of the code of practice, by agreement between the highway authority and the utility undertaker the procedures set out in App C to the code could be foreshortened and the draft scheme and budget estimate stage omitted, a detailed estimate under App C4 of the code was a *further* estimate and the costs of preparing it were 'allowable costs' which fell to be shared.

[63] Mr Mayes accepted that if there was no C3 budget estimate and, by agreement, the parties proceeded straight to C4, then the C4 detailed estimate was the *initial* estimate and the utility undertaker alone bore the cost of preparation. The code of practice envisaged that the C2 and C3 stages could be omitted and the procedure start at the C4 stage in smaller-scale works or where schemes have minimal effect on the utility undertaker's apparatus (see para C1.2). Thus the passage in brackets towards the end of the first paragraph of App C, section C4, upon which the appellant had placed great emphasis, namely:

'(If there is a requirement to provide more than one detailed estimate, the utility may charge for such additional estimates) ...' was not, on BT's construction, redundant.

[64] Mr Mayes argued that, as the evidence at trial had showed, in most instances, there are just two schemes and estimates: namely (a) the draft scheme and budget estimate (App C3); and (b) the final detailed scheme and detailed estimate (App C4). However, in the event that the parties did go direct to the App C4 detailed estimate stage but two detailed estimates were required, he accepted that the costs of preparing the *initial* one of these were not 'allowable costs'; but, he argued, the costs of preparing any *further* estimate(s) were 'allowable costs' (as they were not costs of the initial estimate).

[65] In BT's submission, upon a proper construction, the 1992 regulations were consistent with the practical guidance contained in the code of practice approved by the Secretary of State; but if the code of practice could not sensibly be read in conjunction with the regulations, he agreed that it was the regulations which prevailed.

[66] On the interpretation of the inelegant sentence in para 9.2 of the code of practice set out at [13], above, Mr Mayes submitted that the part of App C4 'which consists of preliminary planning and liaison' was (1) the 'joint discussions' which the highway authority submitted to the utility undertaker details of the final design with working drawings and an outline programme and (2) in those instances where the parties, by agreement, proceeded direct to C4, the cost of the *initial* detailed estimates but not any *further* detailed estimates.

[67] Thus, Mr Mayes argued, the construction of the 1992 regulations for which BT contended accorded both with the code of practice and with the guidance given in the manual which, he pointed out, had been given by the Highways Agency and the National Assembly for Wales in August 2001, after the 1991 Act had been in force for eight years.

DISCUSSION AND ANALYSIS

[68] As I indicated at the outset of this judgment, and like the judge, I do not find the construction of the 1991 Act and the 1992 regulations easy. I readily acknowledge that my mind vacillated during the course of the able oral arguments presented to us. In particular, and despite Mr Mayes's reassuring submissions, I detected a possible tension between the strict meaning of the statutory language, and the pragmatic manner in which it had been interpreted in practice on the ground. Having reflected on the matter, however, I have come to the conclusion that the construction proffered by Mr Mayes is correct, and that the judge reached the right conclusion.

[69] I accept Mr Sauvain's proposition that the 'measures needed to be taken for the purpose specified in section 84(1) of the Act' identified in reg 2(2) are '[the] measures needing to be [under]taken in relation to the apparatus' of the undertaker. I also accept that s 84 of the 1991 Act draws a clear distinction between the 'measures' to be undertaken in relation to the undertaker's apparatus, and 'the execution of the authority's works'. It is, I think, clear, therefore, that the 'allowable costs' in reg 2(2) relate exclusively to the measures 'needing to be taken in relation to the apparatus' the undertaker.

[70] Whilst the 1991 Act does not define the word 'measures', I also accept that in the context of ss 84 and 85 'measures' mean the works needed to protect the undertaker's apparatus. That this is so seems to me clear both from s 84(1)(b) which enjoins the parties to take such steps as are reasonably required 'to settle a specification of the necessary measures', and from s 85(1) which refers to 'the allowable costs of the measures needing to be taken in relation to the apparatus in consequence of the works'.

[71] However, I am unable to accept Mr Sauvain's arguments (1) that 'allowable costs' relate only to the costs of the execution of the physical work required to move or otherwise protect the undertaker's apparatus, and (2) that BT's App C4 estimate in this case is excluded from the concept of allowable costs because it represents costs incurred 'in preparing the initial set of plans and estimates'. Whilst Mr Sauvain's construction is plainly arguable—and, indeed, is attractive in its simplicity—I do not think it is what the 1991 Act and the 1992 regulations mean or envisage.

[72] In my judgment, it is plain from reg 2(2) itself that the phrase 'all the reasonable costs of the measures' is not limited to the cost of the physical execution of the measures. Self-evidently, measures designed to protect the equipment of an undertaker do not materialise out of thin air, or spring fully armed from the head of the undertaker's engineer. They have to be planned.

[73] Section 85(2) and (4) of the 1991 Act delegate to the 1992 regulations the power to identify and apportion allowable costs. That is precisely what reg 2(2)(a) does. It excludes—

> 'costs incurred ... in preparing the initial set of plans and estimates in relation to those measures (but not in preparing any further plans and estimates which the authority may require) ...'

The crucial question, therefore becomes: what are the initial set of plans in this case?

[74] At this point, it seems to me, we have to turn to the code of practice, and the first three of the seven stages identified in para C1.2, namely: (i) preliminary inquiries, (ii) draft scheme and budget estimates and (iii) detailed scheme and detailed estimates. These concepts are, of course, fleshed out at Apps C2, C3 and C4, and the heading of App C4 adds the word 'FINAL' to the phrase 'DETAILED SCHEME AND DETAILED ESTIMATES'. It is common ground that these stages were followed in this case. This is not a case in which they were foreshortened, or in which the parties moved straight from C2 to C4.

[75] I do not propose to repeat the matters set out in the code of practice under the three headings C2, C3 and C4. It is, I think, sufficient for me to say that on the facts of this case I am unable to agree that the C4 plans and estimates prepared by BT are 'the initial set of plans and estimates in relation to [the] measures'. Mr Sauvain's submission seems to me, with respect, to be contrary to the structure of the scheme contained in the 1991 Act and the 1992 regulations as fleshed out in the code of conduct, and inconsistent with the fact that in this case the parties clearly regarded themselves as proceeding from stage C2 through stage C3 and then to stage C4.

[76] In other words, in my judgment, the instant case was plainly not one where the C4 plans prepared by BT were 'the initial set of plans and estimates'. The initial set of plans and estimates were the C3 document described in [30],

above. It follows that the 'Detailed Client Estimate' for which BT seeks to charge is a 'further estimate' and thus an allowable cost within reg 2(2). a

[77] Whilst it is, of course, by no means conclusive, the language of the stages identified in the code of practice indicates clearly that Apps C2 and C3 are preliminary inquiries and draft schemes and budget estimates: App C4 is the final detailed scheme and detailed estimates. Although the language is different, this fits conveniently with the wording of reg 2(2)(a). In my judgment, therefore, on b the facts of this case, the costs excluded by reg 2(2)(a) are those at stages C2 and C3: the C4 costs are not excluded and are part of the allowable costs of the measures.

[78] This conclusion needs, of course, to be tested against the other objections made by Mr Sauvain. I see no difficulty, firstly, with the words in brackets in c reg 2(2)(a) of the 1992 regulations. The C4 plans and estimates in this case are 'further plans and estimates' over and above those prepared at stage C3. Moreover, the phrase, 'further plans and estimates' in my judgment, is wide enough to cover both the C4 plans prepared following completion of stage C3 and any additional plans which Gwynedd might have required following receipt of the C4 plans. The relationship between BT and Gwynedd, it must be d remembered, is statutory not contractual, and it was common ground that in exercising its powers as a statutory authority, Gwynedd had the power to require further plans and estimates from BT.

[79] The phrase 'further plans and estimates' is also wide enough, in my judgment, to cover the situation in which the parties have moved directly to e stage C4 (leaving out stage C3) with the result that the C4 plans represent 'the initial set of plans and estimates'. In such a case the undertaker could not charge for the first C4 plans, because they would be 'the initial set'. It could, however, charge for any 'further plans and estimates' which the authority required.

[80] In this context, therefore, I do not think that the word 'initial' causes any f difficulty. The 'initial set of plans and estimates' are either those produced at stage C3 (in which case they are not chargeable) or those produced at stage C4 where there has been no stage 3. In neither case can the undertaker charge for them.

[81] Equally, whilst it would have been preferable if para 9.2 of the code g of practice had followed the wording of the 1992 regulations, I do not have any difficulty in applying the word 'preliminary' to the C3 stage, or to the C4 stage where there has been no stage C3. Whilst there may be some circumstances in which it is necessary, in relation to a given event, to draw a clear distinction between 'initial' and 'preliminary', what is here under h discussion is a process—a series of stages—and in that context the distinction between the precise meaning of the two words becomes blurred. The initial stages of a football match occur only after the referee has blown his whistle to start the game. Everything prior to that moment is preliminary to the match. However, where a process such as that envisaged by the 1991 Act and j the 1992 regulations is concerned, it seems to me perfectly possible to describe the C2 and C3 stages (and part of the C4 stage where there has been no C3) as either the initial or the preliminary stages in the process of taking the steps set out in s 84(1) of the 1991 Act. I certainly do not see the use of the word 'preliminary' in the context of the code of practice as inconsistent with the interpretation of reg 2(2)(a) which I have reached.

[82] If the code of practice is inconsistent with the 1991 Act and the 1992 regulations it is, of course, the latter, which prevail. The sentence in the second part of para 9.2 of the code of practice (and set out at [13], above) is most unfortunately worded, but, in my judgment, Mr Mayes's answer to it is the right one. Paragraph 9.2 of the code envisages the situation in which the parties have proceeded direct to stage C4, with the consequence that the work undertaken by the undertaker represents the work normally undertaken in stages C2 and C3, and with the further consequence that the C4 work represents both the initial set of plans and estimates within reg 2(2) of the 1992 regulations, and the 'preliminary planning and liaison' within para 9.2.

[83] Finally, I do not accept Mr Sauvain's argument that the phrase in reg 2(2)(a) of the 1992 regulations ('but not in preparing any further plans and estimates which the authority may require') and its echo at the start of App C4 necessarily implies that a charge cannot be made for the C4 plans and estimates. As I have already indicated, the 1992 regulations can, in my judgment, properly be read as meaning that whilst the undertaker cannot charge for the App C3 estimate, it can both charge for the first C4 estimate, and is entitled to charge for any additional estimates required. Regulation 2(2)(a) of the 1992 regulations, as I have already, I hope, made clear, is to be read as excluding the C3 estimates, but not those required at the C4 stage, where C4 follows C3.

[84] For all these reasons, and despite the able arguments of Mr Sauvain, I am satisfied that the judge came to the correct conclusion, and I would dismiss this appeal.

RIDERS

[85] I add two riders. The first is that, as the judge recognised, the interpretation which he preferred involved the obvious danger, as he put it (at para 46), that—

> 'there is an obvious temptation to [the undertaker] to do as little as possible at C2 and C3, so as to load as much as possible of its costs into C4. This may well be contrary to the spirit and intent of the code of practice. Self-interest must not prevail, as the guiding principles in the code of practice make clear.'

[86] The judge made these comments in response to a submission from Mr Mayes voicing BT's concern, if the court found for Gwynedd, that it would become commonplace for authorities to seek to omit stages C2 and C3. The judge went on to say (at para 47) that—

> 'as is stated in the executive overview to the code of practice, there must be close co-operation and co-ordination and "the need for this underpins all the provisions of the code". I have the clear impression that relationships between the parties have been allowed to deteriorate over a period of time (which period began well before this dispute) to such an extent that the objectives of the code of practice have been undermined. Where the fault lies, I do not know. Each side accuses the other of being intransigent. I rather suspect that, as Mr Sauvain observed, there has been fault on both sides. They need to start working together again in order "to obtain the optimum solution".'

[87] I respectfully indorse those sentiments. Both highway authorities and utility undertakers are, in their different ways, servants of the public. No doubt

the pressures on budgets provide a powerful incentive for both authorities and undertakers to avoid incurring costs wherever possible. However, both the 1991 Act and the code of practice require authorities and undertakers to co-operate, and it is to be hoped that the decision of this court will assist in clearing the air.

[88] My second rider may well provide one issue on which the parties can unite. If the interpretation I have reached is not that intended by either Parliament or the various agencies involved, the reason, in my judgment, lies primarily in the fact that the draftsmen of the code of practice have, for reasons which I do not understand, expressed themselves in different language from that contained in the statute and the regulations. A code of practice, which is designed to facilitate the operation of a statutory scheme, should surely follow the language of the statute and the attendant regulations. If, for any reason, the draftsmen choose to depart from that language, they should explain clearly what they mean and why they are not using the statutory terminology.

[89] The explanation in the instant case may lie in the fact that the code of practice, which was approved by the three relevant Secretaries of State in June 1992, appears to pre-date the 1992 regulations, and was the product of a committee (the Highway Authorities and Utilities Committee). Whether or not the cart preceded the horse, the committee ought to have had access to the draft 1992 regulations, which were made on 15 July 1992. The use of different language is unfortunate and appears to demonstrate a lack of sensible co-ordination.

JACOB LJ.

[90] I agree.

AULD LJ.

[91] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Re Spectrum Plus Ltd

National Westminster Bank plc v Spectrum Plus Ltd and others

[2004] EWCA Civ 670

COURT OF APPEAL, CIVIL DIVISION

LORD PHILLIPS OF WORTH MATRAVERS MR, JONATHAN PARKER AND JACOB LJJ

5, 6 APRIL, 26 MAY, 12 JULY 2004

Company – Charge – Charge over book and other debts of company – Charge permitting company to realise debts of company in ordinary course of business – Whether fixed or floating charge.

A company opened an account with a bank, obtained an overdraft facility and granted the bank a debenture to secure all moneys due from the company to the bank. The facility was made available on a fully fluctuating basis for the purpose of providing working capital. It was to be reviewed on a specified date but was repayable on demand. It might be withdrawn, reduced or made subject to further conditions or otherwise varied on notice, and was otherwise subject to the bank's general terms. The debenture was in a standard form. Clause 2(v) charged 'by way of specific charge all book debts and other debts ... now and from time to time due or owing to the company ...'. Clause 5 provided: 'With reference to the book debts and other debts hereby specifically charged the Company shall pay into the Company's account with the Bank all moneys which it may receive in respect of such debts and shall not without the prior consent of the Bank sell factor discount or otherwise charge or assign the same in favour of any other person or purport to do so and the Company shall if called upon to do so by the Bank from time to time execute legal assignments of such book debts and other debts to the Bank.' The proceeds of book debts were collected by the company and paid into its account with the bank, thereby reducing the overdraft, and the company drew on the account as and when it needed to do so, thereby increasing the overdraft. Four years later the company resolved to go into creditors' voluntary liquidation. The bank applied for a declaration that the debenture had created a fixed charge over the company's book debts. In the High Court the Vice-Chancellor, not following authority, held that under the proper construction of the debenture the company had been free to use the proceeds of its book debts in the normal course of its business, unless and until the bank intervened, and that such a charge had necessarily been a floating charge. The bank appealed.

Held – (1) The reasoning of the Vice-Chancellor that, if the terms of a debenture entitled a chargor to collect book debts and use the proceeds in the normal course of business, unless and until the chargee intervened, the charge would necessarily be a floating charge, notwithstanding that the debenture might contain restrictions against particular modes of dealing with, or collecting the book debts, could not be supported, as it was not open to the Court of Appeal to reach a decision incompatible both with the reasoning and the result of authority of the Court of Appeal, even though held by the Privy Council to have been wrongly

decided (see [57]–[59], [100], [101], below); *Davis v Johnson* [1978] 1 All ER 1132 applied, *Re New Bullas Trading Ltd* [1994] 1 BCLC 485 and *Agnew v Comr of Inland Revenue* [2001] 2 BCLC 188 considered.

(2) The relationship of banker and customer, which was such that where the proceeds of book debts owed to the customer of a bank were paid into that customer's account with the bank, title to those proceeds passed absolutely to the bank, and the obligations that the bank came under to the customer as a result of receiving those proceeds depended on the terms of the contract between the customer and the bank, meant that the fact that a debenture, as in the instant case, required the proceeds of book debts to be paid into an account at the chargee bank was of critical importance. Thus where a charge on book debts was created by a debenture which required that they should not be disposed of prior to collection, and that, on collection, the proceeds should be paid to the chargee bank itself, that requirement sufficed to create a fixed charge on the book debts. It followed that a debenture imposing restrictions on the use of the proceeds of book debts also created a fixed charge over book debts. The appeal would, accordingly, be allowed (see [86], [87], [89], [96], [98], [100], [101], below); *Siebe Gorman & Co Ltd v Barclays Bank Ltd, Siebe Gorman & Co Ltd v RH McDonald Ltd* [1979] 2 Lloyd's Rep 142 followed, *Re New Bullas Trading Ltd* [1994] 1 BCLC 485 and *Agnew v Comr of Inland Revenue* [2001] 2 BCLC 188 considered).

Decision of Sir Andrew Morritt V-C [2004] 1 All ER 981 reversed.

Notes

For the form of debentures, for the meaning of 'floating charge' and for the effect of a floating charge, see 7(2) *Halsbury's Laws* (4th edn) (1996 reissue) paras 1251, 1260, 1261.

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Smith v Chadwick (1884) 9 App Cas 187, [1881–5] All ER Rep 242, HL; affg (1882) 20 Ch D 27.

Snook v London & West Riding Investments Ltd [1967] 1 All ER 518, [1967] 2 QB 786, [1967] 2 WLR 1020, CA.

Specialised Mouldings Ltd, Re (13 February 1987, unreported), ChD.

Sperrin Textiles Ltd (in receivership), Re [1992] NI 323.
State Rail Authority of New South Wales v Heath Outdoor Pty Ltd (1986) 7 NSWLR 170, NSW SC.
Tilley's Will Trusts, Re, Burgin v Croad [1967] 2 All ER 303, [1967] Ch 1179, [1967] 2 WLR 1533.
Toomey v Eagle Star Insurance Co Ltd [1994] 1 Lloyd's Rep 516, CA.
Warden and Hotchkiss Ltd, Re [1945] 1 All ER 507, [1945] 1 Ch 270, CA.
Welsh Development Agency v Export Finance Co Ltd [1992] BCLC 148, CA.
Williams & Glyn's Bank Ltd v Barnes [1981] Com LR 205.
Wilson v Maynard Shipbuilding Consultants AB [1978] 2 All ER 78, [1978] QB 665, [1978] 2 WLR 466, CA.
Wilson v United Counties Bank Ltd [1920] AC 102, [1918–19] All ER Rep 1035, HL.
Wogan's (Drogeda) Ltd, Re, Jenkins v Hill Samuel (Ireland) Ltd [1993] 1 IR 157, Ir HC and SC.
Young v Austen (1869) LR 4 CP 553, DC.

Appeal

National Westminster Bank plc appealed from the decision of Sir Andrew Morritt V-C on 15 January 2004 ([2004] EWHC 9 (Ch), [2004] 1 All ER 981) dismissing the bank's application pursuant to s 112 of the Insolvency Act 1966 for a declaration that a debenture dated 30 September 1997 granted to the bank by the first respondent, Spectrum Plus Ltd (the company) created a fixed charge over the company's book debts and the proceeds thereof and for an order directing the second and third respondents, Richard Hawes and David Thomas, the liquidators appointed on the company's resolution to go into creditors' voluntary liquidation, to account to the bank in respect of the book debts. The fourth, fifth, and sixth respondents, the Customs and Excise Commissioners, the Inland Revenue Commissioners, and the Secretary of State for Trade and Industry were joined to the action as being, or being subrogated to, preferential creditors. The first, second, and third respondents took no part in the appeal. The facts are set out in the judgment of Lord Phillips of Worth Matravers MR.

Gabriel Moss QC and *Jeremy Goldring* (instructed by *Allen & Overy LLP*) for the Bank.

Philip Jones and *Catherine Addy* (instructed by the *Solicitor of Inland Revenue*, the *Solicitor for the Customs & Excise* and the *Treasury Solicitor*) for the preferential creditors.

Cur adv vult

12 July 2004. The following judgments were delivered.

LORD PHILLIPS OF WORTH MATRAVERS MR.

INTRODUCTION

[1] This is an appeal against a judgment of Sir Andrew Morritt V-C dated 15 January 2004 ([2004] EWHC 9 (Ch), [2004] 1 All ER 981, [2004] 2 WLR 783) in which he dismissed an application by the appellant National Westminster Bank plc (the Bank) pursuant to s 112 of the Insolvency Act 1986 for a declaration that a debenture granted to the Bank by the first respondent Spectrum Plus Ltd (the Company) created a fixed charge over the Company's book debts.

[2] Both fixed and floating charges are the products of agreement between the chargor and the chargee. The rights conferred by fixed and floating charges were

initially the creatures of equity. The use of fixed charges long predated the existence of floating charges. Floating charges were introduced and recognised in the second half of the nineteenth century. The creation of floating charges was rapidly followed by the introduction of statutory provisions which made the distinction between fixed and floating charges of particular significance.

[3] Initially it was not difficult to distinguish between a fixed and a floating charge. A fixed charge arose where the chargor agreed that he would no longer have the right of free disposal of the assets charged, but that they should stand as security for the discharge of obligations owed to the chargee. A floating charge was normally granted by a company which wished to be free to acquire and dispose of assets in the normal course of its business, but none the less to make its assets available as security to the chargee in priority to other creditors should it cease to trade. The hallmark of the floating charge was the agreement that the chargor should be free to dispose of his assets in the normal course of business unless and until the chargee intervened. Up to that moment the charge 'floated'.

[4] Where the chargor and the chargee agree that there shall be immediate restrictions, but not a total embargo, on the manner in which the chargor may dispose of the assets charged, it can be less easy to decide whether the charge should be categorised as a fixed or a floating charge. This is such a case.

[5] This appeal concerns a charge granted over book debts by a clause in a debenture. The courts sometimes have problems in identifying whether an agreement to grant a charge over book debts has created a fixed or a floating charge. Two problems can arise. The first is of identifying the degree to which the parties have agreed that the chargor's right to dispose of the book debts or their proceeds are to be restricted. This is a problem of construction of the relevant agreement. The second problem is of determining whether, having regard to the restrictions that the parties have agreed should be imposed on the chargor's rights, the resulting charge is properly to be categorised as a fixed or a floating charge. This is an issue of law.

[6] The charge in issue in this case was granted by the Company over its book debts to secure its obligations to the Bank to repay borrowings under an overdraft facility. There were two stages in the reasoning that led Sir Andrew Morritt V-C to conclude that the charge constituted a floating rather than a fixed charge over book debts. (1) If the terms of a debenture entitle a chargor to collect book debts and use the proceeds in the normal course of business, unless and until the chargee intervenes, the charge will necessarily be a floating charge, notwithstanding that the debenture may contain restrictions against particular modes of dealing with or collecting the book debts. (2) The effect in law of the debenture, properly construed, was that, the Company was free to use the proceeds of its book debts in the normal course of its business, unless and until the Bank intervened.

[7] The first stage of this reasoning is in direct conflict with the decision of this court in *Re New Bullas Trading Ltd* [1994] 1 BCLC 485. In *Agnew v Comr of Inland Revenue* [2001] UKPC 28, [2001] 2 BCLC 188, [2001] 2 AC 710 the Privy Council held that *Re New Bullas* was wrongly decided. The question arises of whether the requirements of precedent permitted Sir Andrew Morritt V-C or permit this court to prefer the reasoning of the Privy Council in *Agnew*'s case to that of this court in *Re New Bullas*. Mr Gabriel Moss QC for the Bank has not, however, been anxious, either before Sir Andrew Morritt V-C or before this court to take his stand on the reasoning in *Re New Bullas*, no doubt through apprehension that any victory on that ground would be ephemeral.

[8] The second stage of the reasoning of Sir Andrew Morritt V-C is in conflict with the relevant part of the judgment of Slade J in *Siebe Gorman & Co Ltd v Barclays Bank Ltd, Siebe Gorman & Co Ltd v RH McDonald Ltd* [1979] 2 Lloyd's Rep 142. In that case Slade J had to consider a clause in a debenture that was in essentially the same terms as those in issue in the present case. Slade J held that those terms placed a certain restriction on the freedom of the chargor to use the proceeds of its book debts once these had, as the debenture required, been paid into its account with the chargee bank and that the debenture created a fixed charge. Sir Andrew Morritt V-C held that this conclusion was erroneous and that the *Siebe Gorman* case had been wrongly decided.

[9] It is with this conclusion of Sir Andrew Morritt V-C that Mr Moss has joined vigorous issue. He has submitted that over the last 25 years the wording of innumerable debentures has been based on that construed by Slade J in the *Siebe Gorman* case with the intention and belief (1) that the wording carried the meaning found by Slade J and (2) that the effect in law of that meaning was to create a fixed charge over book debts. In these circumstances his submission is that the decision in the *Siebe Gorman* case should not be reversed unless it is plainly wrong. He submits that, far from being plainly wrong, it was correctly decided.

[10] This appeal requires a detailed analysis of the decision in the *Siebe Gorman* case in the light of the relevant jurisprudence that bears on the essential characteristics of a floating charge.

THE RELEVANT FACTS

[11] The facts found by Sir Andrew Morritt V-C are not in issue. They are as follows. The Company was incorporated in May 1992 to carry on the business of a manufacturer of dyes, paints, pigments and other chemical products for the paint industry. In the autumn of 1997 the Company changed banks. It opened an account with the Bank, obtained an overdraft facility of £250,000 and granted the Bank a debenture to secure all moneys due from the Company to the Bank. The overdraft facility (the facility) was, in accordance with its terms, made available on a fully fluctuating basis for the purpose of providing working capital. It was to be reviewed on 1 September 1998 but was repayable on demand. It might be withdrawn, reduced or made subject to further conditions or otherwise varied on notice. Otherwise it was subject to the Bank's 'general terms upon which the Bank makes facilities available'.

[12] The debenture dated 30 September 1997 and duly registered on 7 October 1997 (the Debenture) was in a standard form and contained the following material terms:

> '1 The Company hereby covenants to pay to the Bank on demand the sum of One pound (£1) and to pay and discharge on demand all moneys obligations and liabilities (whether present or future actual or contingent) which may now or at any time hereafter may be or become due owing or incurred by the Company to the Bank ...
>
> 2 The Company with full title guarantee and to the intent that the security shall rank as a continuing security hereby charges with the payment or discharge of all moneys obligations and liabilities hereby covenanted to be paid or discharged (together with all costs and expenses howsoever incurred by the Bank in connection with this Mortgage Debenture on a full indemnity basis) ... (v) by way of specific charge all book debts and other debts

(including without limitation rents) now and from time to time due or owing to the Company ...

5 With reference to the book debts and other debts hereby specifically charged the Company shall pay into the Company's account with the Bank all moneys which it may receive in respect of such debts and shall not without the prior consent in writing of the Bank sell factor discount or otherwise charge or assign the same in favour of any other person or purport to do so and the Company shall if called upon to do so by the Bank from time to time execute legal assignments of such book debts and other debts to the Bank.'

Clause 15 authorised the bank to combine accounts.

[13] On 6 October 1997 the Bank advanced to the Company £200,000 and debited its new account accordingly. Whilst the overdraft facility varied from time to time the Company's account was never in credit. The proceeds of book debts were collected by the Company and paid into its account with the Bank, thereby reducing the overdraft, and the Company drew on the account as and when it needed to do so thereby increasing the overdraft.

[14] On 15 October 2001 the Company resolved to go into creditors' voluntary liquidation and appointed the second and third respondents as liquidators. According to the statement of affairs sworn that day £165,407 was due to the Bank, £156,554 was estimated to be realisable from book debts with a face value of £291,293, £16,136 was due to preferential creditors (including the Inland Revenue £6,865, Customs and Excise £7,760 and employees £1,511) and the deficiency with regard to creditors was £649,249. Since then the liquidators have collected book debts to the value of £113,484 but have refused to account for them to the Bank.

THE NATURE OF A FLOATING CHARGE

[15] The early history of the floating charge is set out in detail in the speech of Lord Millett in *Agnew*'s case [2001] 2 BCLC 188 at [5]–[15] to which reference should be made for the detailed picture. I shall restrict myself to a few key references. In the early days it was common for a floating charge to cover the entire undertaking of the chargor company. The agreement, commonly a debenture, would identify the assets to be charged and provide the right on the part of the chargee to enter into possession of those assets for the purpose of enforcing the security. Expressly, or by implication, the agreement would permit the chargor to continue to use and dispose of those assets in the ordinary course of business unless and until the chargee exercised his right to enter into possession, or some other specified event occurred.

[16] The object of the floating charge was to provide security to the chargee in a form that would not inhibit the chargor from continuing to carry on its business.

[17] A floating charge was not, and is not, easy to define. Initially the courts tended to analyse it as a charge coupled with a licence by the chargee to the chargor to dispose of the assets charged. Thus in *Robson v Smith* [1895] 2 Ch 118 at 124 Romer J approved the statement that floating charges 'constitute a charge but give a licence to the company to carry on its business'. In *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979 at 999, however, Buckley LJ provided the following, more accurate, description of a floating charge:

'A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.'

[18] In *Illingworth v Houldsworth* [1904] AC 355 at 358 Lord Macnaghten illustrated the difference between a specific and a floating charge with the following description:

'A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.'

[19] When that case was before the Court of Appeal under the name *Re Yorkshire Woolcombers Association Ltd, Houldsworth v Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, Romer LJ (at 295) identified three characteristics of a floating charge:

'(1.) If it is a charge on a class of assets of a company present and future; (2.) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3.) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.'

[20] That case concerned a charge over book debts. In the House of Lords the Earl of Halsbury LC ([1904] AC 355 at 357–358) expanded on the third characteristic identified by Romer LJ:

'It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of those book debts being extinguished by payment to the company, and that other book debts should come in and take the place of those that had disappeared. That, my Lords, seems to me to be an essential characteristic of what is properly called a floating security. The recitals ... shew an intention on the part of both parties that the business of the company shall continue to be carried on in the ordinary way—that the book debts shall be at the command of, and for the purpose of being used by, the company. Of course, if there was an absolute assignment of them which fixed the property in them, the company would have no right to touch them at all. The minute after the execution of such an assignment they would have no more interest in them, and would not be allowed to touch them, whereas as a matter of fact it seems to me that the whole purport of this instrument is to enable the company to carry on its

business in the ordinary way, to receive the book debts that were due to them, to incur new debts, and to carry on their business exactly as if this deed had not been executed at all. That is what we mean by a floating security.' a

[21] Where a grantor of a floating charge ceased to carry on business, the floating charge crystallised and the chargee could look to the assets charged to secure the debt owed to it. This was to the detriment of the other creditors of the chargor. The legislature then intervened to protect preferential creditors from this detriment. Section 107 of the Preferential Payments in Bankruptcy (Amendment) Act 1897 made preferential debts payable out of the proceeds of a floating charge in priority to the right of the chargee. This made the distinction between a fixed and a floating charge of particular importance and subsequent insolvency legislation has perpetuated the importance of that distinction. The significance of this appeal is that ss 40 and 175(2)((b) of the Insolvency Act 1986 give priority to the preferential creditors over the Bank's charge if that charge, as created, was a floating charge, but not if it was a fixed charge. They provide as follows: b c

'**40. Payment of debts out of assets subject to floating charge**—(1) The following applies, in the case of a company, where a receiver is appointed on behalf of the holders of any debentures of the company secured by a charge which, as created, was a floating charge. d

(2) If the company is not at the time in course of being wound up, its preferential debts (within the meaning given to that expression by section 386 in Part XII) shall be paid out of the assets coming to the hands of the receiver in priority to any claims for principal or interest in respect of the debentures. e

(3) Payments made under this section shall be recouped, as far as may be, out of the assets of the company available for payment of general creditors ...

175. Preferential debts (general provision)—(1) In a winding up the company's preferential debts (within the meaning given by section 386 in Part XII) shall be paid in priority to all other debts. f

(2) Preferential debts—(a) rank equally among themselves after the expenses of the winding up and shall be paid in full, unless the assets are insufficient to meet them, in which case they abate in equal proportions; and (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures secured by, or holders of, any floating charge created by the company, and shall be paid accordingly out of any property comprised in or subject to that charge.' g h

[22] The distinction between a fixed and a floating charge over book debts became less clear when debentures began to impose restrictions upon the right of the chargor to dispose of book debts in the course of business, notwithstanding that the charge was described as a 'floating charge'. Thus in *Re Brightlife Ltd* [1986] 3 All ER 673, [1987] Ch 200 a clause of a debenture gave a charge which provided that the chargor should not— j

'deal with its book or other debts or securities for money otherwise than in the ordinary course of getting in and realising the same which expression shall not authorise the selling, factoring or discounting ... of its book debts or other negotiable instruments ...'

[23] Hoffmann J, in determining that the charge created was none the less a floating charge, remarked:

> 'But a floating charge is consistent with some restriction on the company's freedom to deal with its assets. For example, floating charges commonly contain a prohibition on the creation of other charges ranking prior to or pari passu with the floating charge. Such dealings would otherwise be open to a company in the ordinary course of its business.' (See [1986] 3 All ER 673 at 676–677, [1987] Ch 200 at 209.)

[24] It might have been suggested that the charge in question was a hybrid, which did not fully satisfy the descriptions of a floating charge in the early jurisprudence, for the restrictions in question did not leave the chargor, so far as the book debts were concerned, free 'to carry on their business exactly as if this deed had not been executed at all'—per the Earl of Halsbury LC in *Illingworth v Houldsworth* (see [20], above).

[25] The conundrum of the nature and effect of restrictions of this nature over the use of book debts is not merely one of whether, as a matter of categorisation, they classify as a floating charge for purposes of insolvency legislation. A related issue arises as to the effect on third parties of partial restrictions on the right to dispose of book debts. Surprisingly, this is a topic which has received little principled discussion in recent English cases and it is not easy to fathom the equitable principles in play.

[26] In *Re Portbase Clothing Ltd* [1993] 3 All ER 829 at 839, [1993] Ch 388 at 401 Chadwick J, after reference to authority, remarked:

> 'The principle to be derived from those decisions of the Court of Appeal, as I understand it, is that the holder of a subsequent fixed charge which has been made subject to a prior floating charge, either by express provisions in the fixed charge itself or by a restriction in the floating charge of which the holder of the fixed charge had notice, takes his security upon terms that, if before the charged property has been realised under that fixed charge events occur which cause the floating charge to crystallise, then the proceeds of realisation must be paid to the holder of the floating charge; the holder of the fixed charge can have no claim upon those proceeds until the claims under the floating charge have been paid out.'

[27] In the following year in *Griffiths v Yorkshire Bank plc* [1994] 1 WLR 1427 at 1435 Morritt J commented on this observation as follows:

> 'Chadwick J. envisaged two possibilities. One is a restriction in the floating charge of which the holder of the fixed charge had notice, i.e. the 1977 debenture. In none of the cases to which he had earlier referred was this possibility considered or in issue. In my judgment it is not the law that such a restriction affects priorities as a matter of property law whatever may be the contractual result. It is of the essence of a floating charge that proprietary interests having priority over any interest of the holder of the floating charge may be created.'

[28] In his illuminating work on *Legal Problems of Credit and Security* (3rd edn, 2003) para 5-40 Professor Roy Goode prefers the conclusions of Chadwick J referring to three early decisions, one of which, *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700 was a decision of the Court of Appeal. In that case the debenture in issue contained provisions that would normally have

created a simple floating charge but which included a restriction on the chargor company from granting any prior charge on the assets in question. The chargor subsequently granted a charge over a fund that was one of those assets. The only issue was whether the chargee of the fund, who was aware of the existence of the debenture, had constructive knowledge of the restriction. The Court of Appeal held that he did not. It appears to have been taken for granted that, had the chargee had such knowledge, its security would have ranked after the debenture—see Lord Esher MR (at 707).

[29] Professor Goode summarises the position as follows:

> 'If the debenture imposes restrictions on sales or subsequent incumbrances and the particular sale or charge, though in the ordinary course of business, is in breach of such restrictions, the floating charge will, on crystallisation, retain its priority if the buyer or incumbrancer took with notice of the restrictions, whether his interest is legal or equitable. This stems from the fact that the floating charge, though ambulatory, is a present security, not a mere contract right, so that restrictions contained in it will constitute an equity binding those who have notice of them.'

[30] This passage raises a number of questions. Why cannot the chargee assert his security interest over the asset that has been disposed of in breach of contract until the remainder of the charge has crystallised? If the assignee of the asset charged realises the asset, can the chargee trace into the proceeds? If so, what is the nature of the interest that entitles him to do so? In considering the first of these questions, Professor Goode refers to a passage in *Reynolds Bros (Motors) Pty Ltd v Esanda Ltd* (1983) 1 ACLC 1333, a decision of the Court of Appeal of New South Wales. Mahoney JA (at 1338) gives detailed consideration to charges containing restrictions on disposal and comments that the effect of such restrictions has yet to be fully explained and the rationale of *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700 yet to be finally stated. I would endorse his comments.

[31] It is not necessary in this appeal to pursue this difficult area of the law further. It suffices to note that where a charge places restrictions on the disposal of book debts prior to collection but leaves the chargor free to collect and use their proceeds in the ordinary course of business there are problems in identifying the precise effect in law of what has been agreed. There are also problems in deciding whether such a charge falls to be classified as a fixed or a floating charge.

THE CONFLICT OF AUTHORITY

[32] In the *Siebe Gorman* case [1979] 2 Lloyd's Rep 142, applying *Tailby v Official Receiver* (1888) 13 App Cas 523 Slade J recognised that it was possible, by agreement, to create a fixed charge over both present and future book debts. The conflict of authority relates to the question of the effect of an agreement which precludes the chargor from alienating its book debts, but leaves it free to receive the proceeds of those debts as and when they fall due for payment and to use those proceeds in the normal course of its business. Is such a charge properly to be categorised as a fixed charge or a floating charge over the book debts? To a degree this question was considered by Slade J himself, and I shall consider his observations when I come to look at the *Siebe Gorman* case in detail. First I propose to consider the approach to categorisation and the more recent decisions which bear on this issue.

THE APPROACH TO CATEGORISATION

[33] In *Agnew v Comr of Inland Revenue* [2001] 2 BCLC 188 Lord Millett pointed out that whether a charge falls into the category of a fixed or a floating charge cannot depend upon the manner in which the parties choose to describe it in the instrument creating it. He said (at [32]):

> 'The question is not merely one of construction. In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it.'

[34] With respect these observations are plainly sound. I would, however, make one comment. They do not accommodate the possibility that the rights agreed by the parties may be inconsistent both with a fixed charge and with a floating charge, as these terms were originally understood. In such a situation the issue becomes whether the charge has some dominant characteristics which have the effect that it falls to be classified as a floating charge, for the purposes of the insolvency legislation.

THE MORE RECENT DECISIONS

[35] In *Re Atlantic Computer Systems plc* [1992] 1 All ER 476, [1992] Ch 505 has been analysed by Professor Goode in an article ((1994) 110 LQR 592) entitled 'Charges over Book Debts: a Missed Opportunity'. The chargor was a company which arranged with the chargee, a funding bank, that it should purchase equipment and let it on hire purchase to the chargor with permission to sublease to end users. The chargor charged to the chargee by way of security all the benefit of the terms of each of the specific subleases involved and, in particular, the rentals due under them. The chargor later went into administration and the issue arose as to whether the charges were fixed or floating charges. The reasoning of Nicholls LJ, when giving the judgment of the court, included the following passages:

> 'The notable feature of the present case is that the charges were not ambulatory. The property assigned by the company was confined to rights to which the company was entitled under specific, existing contracts. The assignments consisted of the company's rights "under or by virtue of" subleases each of which was already in existence at the time of the assignments and each of which was specifically identified in the relevant deeds of assignment. In each case the payments due to the company under a specific sublease were charged as security for the payments due by the company under the headlease relating to the same equipment. The company's right to receive future instalments from end-users in due course

pursuant to the terms of these subleases was as much a present asset of the company, within Romer LJ's reference to "present and future" assets of a company, as a right to receive payment of a sum which was immediately due. Romer LJ's reference to future assets was a reference to assets of which, when the charge was created, the company was not the owner. That was the position in that case. That is not the position in this case. We have in mind that in practice sums payable by the end-users under these subleases were paid to the company and utilised by it in the ordinary course of business. In so far as this is relevant, it may well be that this was what the parties intended should happen. The company was to be at liberty to receive and use the instalments until AIB chose to intervene. We are unpersuaded that this results in these charges, on existing and defined property, becoming floating charges. A mortgage of land does not become a floating charge by reason of the mortgagor being permitted to remain in possession and enjoy the fruits of the property charged for the time being.' (See [1992] 1 All ER 476 at 494, [1992] Ch 505 at 534.)

[36] Professor Goode has criticised this reasoning. He comments that the emphasis placed by the court on the fact that the assets subject to the charge were restricted to rights under existing contracts was misplaced, in that this was not incompatible with a floating charge. The material consideration in his opinion was that the chargor was free to use the proceeds of the rentals charged in the ordinary course of business free from the security interest. This was only consistent with the charge being a floating charge.

[37] *Re Atlantic Computer Systems* was followed by Vinelott J in *Re Atlantic Medical Ltd* [1993] BCLC 386. That case resembled *Re Atlantic Computer Systems* in that it involved a charge granted over hire-purchase agreements, subleases and rentals of leased equipment. The difference was that the charge extended to such agreements as the chargor might enter into in the future. Here again, Professor Goode considers that the judge overlooked the crucial characteristic—the right of the chargor to make use of the proceeds of the agreements in the ordinary course of its business.

[38] I now come to *Re New Bullas Trading Ltd* [1994] 1 BCLC 485. In that case the chargor company executed a debenture which purported to charge to the chargee all book debts both present and future, the charge to take effect 'as a first fixed mortgage by assignment'. The debenture provided that when the debts were paid, the proceeds should be placed in a designated account and, in the absence of directions by the chargee to the contrary, thereupon treated as subject to a floating charge—i e the chargor was free to use the proceeds. Administrative receivers of the chargor were appointed, which brought into play s 40 of the 1986 Act (see [21], above). The issue was whether the charge over the book debts constituted a fixed or a floating charge.

[39] Giving a single judgment, with which Russell LJ and Scott Baker J agreed, Nourse LJ held that the parties had succeeded in their intention of creating a fixed charge over the book debts. His reasoning appears in the following passages from 491–493 of his judgment:

'Mr Henderson has submitted that the distinction drawn between the book debts before collection and after realisation is unrealistic and artificial because a debt is worth nothing unless and until it is turned into money. He says that it is of the essence of a fixed charge that the asset is appropriated to the charge from the beginning and that it cannot be released from it without

a the consent of the chargee. He relies strongly on a passage in the judgment of Vaughan Williams LJ in *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 at 294, where he said: "... what you do require to make a specific security is that the security whenever it has once come into existence, and been identified or appropriated as a security, shall never thereafter at the will of the mortgagor cease to be a security." The short answer to these b submissions is that here the asset does not cease to be subject to the fixed charge at the will of the company. It ceases to be such because both parties, not the company alone, have determined that if the proceeds of a book debt are paid into the specified account at a time when no directions have been given it shall thereupon be released. The matter is governed by a clear agreement of the parties. Unless there is some authority or principle of law c which prevented them from agreeing what they have agreed, their agreement must prevail. An equitable assignment, whether it takes effect as an out and out assignment or, as here, by way of charge, is a creature of exceptional versatility, malleable to the intention of its creators, adaptable to the subject matter assigned. Provided it is in writing, made for value and the d intention is clear, it requires no formalities of expression; it may take effect over property real or personal, and over estates or interests legal or equitable, vested or contingent or, as in the case of future book debts, mere expectancies ... just as it is open to contracting parties to provide for a fixed charge on future book debts, so it is open to them to provide that they shall be subject to a fixed charge while they are uncollected and a floating charge e on realisation. No authority to the contrary has been cited and, the principle being as spacious as it has been expressed to be, no objection is on that account sustainable.'

[40] *Re New Bullas* was criticised by Professor Goode and has been held to be wrongly decided in *Agnew's* case, both by the Court of Appeal of New Zealand f and by the Privy Council. Before turning to that case, I propose to consider those English decisions which are in conflict with *Re New Bullas*.

[41] *Re Brightlife Ltd* [1986] 3 All ER 673, [1987] Ch 200 involved a debenture which purported to create a 'first specific charge' over all book debts. The debenture prohibited the chargor from dealing with the book debts 'otherwise g than in the ordinary course of getting in and realising the same' (see [22], above). Hoffmann J held that, despite the language used by the parties, the charge created fell to be categorised as a floating charge. He said:

> 'In this debenture, the significant feature is that Brightlife was free to collect its debts and pay the proceeds into its bank accounts. Once in the h account, they would be outside the charge over debts and at the free disposal of the company. In my judgment a right to deal in this way with the charged assets for its own account is a badge of a floating charge and is inconsistent with a fixed charge.' (See [1986] 3 All ER 673 at 677, [1987] Ch 200 at 209.)

j **[42]** *Royal Trust Bank v National Westminster Bank plc* [1996] 2 BCLC 682 involved a charge over the benefits of hire purchase and leasing agreements. The terms of the charge entitled the chargee to require payments under the agreements to be paid into a special account, but the chargee never in fact did so and the chargor paid them into its own bank account from which it drew for its own purposes. The issue was whether the funds in that account were subject to a trust in favour of the chargee. It was conceded that the charge itself was a fixed

charge, but Millett LJ held that this concession was wrongly made. He observed (at 704) that he did not see how it could be possible to separate a debt or other receivable from the proceeds of its realisation. He went on to find that, unless and until the chargee intervened, the chargor had a contractual right to apply the proceeds of the charged assets in the ordinary course of its business. This right was 'a badge of a floating charge' and 'inconsistent with the existence of a fixed charge'. However, the view expressed by Millett LJ was not adopted by the other members of the court and was not essential to his determination of the issue before the court.

[43] So far as the doctrine of precedent is concerned, therefore, there is no English decision which permits this court to disregard the decision of the Court of Appeal in *Re New Bullas* that it is possible to have a fixed charge over book debts notwithstanding that the chargor is entitled to collect and use the proceeds of the debts, which are agreed to be subject only to a floating charge.

[44] In *Re ASRS Establishment Ltd (in administrative receivership and liquidation)* [2000] 2 BCLC 631 at 642 Robert Walker LJ remarked that *Re New Bullas* was a controversial decision which was 'concerned with a very unusual provision ... under which receivables were subject to a fixed charge until received but were then released so as to be subject merely to a floating charge'. In *Re Pearl Maintenance Services Ltd, Re Pearl Building Contracts Ltd* [1995] 1 BCLC 449 Carnwath J held that a charge which left the chargor free to realise its book debts and use them in the ordinary course of its business was a floating charge. He had this to say of *Re New Bullas* ([1995] 1 BCLC 449 at 454):

> 'That decision has promoted considerable academic interest (see e g Goode "Charges over book debts: A missed opportunity" (1994) 110 LQR 592 and Lightman & Moss Receivers (2nd edn) at pp 35ff). However, the court in terms treated the case as turning on the specific wording of the clause in the debenture before it. It does not give any basis for revisiting the earlier authorities in cases where the debenture does not draw the same sharp distinction between the treatment of the book debts and their proceeds. Those authorities will have been consistently acted upon by draftsmen, receivers and others. Whatever the precise limits of the New Bullas approach, it offers no excuse (certainly at first instance) for introducing uncertainty in relation to forms of charge whose interpretation has been treated as settled.'

In *Chalk v Kahn* [2000] 2 BCLC 361 at 366 Hart J distinguished *Re New Bullas* in the same way.

[45] In the present case, Mr Philip Jones for the preferential creditors contended, without great enthusiasm, that *Re New Bullas* could be distinguished by confining its reasoning to debentures that draw a similar specific distinction between book debts and their proceeds. We do not consider that this course is open to us. In *Agnew's* case [2001] 2 BCLC 188 at [45] Lord Millett remarked:

> 'Their Lordships agree with this to this extent: if the company is free to collect the debts, the nature of the charge on the uncollected debts cannot differ according to whether the proceeds are subject to a floating charge or are not subject to any charge. In each case the commercial effect is the same: the charge holder cannot prevent the company from collecting the debts and having the free use of the proceeds.'

If an essential step in upholding the decision of Sir Andrew Morritt V-C is to hold that a fixed charge over book debts cannot exist where the chargor is free to use the proceeds of those debts in the ordinary course of his business we can only take that step if it is open to us to hold that *Re New Bullas* was wrongly decided. It is time to consider why the Privy Council so held in *Agnew*'s case.

THE DECISION IN *AGNEW*'S CASE

[46] In *Agnew*'s case [2001] 2 BCLC 188 the chargor company created a charge on book debts that was modelled on that in *Re New Bullas*. It was expressed to be 'fixed' in favour of its bank, but left the chargor free to collect the debts when they fell due and to use the proceeds in the ordinary course of business.

[47] In giving the advice of the Privy Council Lord Millett traced the jurisprudence relating to the nature of a floating charge, including the *Siebe Gorman* case and a number of decisions which followed it, which do not bind this court and to which I have yet to refer. He then set out the reasoning of Nourse LJ in *Re New Bullas*. He expressed the view that the reasoning could not be supported (see [2001] 2 BCLC 188 at [34]):

> 'It is entirely destructive of the floating charge. Every charge, whether fixed or floating, derives from contract. The company's freedom to deal with the charged assets without the consent of the holder of the charge, which is what makes it a floating charge, is of necessity a contractual freedom derived from the agreement of the parties when they entered into the debenture. To find the consent in question in the original agreement would turn every floating charge into a fixed charge.'

[48] After reference to academic comment, Lord Millett continued (at [36]):

> 'The judge considered that the critical distinction between a floating charge and a fixed charge lay in the presence or absence of a power on the part of the company to dispose of the charged assets to third parties. It was sufficient to create a fixed charge on book debts that the company should be prohibited from alienating them, whether by assigning, factoring or charging them. It was not necessary to go further and also prohibit the company from collecting them and disposing of the proceeds. Their Lordships cannot accept this. It is contrary to both principle and authority and their Lordships think to commercial sense. It is inconsistent with the actual decisions in *Brightlife* and *Supercool* and contrary to the statements of principle in virtually every case from *Re Yorkshire Woolcombers Association Ltd* to *Cosslett*. It makes no commercial sense because alienation and collection are merely different methods of realising a debt by turning it into money, collection being the natural and ordinary method of doing so. A restriction on disposition which nevertheless allows collection and free use of the proceeds is inconsistent with the fixed nature of the charge; it allows the debt and its proceeds to be withdrawn from the security by the act of the company in collecting it.'

[49] Lord Millett added (at [46]):

> 'While a debt and its proceeds are two separate assets, however, the latter are merely the traceable proceeds of the former and represent its entire value. A debt is a receivable; it is merely a right to receive payment from the debtor. Such a right cannot be enjoyed in specie; its value can be exploited only by exercising the right or by assigning it for value to a third party. An assignment or charge of a receivable which does not carry with it the right to

the receipt has no value. It is worthless as a security. Any attempt in the present context to separate the ownership of the debts from the ownership of their proceeds (even if conceptually possible) makes no commercial sense.'

[50] Lord Millett concluded (at [49]):

'Before their Lordships the receivers insisted that the company had no power to withdraw either the book debts or their proceeds from the security of the fixed charge. The debenture was so drafted that the company had no need to do so. The debts were automatically extinguished by collection and their proceeds never became subject to a fixed charge. But this is simply playing with words. Whether conceptually there was one charge or two, the debenture was so drafted that the company was at liberty to turn the uncollected book debts to account by its own act. Taking the relevant assets to be the uncollected book debts, the company was left in control of the process by which the charged assets were extinguished and replaced by different assets which were not the subject of a fixed charge and were at the free disposal of the company. That is inconsistent with the nature of a fixed charge.'

COMMENTARY

[51] Where book debts are payable forthwith, or after a short period of credit, a charge which prohibits alienation of the debts but leaves the chargor free to collect them and use the proceeds is of limited value as a security. The position is quite different where the debts in question are payable by instalments over lengthy periods, as is the case with hire purchase or credit sale agreements. In the latter case at any one time the vast majority of the book debts will not be susceptible to being withdrawn from the security by collection. The primary concern of the chargee is likely to be to ensure that he is not deprived of the bulk of his security by some form of alienation. A debenture which prohibits all forms of disposal of the security but which allows collection of the debts by the chargor when they fall due is a very different form of security from those which were described as floating charges in the early cases.

[52] As I have demonstrated above, it seems to be the case that a chargee can enhance his security over book debts beyond that which would be provided by a simple floating charge if he imposes restrictions on disposing of them. It has, apparently, been suggested that such a charge is a third type of charge, neither fixed nor floating. The authors of *Palmer's Company Law* comment (13.115—footnote 7) that 'there is no conceptual or practical room for such third charge to be inserted between the other two'.

[53] So far as categorisation is concerned, it seems to me that there might have been scope for identifying, by way of a third category, a charge that prohibits disposal of book debts but permits the chargor to collect and use their proceeds. That course has not, however, been adopted by the courts and so it is necessary to decide whether such a charge falls to be categorised as a fixed or a floating charge. Nourse LJ in *Re New Bullas* considered that such a charge could properly be categorised as a fixed charge. The Privy Council in *Agnew's* case did not agree.

[54] *Agnew's* case identifies as the definitive touchstone of a floating charge on book debts the unrestricted right of the chargor, prior to crystallisation, to collect and make use of the proceeds of the book debts. This not only conflicts directly

with the decision in *Re New Bullas* but also conflicts indirectly with the decisions in *Re Atlantic Computer Systems* and *Re Atlantic Medical*.

[55] The reasoning in *Agnew*'s case is that the essential characteristic of the floating charge is that it leaves the chargor free to make use of the assets charged in order to continue to run the business. So long as he is free to use the proceeds of book debts for this purpose the charge is properly to be considered as floating over the book debts rather than fixed to them.

[56] The reasoning in *Re New Bullas* is less satisfactory. Nourse LJ held that the parties could create a fixed charge over book debts, but not their proceeds, by so agreeing in terms. He did not analyse the nature of the respective rights and obligations involved in the agreement. He elided the two steps that Lord Millett rightly identified as essential to the categorisation of the nature of a charge.

THE FETTER OF PRECEDENT

[57] Is it open to this court to reach a decision which is incompatible both with the reasoning and the result in *Re New Bullas*? In *Worcester Works Finance Ltd v Cooden Engineering Co Ltd* [1971] 3 All ER 708, [1972] 1 QB 210 the Court of Appeal held that it was not bound to follow decisions of the court which had been held to be wrongly decided by the Privy Council. Lord Denning MR held:

> '... although decisions of the Privy Council are not binding on this court, nevertheless when the Privy Council disapprove of a previous decision of this court, or cast doubt on it, then we are at liberty to depart from the previous decision. I am glad to depart from those earlier cases and to follow the Privy Council.' (See [1971] 3 All ER 708 at 711, [1972] 1 QB 210 at 217.)

Phillimore LJ expressly and Megaw LJ by implication agreed with Lord Denning MR.

[58] In *Young v Bristol Aeroplane Co Ltd* [1944] 2 All ER 293, [1944] KB 718 the Court of Appeal gave detailed consideration to the doctrine of precedent and held that there were only three situations in which the Court of Appeal was not bound to follow one of its own decisions. Disapproval of the decision by the Privy Council was not one of them. In *Davis v Johnson* [1978] 1 All ER 1132, [1979] AC 264 the House of Lords reaffirmed 'expressly, unequivocally and unanimously' that the rule laid down in *Young*'s case was still binding. The authors of 37 *Halsbury*'s *Laws* (4th edn reissue) para 1242, footnote 6, express the view that this decision must be taken as nullifying earlier attempts to spell out further exceptions, including that in the *Worcester Works Finance* case. I agree. It is not open to this court to rule that *Re New Bullas* was wrongly decided. There can be little doubt however, that if and when this point falls for decision in the House of Lords their Lordships will so decide.

[59] For this reason alone I am driven to conclude that the first stage in the reasoning of Sir Andrew Morritt V-C (see [6], above) cannot be supported.

[60] I propose to proceed to consider the second stage in Sir Andrew Morritt V-C's reasoning. He concluded that, on the true construction of the debenture in this case, the book debts were to be under the control of and available for use by the company in the ordinary course of its business through their collection and the ordinary operation of the bank account and the effect in law of the debenture, so construed, was to create a floating charge. He went on to hold that Slade J should have reached the same conclusion on the similar wording of the debenture that was in issue in *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142.

THE DECISION IN THE *SIEBE GORMAN* CASE

[61] The facts of the *Siebe Gorman* case were complex, indeed they occupy 12 pages of the judgment. Even so, there are aspects of the story which are not entirely clear. I shall attempt a short summary of the material facts, as I understand them.

[62] RH McDonald Ltd (the company) carried on business as suppliers of safety equipment. On 5 January 1971 the company granted to Barclays Bank (the bank) a debenture to secure payment or discharge of 'all monies and liabilities which shall for the time being ... be due or owing or incurred to the Bank by the Company'. The terms of the debenture included the following:

> '3. The Company as beneficial owner hereby charges with the payment or discharge of all monies and liabilities hereby covenanted to be paid or discharged by the Company ... (d) by way of first fixed charge all book debts and other debts now and from time to time due or owing to the Company; (e) by way of a first floating charge all other the undertaking and assets of the Company whatsoever and wheresoever both present and future but so that the Company is not to be at liberty to create any mortgage or charge upon and so that no lien shall in any case or in any manner arise on or affect any part of the said premises either in priority to or *pari passu* with the charge hereby created and further that the Company shall have no power without the consent of the Bank to part with or dispose of any part of such premises except by way of sale in the ordinary course of its business.
>
> 5. During the continuance of this security the Company ... (c) shall pay into the Company's account with the Bank all monies which it may receive in respect of the book debts and other debts hereby charged and shall not without the prior consent of the Bank in writing purport to charge or assign the same in favour of any other person and shall if called upon to do so by the Bank execute a legal assignment of such book debts and other debts to the Bank.'

[63] The bank opened a single account in the name of the company—the 'A' account. It was subject to an overdraft limit. It was, from the outset, overdrawn and by February 1972 was at or near that limit. By this time the company was indebted to Siebe Gorman in what was then the considerable sum of about £10,000.

[64] On 24 March 1972 the company assigned to Siebe Gorman bills of exchange and a letter of credit that were subject to the bank's charge under the debenture. I shall refer to these instruments simply as 'the bills of exchange'. Siebe Gorman were aware of the existence of the charge. They also had constructive knowledge of it, as it was registered. They did not, however, have notice of the terms of cl 5(c) of the debenture.

[65] By 6 April 1972 the overdraft on the 'A' account stood at £6,105, which was in excess of the overdraft limit. The company then arranged a loan from a finance house, which was paid into the 'A' account. For a brief period this account went into credit, before lapsing again into debit.

[66] On 1 May 1972 the bank opened a new account for the company—the 'C' account. The bank transferred to the 'C' account, to the debit of the 'A' account, sums intended to represent the proceeds of some of the bills of exchange that had been received.

[67] On 8 May 1972 the proprietor of the company gave the bank notice that he did not wish the company's overdraft to be further increased. This led the

bank to decide that, for the time being, no further cheques drawn by the company would be honoured. The bank then transferred back to the 'A' account the sum standing to the credit of the company in the 'C' account.

[68] The bank then opened a new account—the 'B' account, into which credits, and in particular further proceeds of bills of exchange, were paid. The bank permitted the company to draw on this account, but not to overdraw on it (with one brief and very minor exception).

[69] On 30 June 1972 the bank learned that the company had been made subject of a winding-up petition. Thereupon it permitted no further drawings on the 'B' account and opened a further account, the 'D' account to receive credits. On 6 July the bank appointed a receiver of all the property subject to its debenture and opened a further account, the 'E' account, to receive all further proceeds of the letters of credit.

[70] The principal issue in the action was the extent to which the bank could assert its charge over the proceeds of the bills of exchange that had been assigned to Siebe Gorman. The relevant issue, for present purposes, was whether the debenture created a fixed or a floating charge over the company's book debts.

[71] In considering the nature of the charge upon book debts created by cl 3(d) of the debenture Slade J first held ([1979] 2 Lloyd's Rep 142 at 158) applying *Tailby v Official Receiver* (1888) 13 App Cas 523, [1886–90] All ER Rep 486, that it was possible to create an equitable charge upon future book debts, which would attach to them as soon as they came into existence. He went on to consider whether the charge created over the book debts was a specific (ie fixed) or a floating charge.

[72] After quoting the three characteristics of a floating charge identified by Romer LJ in *Re Yorkshire Woolcombers Association* [1903] 2 Ch 284 (see [19], above). Slade J proceeded to examine whether all three existed in the case of the charge created by cl 3(d) of the debenture. He concluded that the first two characteristics were demonstrated, but that the third was not. In consequence, he concluded that the charge created was a specific or fixed charge and not a floating charge. I shall set out his reasoning in full ([1979] 2 Lloyd's Rep 142 at 158–159):

> 'The charge on the book debts represented by the relevant bills in the present case clearly possesses the first two of these three characteristics. The dispute arises in regard to the third, The provisions of cl. 5(c) of the debenture obliged the debtor, even before the bank had taken any steps to enforce its security, to pay into the debtor's account with the bank all moneys which it might receive in respect of the relevant bills and not without the prior consent of the bank in writing to purport to charge or assign the same in favour of any other person. Notwithstanding these provisions, Mr. Phillips, on behalf of Siebe Gorman, submitted that it was plain in the context of the debenture that R.H. McDonald Ltd. was intended, until the bank took steps to enforce its security, to be free to continue trading and to use the proceeds of its future book debts, including the relevant bills for the purposes of such trading. He submitted that there were a number of forms of dealing with future book debts which were not precluded by the terms of cl. 5(c), for example dealings by way of barter, exchange or set-off, and that the sub-clause necessarily implied that the debtor had the right to deal with future book debts, save as thereby expressly precluded. He emphasised that, while according to the terms of cl. 5(c) all the proceeds of future book debts would in the first instance have to go into the

debtor's account with the bank, it must have been contemplated that R.H. McDonald Ltd. would then be free immediately to draw out all those moneys for the ordinary purposes of its business, at least if such account was for the time being in credit. In regard to the latter point, if I had accepted the premise that R.H. McDonald Ltd. would have had the unrestricted right to deal with the proceeds of any of the relevant books debts paid into its account, so long as that account remained in credit, I would have been inclined to accept the conclusion that the charge on such book debts could be no more than a floating charge. I refer to the respective definitions of a floating charge and a specific charge given by Lord Macnaghten in *Illingworth v. Houldsworth*, ([1904] AC 355 at 358): "A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp." If the debenture on its true construction had given the bank no rights whatsoever, at a time when the account of R.H. McDonald Ltd. was in credit, to prevent the company from spending in the ordinary course of business all or any of the proceeds of book debts paid into its account, I would have been inclined to regard the charge, for all the wording of the debenture, as doing no more than "hovering over and so to speak floating with" the book debts, within the words of Lord Macnaghten. Such, I would conceive, is the effect of a charge on future book debts in the form more usually employed. Commonly it is intended, by both creditor and debtor, that the debtor shall have the free disposal of the proceeds of future book debts which may come into his hands, so long as the creditor takes no steps to enforce his security, or the charge has not otherwise crystallised. In my judgment, however, it is perfectly possible in law for a mortgagor, by way of continuing security for future advances, to grant to a mortgagee a charge on future book debts in a form which creates in equity a specific charge on the proceeds of such debts as soon as they are received and consequently prevents the mortgagor from disposing of an unencumbered title to the subject matter of such charge without the mortgagee's consent, even before the mortgagee has taken steps to enforce its security: (compare [*Evans Coleman & Evans Ltd v RA Nelson Construction Ltd* (1958) 16 DLR (2d) 123]). This in my judgment was the effect of the debenture in the present case. I see no reason why the Court should not give effect to the intention of the parties, as stated in cl. 3(d), that the charge should be a first fixed charge on book debts. I do not accept the argument that the provisions of cl. 5(c) negative the existence of a specific charge. All that they do, in my judgment, is to reinforce the specific charge given by cl. 3. The mere fact that there may exist certain forms of dealing with book debts which are not specifically prohibited by cl. 5(c) does not in my judgment turn the specific charge into a floating charge. This conclusion that the charge is a specific charge involves the further conclusion that, during the continuance of the security, the bank would have the right, if it chose, to assert its lien under the charge on the proceeds of the book debts, even at a time when the particular account into which they were paid was temporarily in credit. However, I see nothing surprising in this conclusion, bearing in mind that the charge afforded continuing security to the bank not only in respect of any indebtedness on that particular account but also in respect of any other indebtedness of R.H.

a McDonald Ltd. to the bank. The bank's lien would, after all, continue only during the subsistence of the debenture, which the debtor would at all times have the right to redeem. For these reasons, I conclude that the debenture on its true construction conferred on the bank a specific charge in equity on all future book debts owed to R.H. McDonald Ltd. ...'

b [73] This passage raises the following questions. (i) To what did Slade J refer when he drew a distinction between 'the particular account into which the proceeds of the book debts were paid' and 'any other indebtedness of R.H. McDonald Ltd. to the Bank'? (ii) What was the nature of the restriction that Slade J held that the debenture placed upon the use by the company of the proceeds of the book debts that were paid to the bank? (iii) What provision or c provisions of the debenture had the effect of imposing the restrictions in question?

'ANY OTHER INDEBTEDNESS'

[74] Slade J appears to have envisaged that a situation might develop in which one account might exist, into which the proceeds of book debts were paid, d standing in credit, while other accounts or dealings might co-exist, giving rise to indebtedness to the bank on the part of the company. Such a situation can arise. A bank and its customer can agree to the creation of independent accounts governed by different terms and one can stand in credit, affording security for another that is in debit—see *Halesowen Presswork and Assemblies Ltd v National* e *Westminster Bank Ltd* [1970] 3 All ER 473, [1971] 1 QB 1, *Re Bank of Credit and Commerce International SA (No 8)* [1997] 4 All ER 568, [1998] AC 214. It is possible that such a situation in fact developed in the latter stages of the dealings that I have described above.

[75] There are, of course, many situations in which a customer may become actually or potentially indebted to its bank notwithstanding that its current f account stands in credit.

THE RESTRICTION ON THE USE OF THE PROCEEDS OF BOOK DEBTS

[76] Slade J did not accept the premise that the company 'would have had the unrestricted right to deal with the proceeds of any relevant book debts paid into its account, so long as that account remained in credit'—see [1979] 2 Lloyd's Rep g 142 at 158. The nature of the restriction that he envisaged appears at 159. The 'bank would have the right, *if it chose*, to assert its lien under the charge on the proceeds of the book debts, even at a time when the particular account into which they were paid was temporarily in credit' (my emphasis). The phrase 'assert its lien' is imprecise—see the comments of Lord Denning MR and h Buckley LJ in the *Halesowen Presswork* case [1970] 3 All ER 473 at 477, 487, [1971] 1 QB 1 at 33, 46, respectively.

[77] My understanding of this passage of Slade J's judgment is as follows. Under the terms of the debenture the bank would be entitled to decline to honour cheques drawn when the account into which the proceeds of book debts j was paid was in credit if there existed other actual or potential indebtedness on the part of the company towards the bank.

[78] In *Agnew v Comr of Inland Revenue* [2001] 2 BCLC 188 at [20] Lord Millett made the following comment on the *Siebe Gorman* case:

'Slade J held that the critical feature which distinguished a floating charge from a fixed charge was not the fluctuating character of the charged assets

but the company's power to deal with them in the ordinary course of business. He found that, on the proper construction of the debenture, the company was not free to draw on the account without the consent of the bank even when it was in credit. Accordingly, he held that the charge on the uncollected book debts and their proceeds was a fixed charge.'

In [38] he commented:

'The judge gave two examples of fixed charges over assets which are defeasible at the will of the chargor. One was a charge over uncalled share capital; the other was a shipowner's lien on subfreights. With respect neither supports his argument. A charge on uncalled share capital leaves the company with the right to make calls, and this may properly be regarded as analogous to a right to collect book debts. But, as the Court of Appeal observed, such a charge is normally accompanied by restrictions on the use to which the company may put the receipts, so that the situation is analogous to that which *was thought to* obtain in *Siebe Gorman* and *did* obtain in [*Re Keenan Bros Ltd* [1986] BCLC 242]. The company can collect the money, but it is not free to use it as it sees fit.'

The words that I have emphasised indicate, perhaps, doubt on the part of Lord Millett as to whether Slade J correctly construed the effect of the debenture in the *Siebe Gorman* case.

[79] Finally in [48] Lord Millett said:

'To constitute a charge on book debts a fixed charge, it is sufficient to prohibit the company from realising the debts itself, whether by assignment or collection. If the company seeks permission to do so in respect of a particular debt, the charge holder can refuse permission or grant permission on terms, and can thus direct the application of the proceeds. But it is not necessary to go this far. As their Lordships have already noted, it is not inconsistent with the fixed nature of a charge on book debts for the holder of the charge to appoint the company its agent to collect the debts for its account and on its behalf. *Siebe Gorman* and *Keenan* merely introduced an alternative mechanism for appropriating the proceeds to the security. The proceeds of the debts collected by the company were no longer to be trust moneys but they were required to be paid into a blocked account with the charge holder. The commercial effect was the same: the proceeds were not at the company's disposal. Such an arrangement is inconsistent with the charge being a floating charge, since the debts are not available to the company as a source of its cash flow. But their Lordships would wish to make it clear that it is not enough to provide in the debenture that the account is a blocked account if it is not operated as one in fact.'

[80] I shall have to revert to this last important passage. At present I am only concerned with identifying the nature of the restriction that Slade J concluded was placed by the debenture that he was considering over the use of the proceeds of the book debts that were paid into the company's account.

[81] In *Agnew*'s case Lord Millett equated the *Siebe Gorman* case with *Re Keenan*. The latter case was a decision of the Supreme Court of Ireland. That case concerned a charge in a debenture in favour of a bank which prohibited a company from disposing of its book debts, permitted it to collect the proceeds of those debts, but required it to pay those proceeds into a designated account with

the bank from which the company was not permitted to make any withdrawals without the written consent of the bank. Lord Millett commented (at [22]):

> 'The critical feature which led the court to characterise the charge on the book debts as a fixed charge was that their proceeds were to be segregated in a blocked account where they would be frozen and rendered unusable by the company without the bank's written consent.'

[82] Lord Millett stated (at [48]) that in both the *Siebe Gorman* case and *Re Keenan* the proceeds of the debt were required to be paid into 'a blocked account with the charge holder'. This suggests that he concluded that in the *Siebe Gorman* case Slade J had held that the book debts had to be paid into an account with the bank upon which the company could not draw without the express consent of the bank. If this was his conclusion, I respectfully dissent from it. It seems to me that Slade J held that, under the terms of the debenture, the company would be entitled to draw on its account when in credit unless the bank chose to exercise its right to block the account in order to secure other obligations of the company to the bank. That was the limited nature of the restriction that was, according to Slade J, placed on the use that the company could make of the proceeds of its book debts.

HOW DID THE WORDING OF THE DEBENTURE GIVE RISE TO THE RESTRICTION?

[83] Slade J ([1979] 2 Lloyd's Rep 142 at 159) contrasted the debenture with which he was concerned with 'the charge on future book debts in the form more usually employed' which expressed the intention 'that the debtor shall have the free disposal of the proceeds of future book debts which may come into his hands, so long as the creditor takes no steps to enforce his security, or the charge has not otherwise crystallised'. What did Slade J consider to be the unusual features of the debenture with which he was concerned? It seems to me that they were (i) the provision in cl 3(d) that the charge on book debts should be a fixed charge and (ii) the requirements of cl 5(c) including, in particular, the requirement that the proceeds of all book debts should be paid into an account with the bank. It was these features which led Slade J to conclude that the debenture gave the bank the right, if it chose, to prevent the company from drawing on the account into which the book debts were to be paid, even where that account was in credit.

DISCUSSION

[84] In the present case Sir Andrew Morritt V-C was driven by the reasoning in *Agnew*'s case to conclude that the *Siebe Gorman* case was wrongly decided. He gave the following explanation ([2004] 1 All ER 981 at [39]) for his conclusion that Slade J had fallen into error:

> '... he sought to give effect to the intention of the parties that the charge over the book debts should be a first fixed charge and looked to see if that intention was negatived by the restrictions imposed by cl 5(c). But, as indicated in *Agnew*'s case, the real question was whether the rights and obligations conferred and imposed by cl 5(c) disclosed an intention that the company should be free to deal with the book debts and withdraw them from the security without the consent of the bank. Such an approach to the provisions of cl 5(c) of the debenture in the *Siebe Gorman* case must have led to the conclusion that the collection and free use of the proceeds of book debts through the ordinary operation of the bank account was not only

permitted but envisaged. The inevitable consequence would be to reject the description of the transaction as a first fixed charge.' a

[85] I agree with Sir Andrew Morritt V-C that the intention in the *Siebe Gorman* case was that the company should continue to draw on the account with the bank into which the proceeds of book debts were being paid. The issue, however, is whether Slade J was correct to conclude that the bank had a contractual right under the terms of the debenture to decline to continue to honour cheques b drawn on that account, even if it should be in credit. That conclusion was premised, at least in part, on the possibility that there might be other indebtedness of the company to the bank which the bank might wish to secure.

[86] In my judgment the crucial issue of principle is whether the restrictions imposed by a debenture in the terms of the debenture in the *Siebe Gorman* case on c the use that the chargor can make of the proceeds of the book debts charged are sufficient in law to create a fixed charge on those debts. But for the obstacle of the decision in *Re New Bullas*, the decision of the Privy Council in *Agnew's* case would surely lead this court to the conclusion that an unrestricted freedom on the part of a chargor to use the proceeds of book debts charged necessarily means that the charge cannot properly be described as a fixed charge. Thus the effect of d the debenture on the use that can be made of the proceeds of book debts is of vital significance.

[87] In comparing the present case to *Agnew's* case Sir Andrew Morritt V-C observed (at [37]):

'As Lord Millett pointed out at [36], quoted at [30], above, a restriction e which nevertheless allows collection and free use of the proceeds is inconsistent with the fixed nature of a charge. It is true that in *Agnew's* case there was no restriction on the collection of the book debts through an account with another bank. I do not consider that the existence of that restriction in this case makes sufficient difference. The bank account is an f ordinary current business account. There is no restriction on its use for all or any purposes of the company's business so long as the overdraft limit is observed, no notice to withdraw or reduce it has been given and no demand for repayment had been made.'

I consider that the fact that the debenture required the proceeds of book debts to g be paid into an account *at the chargee bank* was of critical importance in the *Siebe Gorman* case and is of critical importance in the present case.

[88] The starting point is the classic exposition by Lord Cottenham LC of the relationship of banker and customer in *Foley v Hill* (1848) 2 HL Cas 28 at 36–37, [1843–60] All ER Rep 16 at 19:

h

'Money, when paid into a bank, ceases altogether to be the money of the principal [see *Parker v Marchant* (1843) 1 Ph 356, [1843–60] All ER Rep 1061]; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's [custody], is money known by the principal to j be placed there for the purpose of being under the control of the banker; it is then the banker's money; he is known to deal with it as his own; he makes what profit of it he can, which profit he retains to himself, paying back only the principal, according to the custom of bankers in some places, or the principal and a small rate of interest, according to the custom of bankers in other places. The money placed in the custody of a banker is, to all intents

and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation; he is not bound it keep it or deal with it as the property of his principal, but he is of course answerable for the amount, because he has contracted, having received that money, to repay to the principal, when demanded, a sum equivalent to that paid into his hands.'

[89] Thus, where the proceeds of book debts owed to the customer of a bank are paid into that customer's account with the bank, title to those proceeds passes absolutely to the bank. The obligations that the bank comes under to the customer as a result of receiving those proceeds depend upon the terms of the contract between the customer and the bank. In so far as the customer is entitled to call upon the bank to pay over the amount of the proceeds received, the right will be contractual, not proprietary. There is no reason why the customer's right to call for such payment should not be restricted by contract.

[90] Where a bank honours cheques drawn by a customer on an overdrawn account, the bank thereby loans the customer the amount in question—see *Coutts & Co v Stock* [2000] 2 All ER 56, [2000] 1 WLR 906 at 59. It is common for bank and customer to agree the terms upon and the extent to which a bank will lend the customer money in this way. Thus it is common for a bank to impose an overdraft limit on a customer's account.

[91] If the proceeds of debts owed to a customer are paid into an account which is overdrawn, their receipt by the bank will discharge, to the extent of the amount paid in, the debt to the bank represented by the overdraft. Where there is an overdraft limit the payment in will, to the extent of the amount paid in, enable the customer to make a further withdrawal from the overdrawn account.

[92] Having regard to these considerations I turn to consider the following questions in relation to the *Siebe Gorman* decision. (i) Was Slade J right to construe the debenture as restricting the company's freedom to draw on the account into which the proceeds of book debts were paid when that account was in credit? If so: (ii) did the existence of that restriction justify Slade J in concluding that the charge on book debts fell to be categorised as a fixed charge? (iii) Should the decision in the *Siebe Gorman* case be followed today?

[93] Dealing with the first question, I consider that it was open to Slade J to conclude that the effect of the provisions of the debenture, which appears to have been in a novel form, imposed on the company the restriction on the use of the account into which the proceeds of book debts had to be paid that I have set out in [82], above. Sir Andrew Morritt V-C is correct to point out that he gave weight to the intention of parties that the charge should operate as a fixed charge, but I do not understand that the approach to construction laid down by Lord Millett in *Agnew*'s case precludes the court from giving weight to such an intention when construing the restrictions placed upon a chargor by a debenture.

[94] Turning to the second question, I do not consider it satisfactory that the limited restraint that Slade J held arose under the debenture should be the critical factor in determining whether the charge should be categorised as a fixed or a floating charge. It seems to me that it is at least arguable that a debenture which prohibits a chargor from disposing of book debts before they are collected and requires him to pay them, beneficially, to the chargee as and when they are collected properly falls within the definition of a fixed charge, regardless of the extent of his contractual right to draw out sums equivalent to the amounts paid

in. Strictly speaking the chargor is neither entitled to dispose of the book debts before they fall due for payment, nor to dispose of the proceeds. What he does enjoy are contractual rights to payments, whether as a lender or as a borrower, from the bank. The extent to which, at any moment in time, a bank is contractually bound to permit a customer who has charged his book debts to make withdrawals which are back to back with the amounts of book debts collected will depend upon the terms of the contract between banker and customer and possibly on the financial consequences of mutual dealings. It is not satisfactory that the categorisation of a charge created by a debenture should turn upon the precise details of a bank's relationship with its customer.

[95] Furthermore, in a case such as the present, it is wholly artificial to ask the question, would the company be entitled to draw freely on its account if in credit? The sole object of the transaction was that the bank should provide working capital for the company by lending it money. The account that was to be set up was, in effect, a loan account. No provision was made, by way of provision of interest or otherwise, to cater for the possibility that the account would go into credit. In the result payment of book debts into the account were received beneficially by the bank by way of partial repayment of the indebtedness of the company to the bank. The company never had any control of these proceeds. It was bound to permit them to be used to reduce its indebtedness. Admittedly it then had, until withdrawn, the contractual right to borrow from the bank up to the overdraft limit, but as a matter of strict analysis that did not mean that the charge on the book debts remained floating.

[96] Thus my conclusion is that Slade J could properly have held the charge on book debts created by the debenture to be a fixed charge simply because of the requirements (i) that the book debts should not be disposed of prior to collection and (ii) that, on collection, the proceeds should be paid to the bank itself. It follows that he was certainly entitled to hold that the debenture, imposing as he found restrictions on the use of the proceeds of book debts, created a fixed charge over book debts.

[97] I turn to the third question. For 25 years parties have used the form of debenture used in *Siebe Gorman* case under the understanding that its meaning and effect were those held by Slade J Not only will banks have relied upon this understanding, individuals will have guaranteed the liabilities of companies to banks on the understanding that the banks would first be entitled to look to their charges on book debts, unaffected by the claims of preferred creditors. In these circumstances, even if Slade J's construction of the debenture had appeared erroneous, I would have been inclined to hold that the form of debenture in question had, by customary usage, acquired the meaning and effect that he had attributed to it.

[98] For all these reasons, I would allow this appeal.

POSTSCRIPT

[99] This is an unsatisfactory area of the law. For 25 years, by following the example of the bank in *Siebe Gorman*, banks have succeeded in providing working capital to enable companies to continue to trade, while maintaining a fixed charge over their book debts. Banks have undoubtedly been able to do this in other ways also. For instance it would seem beyond dispute that a requirement to pay book debts into a blocked account will be sufficient restriction to render a charge over book debts a fixed charge, even if the chargor is permitted to overdraw on another account, into which from time to time transfers are made from the

blocked account. That was precisely the position in *Re Keenan*. Priorities in the event of insolvency should not turn upon the technical skill with which the bank accounting arrangements have been set up. Professor Goode recommends 'structured personal property security legislation' of a type to be found in other common law jurisdictions. This appeal may underline the desirability of such legislation.

JONATHAN PARKER LJ.

[**100**] I agree.

JACOB LJ.

[**101**] I also agree.

Appeal allowed.

Kate O'Hanlon Barrister.

Tayeb v HSBC Bank plc and another

[2004] EWHC 1529 (Comm)

QUEEN'S BENCH DIVISION (COMMERCIAL COURT)

COLMAN J

21, 22, 26–28 APRIL, 5 JULY 2004

Bank – Payment – Time of payment – Clearing Houses Automated Payment System (CHAPS) transfer – Payer transferring funds to payee by CHAPS transfer – Payee's bank suspecting money laundering and reversing transfer next business day – Whether transfer reversible – Whether payee's bank remaining in sufficient control of funds to reverse transfer – Whether payee's bank compelled to either reverse transfer or commit offence – Criminal Justice Act 1988, s 93A.

The claimant, who was not a United Kingdom citizen and had no permanent address in England, owned a database of registered Internet names relating to Libya. He began negotiations to sell the database to a Libyan company and it was agreed that the consideration would be paid to him in England. For that purpose, he opened an account with the first defendant bank at a sub-branch in Derby in April 2000. In mid September the sale of the database was ready to be completed. On 21 September the representative of the Libyan company signed a clearing house automated payment system (CHAPS) transfer form instructing Barclays Bank, Westminster branch, to transfer the agreed consideration, £944,114.23, to the claimant's account. The relevant CHAPS rules made provision for the return to the payer bank of payments which had not been applied, and payments which had been applied in error; in both cases the aim of the was to achieve finality of value transfer to the account holder in real time on the same day as the transfer to the payer bank and to achieve finality in the accounting position between the payer and payee banks by 12 noon on the following business day. The transfer by the CHAPS system via the Bank of England was received by the bank's Derby branch at 13.57 hrs. The bank's district service centre authenticated the sort code and customer account number and an automatic logical acknowledgement (LAK) was sent to Barclays. The claimant's account was credited at 14.03 hrs. The bank was suspicious of the nature and origin of the large sum. About two hours later it placed a marker on the claimant's account which had the effect of preventing automatic withdrawals or account operations without the bank's approval. The following afternoon the bank returned the transfer by CHAPS to the originator account. The claimant later accepted that the circumstances surrounding the transfer to his account justified the bank in being suspicious and the bank later accepted that the origin of the payment was completely innocent and honest. The claimant commenced proceedings against the bank, inter alia, in debt for £944,114.23 plus interest. The bank maintained that its suspicions had justified its conduct, having regard to ordinary banking practices, and that the effect of s 93A[a] of the Criminal Justice Act 1988 was that it would have been an offence to receive, or retain in an account, money as to which the bank was suspicious. Section 93A(1) of the 1988 Act provided, inter alia, that, subject to sub-s (3), a person was guilty of an offence if he was concerned in an arrangement whereby the retention or control by or on

a Section 93A is set out at [52], below

behalf of another (A) of A's proceeds of criminal conduct was facilitated, or A's proceeds of criminal conduct were used to secure that funds were placed at A's disposal, knowing or suspecting that A was a person who was or had been engaged in criminal conduct or benefited from it. Section 93A(3) provided, inter alia, that where a person disclosed to a constable a suspicion or belief that any funds were derived from criminal conduct, if he did any act in contravention of sub-s (1) and the disclosure related to the arrangement concerned, he did not commit an offence if the disclosure was made before he did the act and the act was done with the consent of the constable, or after he did the act, but the disclosure was made on his initiative and as soon as it was reasonable for him to make it.

Held – There was a continuing duty on a bank to credit to the account of a pre-existing account holder all external transfers it received from external sources and which complied with the terms subject to which the account was constituted. The bank's entitlement to decline to accept a transfer was not in the nature of an option exercisable according to the bank's perception of what was commercially desirable but the consequence of the operation of the terms of the account contract with its customer. Consequently, when in the instant case the claimant had opened an account which in accordance with its terms was available for receiving incoming CHAPS transfers, the bank had engaged that it would accept into his account all CHAPS transfers which complied with the CHAPS rules and which were otherwise in accordance with the terms of the account. The system of CHAPS transfers differed in important respects from non-electronic or over-the-counter transfers for value. The CHAPS rules made specific provision for the return of unapplied transfers and for applied transfers made in error. There had therefore to be the very strong implication that following application to the customer's account, in the absence of error, the banking practice relating to CHAPS transfers was that they were ordinarily irreversible. The provisions of the 1998 Act did not provide the bank with a justifiable reason for declining to accept the transfers because under s 93A an offence would not be committed merely by accepting a transfer suspecting that it emanated from fraud or other unlawfulness or that it was part of a money laundering operation, provided that the reporting procedures in sub-s (3) were implemented by the bank. It was, therefore, not open to the bank to justify non-acceptance of the transfer on the grounds that its mere suspicion rendered acceptance illegal per se. It followed that once the claimant's account had been credited, following authentication and the transmission of the LAK, the bank had become indebted to the claimant in respect of the transfer. The proposition that by reason of its justifiable suspicions the bank retained an overriding discretion to reverse the transfer into the account after the 12 noon deadline on the next banking day on the basis of banking practice had not been established on the evidence. There would, accordingly, be judgment for the claimant (see [60], [79], [80], [83]–[85], [89], [91]–[93], [99], below).

Notes

For the relation of banker and customer, and for money laundering offences see, respectively, 3(1) *Halsbury's Laws* (4th edn reissue) para 149, and 11(1) *Halsbury's Laws* (4th edn reissue), para 408A.

Section 93A of the Criminal Justice Act 1988 was repealed by the Proceeds of Crime Act 2002, ss 456, 457, Sch 11, para 17(1), (2)(a), Sch 12 as from a day to be appointed under s 458(1) of that Act.

For the Criminal Justice Act 1988, s 93A, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 986.

Cases referred to in judgment

A/S Awilco v Fulvia SpA di Navigazione, The Chikuma [1981] 1 All ER 652, [1981] 1 WLR 314, HL.

Bank of Scotland v A Ltd [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 WLR 751.

Cowan de Groot Properties Ltd v Eagle Trust plc [1992] 4 All ER 700.

Crantrave Ltd v Lloyds Bank plc [2000] 4 All ER 473, [2000] QB 917, [2000] 3 WLR 877, CA.

Eyles v Ellis (1827) 4 Bing 112, Ct of CP.

Heinl v Jyske Bank (Gibraltar) Ltd [1999] Lloyd's Rep Bank 511, CA.

Mahonia Ltd v JP Morgan Chase Bank [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep 911.

Momm v Barclays Bank International Ltd [1976] 3 All ER 588, [1977] QB 790, [1977] 2 WLR 407.

Royal Brunei Airlines Sdn Bhd v Tan [1995] 3 All ER 97, [1995] 2 AC 378, [1995] 3 WLR 64, PC.

Royal Products Ltd v Midland Bank Ltd and Bank of Valletta Ltd [1981] 2 Lloyd's Rep 194.

Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3) [1968] 2 All ER 1073, [1968] 1 WLR 1555.

Sutherland v Royal Bank of Scotland plc [1997] 6 Bank LR 132, Ct of Sess (OH).

TSB Bank of Scotland plc v Welwyn Hatfield DC [1993] 2 Bank LR 267.

United Trading Corp SA v Allied Arab Bank Ltd [1985] 2 Lloyd's Rep 554, CA.

Cases referred to in skeleton arguments

Hanna v McCrory (Bank of Commerce of San Marcial) (1914) 141 Pac 996, Mexico SC.

Investors Compensation Scheme Ltd v West Bromich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromich Building Society, Armitage v West Bromich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896, HL.

Jameson v Carpenter (1894) 68 NH 62, NH SC.

Jenkins v Mapes (1895) 41 NE 137, Ohio SC.

Kingston Bank v Gay (1854) 19 Barb 459, NY SC.

Limpgrange Ltd v BCCI SA, BCCI SA v Smith [1986] FLR 36.

Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 512, [1991] AC 548, [1991] 3 WLR 10, HL.

R v Montila [2003] EWCA Crim 3082, [2004] 1 All ER 877, [2004] 1 WLR 624.

Tournier v National Provincial Bank [1924] 1 KB 461, [1923] All ER Rep 550, CA.

Western Trust & Savings Ltd v Travers & Co (a firm) (1998) 75 P&CR 200, CA.

Claim

Hosni Tayeb brought proceedings against HSBC Bank plc claiming £944,114.23 and interest from 21 September 2000 or, in the alternative, damages for breach of contract. Al Foursan International Company, a private company incorporated in Tunisia owned and controlled by the claimant, was joined as second defendant at the request of HSBC. It took no substantive part in the action. The facts are set out in the judgment.

Nicholas Elliott QC and *Michael Lazarus* (instructed by *Farrer & Co*) for the claimant.

Jeremy Cousins QC and *Stephen Eyre* (instructed by *DG Solicitors*) for HSBC.

Cur adv vult

5 July 2004. The following judgment was delivered.

COLMAN J.

INTRODUCTION

[1] This case raises for decision for the first time issues of great importance in relation to the operation of money transfers by means of CHAPS—the clearing house automated payment system. In particular, it is concerned with the manner in which a bank should respond to CHAPS transfers into a customer's account when it suspects that the money is the proceeds of fraud or the transfer is for the purpose of money laundering and where the bank is therefore concerned that it may be at risk of committing an offence under s 93A of the Criminal Justice Act 1988 or may sustain liability as constructive trustee.

[2] The claimant had a Tunisian passport and he had no permanent address in England. He did have various members of his family who lived in Derby. He has a degree in architecture and a profession as an architect but his business interests also lie substantially in the field of information technology. He owns and controls the second defendant, a private company incorporated in Tunisia. He personally, and that company respectively, own and manage the top level Internet domain name '.ly' which relates to Libya. In that connection, in 2000 he owned a database of registered Internet names ending in '.ly'. Anyone who wanted to use any of those names had to pay a fee to the claimant.

[3] In 2000 he was negotiating a transaction with the Libyan corporation General Posts and Telecommunications Co (GPTC) under which he was to sell and it was to purchase the database. In anticipation of finalisation of negotiations for completion of the sale he opened an instant saver account at HSBC's branch in Derby. On 21 September 2000 Mr Eshhati, who had been representing GPTC in the negotiations, caused Barclays Bank, Westminster branch, to transfer by CHAPS to the claimant's account at HSBC, Derby some £944,114·23, then the sterling equivalent of $US1·5m which was the consideration for the sale of the database. This sum arrived automatically that day at HSBC, Derby, at 13.57 hrs. The HSBC District Service Centre at Birmingham then authenticated the sort code and customer account number and, having done so, at 14.03 hrs HSBC activated the logical acknowledgement (LAK) which had the effect of informing Barclays Westminster that the transfer had been received and credited to the claimant's account.

[4] Later that afternoon the claimant had a meeting with Mr Eshhati and representatives of GPTC in the course of which he handed over the database and completed the transaction on the assumption, as I infer, that the CHAPS transfer which he knew had been effected by Mr Eshhati had the effect of crediting his account at HSBC that day with the amount of the price.

[5] In the meantime, and before effecting the CHAPS transfer, Barclays Westminster had informed HSBC Derby of Mr Eshhati's request for a transfer by CHAPS to HSBC. The assistant manager at Derby, Mr Wigham, at once became suspicious of the nature and origin of such a large sum. At 16.14 hrs that

afternoon, without reference to the claimant, he ordered a marker to be put on the claimant's account, which had the effect of preventing automatic withdrawals or any other operations of that account without HSBC's approval. In effect, that meant his approval.

[6] On the following day a meeting took place between the claimant and Mr Wigham in the course of which it is common ground that Mr Wigham asked the claimant to explain the transfer. There are stark differences between the evidence of the claimant and of Mr Wigham as to what passed at that meeting. I consider that evidence later in this judgment. In the event, a short time after that meeting, Mr Wigham caused the £944,114·27 to be re-transferred by CHAPS to Mr Eshhati's account at Barclays Westminster. He was not satisfied with the explanation given by the claimant. There is an issue as to whether he had told the claimant that this would be done. There is no issue as to the fact that this transfer was without the claimant's consent. At the same time as the re-transfer occurred Mr Wigham caused the claimant's account to be closed and the credit balance of £10 to be transferred to HSBC's unclaimed balances account. He also cancelled the interest which had been automatically credited to the account for the period 21–22 September 2000 during which the sum transferred by CHAPS was credited to the account.

[7] It is common ground that the circumstances surrounding the transfer to the claimant's account justified HSBC in being suspicious. It is also now accepted by HSBC that the origin of the payment was completely innocent and honest. The facts of this case do not raise any suggestion that the claimant's dealings with the bank or any other party were in any way dishonourable or dishonest.

[8] The claimant now claims against the bank in debt in respect of the money transferred to his account by CHAPS. He runs an alternative case to the effect that the bank was in breach of its contract with him in removing the money from his account and transferring it back to Barclays. The bank maintains that its suspicions justified its conduct. Ordinary banking practice entitled it to act as it did. The course which it took, although not the procedure prescribed in cases of suspicion by s 93A of the 1988 Act or by the Money Laundering Regulations 1993, SI 1993/1933 or the JMLSG Money Laundering Guidance Notes, was justified by ordinary banking practice. Not only was there the risk of committing an offence under the 1988 Act if the money were not re-transferred, but there was also the risk of being held to be liable as a constructive trustee if the funds were the product of a fraudulent transaction.

[9] The primary underlying issue is whether the CHAPS transfer to HSBC followed by its authentication and LAK and the crediting of the amount to the claimant's account created a debt due from HSBC to the claimant or, whether, as the bank contends, it remained throughout in sufficient control of the fund to be entitled to cancel the transfer and re-transfer those funds to Barclays.

THE CHAPS SYSTEM

[10] Although the system has been changed in certain respects since 2000 when the events of this case occurred, the questions raised by these proceedings are pertinent also to the present CHAPS system as described in Ellinger, Lomnicka and Hooley *Modern Banking Law* (3rd edn, 2002) p 480. In summary CHAPS Sterling commenced operation as a same-day value electronic sterling credit transfer system in 1984. CHAPS replaced Town Clearing whereby high value cheques drawn on a City of London branch of a participating bank and paid into a City of London branch of a participating bank would be cleared on the

same day. In 1996 CHAPS Sterling converted to a real time gross settlement system. This means that payments clear during the day on which they are made, within a short period after the payer's bank issues the payment instruction, rather than by netting off against all other relevant payments at the end of the day.

[11] The immediate clearing of such payments is an extremely important advantage of CHAPS because it enables transactions involving the transfer of property, including foreign exchange and securities, to be completed on the same day. There is, as between a transferee bank and its transferee account holder, normally a crediting of the customer's account immediately following electronic acknowledgement of receipt of the transfer.

[12] Both HSBC and Barclays were CHAPS settlement members and as such were bound by the CHAPS rules. I shall refer to these rules in more detail later in this judgment. It is important to note that payments under the system were required to be—

> 'an irrevocable guaranteed unconditional sterling payment for settlement in real time across members' settlement accounts at the Bank of England.'

[13] Further, by sending a LAK each member agreed, after authentication, to give same day value to its payee customer.

[14] The CHAPS system works in the following manner. CHAPS settlement members are provided with special computer software known as gateways. The gateways handle all communications between participating banks and security. The gateways are linked to and accessible from the member's own internal computer system and they can communicate with the gateways of other participants over telecommunications links. A critical feature of CHAPS is that every payment is settled across the payer's bank's and the payee's bank's accounts at the Bank of England before any payment notification is sent to the payee's bank. The sequence of events is as follows. (1) The payer's bank initiates a payment instruction on its computer system. (2) The payer's bank's computer system causes a settlement request to be sent to the Bank of England. This includes details of the payee's bank and account number. (3) If there are sufficient funds in the payer's bank's account at the Bank of England, the payment is settled by the Bank of England by debiting the payer's bank's account and crediting the payee's bank's account. (4) The Bank of England sends a confirmation of settlement to the payer's bank. (5) On receipt of confirmation from the Bank of England, the payer's bank's gateway automatically sends a payment message to the payee's bank. (6) On receipt of the payment message the payee's bank immediately transmits a LAK to the payer's bank. This follows authentication, but at HSBC that did not occur automatically if the amount transferred was over £50,000. (7) Mechanisms exist to ensure that inter-bank settlement can take place even where there is a temporary shortage of liquidity. However, in every case such settlement occurs before the payee's bank receives any notification of the payment.

THE FACTS

[15] Early in 2000 the claimant having commenced negotiations with GPTC for the sale to it of the database relating to the domain name '.ly', it was agreed that payment of the price of $US1·5m was to be made to the claimant in England. It was the claimant's evidence that he wanted payment to be made in England because he believed the money would be more secure and because he had friends and relatives in England and intended to educate his children in this country and

to live here. His brother-in-law, Kareen Al Basha, (KAB) lived in Derby. He ran a small hotel. He advised the claimant to open a bank account at HSBC into which the proceeds of sale could be paid.

[16] On 10 April 2000 the claimant went to the HSBC sub-branch at Alvaston, Derby. He was accompanied by KAB who spoke much better English than the claimant and was an existing customer of HSBC. The claimant told Lesley Cope, a clerk at that sub-branch, that he was a self-employed architect, earning what she understood to be £20,000 per annum, but according to the claimant's evidence, he told her he earned 20,000 Tunisian dinars per month, which is about £120,000 per annum. There appears to have been a misunderstanding due to the claimant's very poor English. The claimant asked if he could open a business account at HSBC. He told Lesley Cope that he was expecting to receive a large sum of money derived from the database sale.

[17] She consulted a senior clerk at the sub-branch, Mr Robert Aldred, and he expressed concern about the opening of a business account because of the opportunity it provided for money laundering. The claimant was a Tunisian national not permanently resident in this country. Mr Aldred suggested that a savings account should be opened, as it would not provide a card withdrawal facility and could therefore be more effectively monitored by the bank. The claimant was therefore told that he could open an instant savings account. This he did by depositing £10 that day. The account opening procedures were completed on the following day when formal authorisation was signed by Mr Chris Wigham, an assistant manager at the Derby branch.

[18] No further use was made of the savings account until 21 September 2000. The events of that day are of some importance but the claimant's evidence in certain respects conflicts with that of the bank's witnesses.

[19] According to the claimant, after several months of negotiations with Mr Eshhati, on behalf of GPTC, the sale of the database was ready to be completed by mid-September 2000. On 14 September he received a bank draft for $US1·5m drawn on Suez Canal Bank. He then telephoned HSBC in London and told a woman employee that he was about to effect a transfer to his account and asked her how long it would take for the amount of the draft to be credited to his account. The conversation had to be conducted through an English-speaking friend. He wished to know when he could hand over the database under the sale agreement. He was advised that the process for that draft could take three weeks because the issuing bank was in Egypt. Not having appreciated that it would take as long as that, he then asked her to advise him as to the fastest method of getting the money into his account. She suggested using SWIFT (Society for Worldwide Interbank Financial Telecommunication) which guaranteed payment on the same day.

[20] The claimant then explained the problem to GPTC who agreed to use that method.

[21] The draft on Suez Canal Bank was cancelled on 19 September and GPTC transferred $US1·5m into the account of Mr Eshhati at Barclays Bank plc, Victoria Street, London. The sterling equivalent on that date was £944,114·23. The transfer of the database by physical delivery to GPTC in London was to take place on 21 September. The claimant said in evidence that on the morning of that day he and Mr Eshhati went to Barclays Bank, Victoria Street to confirm that Mr Eshhati's account had been credited with £944,114·23. There they spoke to a Mrs Matthews. She confirmed that Mr Eshhati's account had been thus credited and then Mr Eshhati instructed her to effect transfer that day to the claimant's

savings account at HSBC by CHAPS. According to the claimant, in the course of that visit Mr Eshhati signed a CHAPS transfer form instructing Barclays to effect transfer. Then he and Mr Eshhati went to HSBC's Victoria Street branch, a few minutes walk away. The purpose of that visit was, according to the claimant, to confirm that the claimant's account had been credited with the transfer. That visit took place between 1.30 pm and 2.30 pm on 21 September. The claimant's evidence was that it was then confirmed by HSBC that the funds had been transferred to his account. He then went to a meeting at the Churchill Hotel to meet the representatives of GPTC and their solicitor. He was handed a document which was signed on behalf of GPTC which evidenced the terms of the agreement. It was titled, Domain Transfer Agreement. It recites that the agreement was made in London on 21 September 2000, between Al Foursan (the second defendant) and GPTC and that the parties made their agreement against the payment of SU$1·5m, which had already been received by Al Foursan. The agreement made provision for the transfer of the database material to GPTC. It was signed by the claimant and those representing GPTC.

[22] It was put to the claimant in cross-examination that when he and Mr Eshhati left Barclays for HSBC Mr Eshhati had not yet signed the CHAPS transfer instruction because they had gone to the local HSBC branch to inquire about more favourable interest rates. The claimant adamantly denied that this was what happened. The basis of that cross-examination was the unchallenged evidence in the witness statement of Robert Eyre, at the time a branch clerk at the Victory Road branch of HSBC at Derby. This referred to a telephone conversation which took place on 21 September 2000. That conversation is said by Mr Eyre to have been accurately recorded in a telephone note made by him that day describing a call received from Ms Matthews of Barclays, Victoria Street, London branch, advising that she had taken written instructions so far unsigned from Mr Eshhati to remit £1m, the funds only having been received in US dollars the previous day. Because the claimant's account at HSBC was only instant access (by which I infer she meant to refer to the very low interest rate on such an account) she had tried to open an account for him at Barclays but, although his passport was in order, such an account could not be opened because he was non-resident. Having asked for the reasons for transfer of funds, she had been told it was for a business deal and she had been offered supporting documentation which she had not yet seen. The transfer had not yet been signed at the time of the telephone call. She thought they (the claimant and Mr Eshhati) had gone to a 'local HSBC' to discuss better interest/accounts. She believed the claimant was leaving the country that morning. The note concludes with the note: 'Action: Await call from Barclays if TT proceeding.'

[23] A manuscript notation on the telephone note records that the claimant had arrived at the Victoria Street branch and had been told 'we would not undertake any transaction'.

[24] There is no doubt whatever, that by 13.57 hrs on 21 September Mr Eshhati had signed the CHAPS transfer instruction form at Barclays Victoria Street branch. I infer that the claimant and Mr Eshhati must later that morning have returned to Barclays after their visit to HSBC and that Mr Eshhati then signed the form. I do not accept the claimant's evidence that the visit to HSBC that morning was to ascertain that the transfer had already been completed. I infer that, having been advised by HSBC on 14 September that a CHAPS transfer took effect on the same day, when on 21 September the claimant and Mr Eshhati returned from HSBC to Barclays to complete the transfer instructions and these

were accepted by Barclays, the claimant assumed that his account would indeed be credited by the time he handed over to GPTC the database in the course of the meeting which was arranged for later that afternoon.

[25] The transfer by the CHAPS system via the Bank of England was received by HSBC at its Victory Road, Derby branch at 13.57 hrs on 21 September 2000. It was then automatically acknowledged to Barclays by the LAK electronic method.

[26] Because the amount was over £50,000 it was required to be authenticated manually by a member of staff at HSBC's Birmingham District Service Centre. This involved checking that the sort code and account number were those which applied to the claimant's account. This procedure had been completed by 14.03 hrs that day and at that time the member of staff concerned activated by computer the crediting of the claimant's account.

[27] That process of crediting the claimant's account led to the credit balance as shown on HSBC's internal computer screens being increased by £944,114·23. This balance would not be visible on external card-operated screens until the next day. Overnight batch processing would cause the transfer payment to be included in the credit balance visible on such screens on the next morning and that would have enabled the card to be used for cash drawdown had the bank taken no further action.

[28] In the meantime, if at any time from 14.03 hrs on 21 September the claimant had applied in person at any HSBC branch or by telephone to any HSBC call centre and inquired as to the credit balance on the account, he would have been informed that the transfer had been included in that balance and he could have withdrawn from the account on that basis. That, at any rate, was the position until 16.14 hrs on 21 September. At that point Mr Wigham caused an inhibit marker to be placed on the account. This had the effect of freezing it. In other words HSBC, while continuing to credit the funds transferred from Barclays to the account, would not accept any payment instructions in respect of the account.

[29] The circumstances in which the marker was placed on the account were, according to the evidence of Mr Wigham, as follows.

[30] He had a gut feeling that the transaction did not seem right. Either this might be money laundering or the money was being used for an improper purpose. He did not, however, report it to the money laundering compliance officer or to his immediate supervisor. However, as he had subsequently discovered, one of his colleagues whom he could not name had made a telephone call to the fraud department. That was not the same as the money laundering compliance officer's department. He was unable to say what the result of that call was. He did not consult any of the bank's specific internal procedural manuals on what to do if money laundering were suspected.

[31] On 22 September 2000 the claimant went to Manchester to investigate the university facilities having in mind that his brother might study there. While in Manchester he called at HSBC's King Street branch and attempted to withdraw £5,000 from his account. He explained this by stating that he attended at that branch to confirm the arrival of the funds in his bank account. He was advised that he could not draw funds there but would have to go to the London Road branch in Derby for that purpose. He arrived at that branch on the same afternoon and saw Lesley Cope. She confirmed to him that the transfer had gone through to his account but told him that in view of the large amount of the transfer Mr Wigham wanted to see him at the Victory Road, Derby branch.

According to her evidence, she had telephoned Mr Wigham to ask what to do about the claimant's request to withdraw funds. The account remained subject to the marker placed on it the previous day. The claimant went to the Victory Road branch. He was accompanied by a friend who spoke better English than he did, one Yousef bin Mohammed Al-Hadi Suleiman, whom the claimant invited to join the meeting with Mr Wigham when the claimant felt that he could not adequately understand Mr Wigham's English.

[32] There is a major conflict in the evidence between the claimant and Mr Wigham as to what passed at the meeting. According to the claimant Mr Wigham wanted to know the nature of the transaction which had given rise to the transfer and the claimant explained it to him and produced the agreement bearing the signatures of the GPTC representatives and of himself. He also produced a copy of Mr Eshhati's CHAPS transfer order dated 21 September. He said that as these were his only copies Mr Wigham took photocopies and returned to him the originals. According to the claimant, Mr Wigham seemed to be satisfied with that explanation and at no time informed him that HSBC proposed to return the funds to Barclays. This account of events is supported by the written evidence of Mr Yousef in a witness statement of 9 September 2002 and another statement made on 11 October 2002.

[33] According to Mr Wigham, having considered HSBC's position in advance of the claimant's arrival, he wanted to be convinced that the transaction was genuine before he would be prepared to allow the claimant to have access to the funds. When the claimant arrived, he therefore asked for an explanation as to the source of the funds. The claimant then explained that the funds came from a contract that was yet to be completed with GPTC. A draft contract was produced. It was on plain paper and unsigned. It was about 13–14 pages long and was not the document described by the claimant in evidence as the agreement of 21 September 2000. When Mr Wigham asked to be permitted to photocopy it, the claimant told him that it was confidential and not yet signed. At that point Mr Wigham left the meeting, stating that he was going to refer the matter to a senior colleague. No senior colleagues were available to be consulted at the time and he discussed the problem with Mr Aldred, a junior colleague who had been present at the meeting. Mr Wigham telephoned HSBC's central fraud office. He stated that he remained concerned that the transaction involved fraud or money laundering. He was advised by Linda McGuchan of that office that as the person concerned was the customer before him he had to take the final decision. He then returned to the presence of the claimant and told him that he was uncomfortable about the situation and the source of the funds. Accordingly, he would be returning the money to Barclays for the credit of the payer. Up to that point the claimant had been unaccompanied, but he then asked if another person who had been waiting in the reception area and who spoke better English could join them. That person joined the meeting and when Mr Wigham stated that he needed to know the source of the funds the other person said that the funds were commission on the contract which had not yet been signed. Mr Wigham then told them that he remained unhappy and was going to return the money to Barclays. He stated in evidence that he repeated this several times, the claimant's friend asked him why and that he was absolutely certain that the claimant himself understood that this was to be done. After this intention had been repeated on several occasions, the claimant left the meeting and was 'a little agitated' that the funds were to be returned.

[34] Mr Wigham said in evidence that in view of his continuing suspicions he saw it as his duty to return the money as a matter of banking practice based on his 35 years' experience in the bank.

[35] Following that meeting at 14.44 hrs, the bank returned the funds to Barclays.

[36] This was done by means of a CHAPS transfer form which was certainly not designed for this purpose. It was headed 'Customer Request/Authority to Remit Funds'. It was signed by Mr Wigham, who described himself as the assistant manager of the Victory Road branch, under the rubric 'Please make the above payment out and debit my/our account'. This was faxed to HSBC's District Service Centre at 14.09 hrs. It was then transmitted through the CHAPS system and the money found its way back to Mr Eshhati's account at Barclays. Interest for one day was initially credited to the claimant's account, but, according to Mr Wigham, was cancelled on the basis that HSBC had never accepted the transfer. Thereafter, on 28 September 2000 Mr Wigham closed the claimant's account and transferred the £10 credit balance without interest to the bank's unclaimed balances account. HSBC issued no written notification to the claimant that it had returned the transfer to Barclays. Nor did it inform him that it had closed the account and removed from it the pre-existing credit balance of £10 without interest and had first credited the account with one day's interest on the total credit balance after the transfer and then cancelled the interest.

[37] The claimant returned later that afternoon with his brother-in-law to the Alvaston branch and once again attempted to make a withdrawal from his account. Lesley Cope declined that request and again referred him to the Victory Road branch. The brother-in-law became vociferous, but they then left. It is unclear whether this was before or after 14.44 hrs. It was certainly before 15.30 hrs when the branch closed.

[38] The evidence as to events following 22 September 2000 has some bearing on how the conflicts of evidence between the claimant and Mr Wigham can be resolved.

[39] After the re-transfer to Barclays had been effected the money went back into a savings account of Mr Eshhati. On 27 September he drew on that account a draft payable to the claimant in the sum of £944,114·23. However, on 29 September 2000 the money was re-transferred back to Mr Eshhati's account and on 3 October 2000 he transferred a larger sum (£1,034,554), which obviously was mainly composed of £944,114·23, to another account under an Arabic version of Mr Eshhati's name. The claimant gave no explanation for these banking operations. However, I infer that by 27 September 2000 Mr Eshhati knew that the claimant had not been credited with the £944,114·23 and I further infer that he had been given this information by the claimant. It follows that when the claimant left the meeting with Mr Wigham on 22 September 2000 he had understood that the funds were to be re-transferred to Barclays. I therefore reject the claimant's evidence that Mr Wigham did not tell him that this was to happen.

[40] There was no further contact between the claimant and HSBC until 25 July 2002, some 22 months after the meeting with Mr Wigham. On that day the claimant returned to the Alvaston branch. He said that this was to confirm that the funds were in his account. He said that he then learned for the first time that the bank had closed his account in 2000.

[41] Having regard to my findings at [33], above, I reject the claimant's evidence that when he visited the bank in July 2002 the information that the funds

had gone back to Barclays came to him as a great shock. This is further demonstrated by the conversation which subsequently took place at a meeting between the claimant and Mr Wigham on the same day in the course of which the claimant told him that he was expecting to receive the US dollar equivalent of £7·5m under another deal he was negotiating relating to computer parts and software. Mr Wigham having consulted the money laundering reporting office at HSBC told him that such a deposit would be accepted on the account. On the following day Mr Wigham informed the claimant by fax that the £7·5m would be held in the claimant's account 'until further instructions are received from yourself'. In the course of that meeting the claimant threatened to take legal action against the bank unless the account was reopened and the £10 re-credited. The bank thereupon reopened the instant saver account with a balance of £10. No interest was credited to it. The claimant's conduct in advising the bank of a further deposit is in my judgment inconsistent with his having been informed for the first time of the re-transfer. I conclude that such information came as no surprise to him: it simply confirmed what Mr Wigham had said he would do on 22 September 2000.

[42] On 27 July 2002 the claimant telephoned Mr Eshhati and asked him to recover the moneys which had been re-transferred. He was told that the moneys had been returned to GPTC and that it would be impossible to recover them. Apparently, the claimant took no further steps to recover the moneys and he made no direct contact with GPTC. The position therefore appears to be that GPTC have received delivery of the domain name database but, having initially remitted the price to HSBC, have, by the re-transfer, received a windfall payment equivalent to the price. There is no evidence that the claimant has taken any further steps to recover the funds.

SUBMISSIONS

[43] On behalf of the claimant Mr Nicholas Elliott QC submits that from the moment when HSBC completed the electronic processing of the payment of £944,114·23 by sending the LAK and carrying out authentication verification on or before 13.57 hrs on 21 September 2000, it became indebted in that amount to the claimant and that no subsequent event released it from that indebtedness. This was immediately prior to the carrying out of HSBC's District Service Centre of verification of the sort code of the Derby branch and that the account number referred to in the transfer was that of the claimant's account. The placing of the marker on the account at 16.14 hrs that day left the debt intact. It simply informed the bank's personnel and computer system that they should not repay it or any part of it upon the depositor's compliance with the withdrawal procedures, such as presentation of the passbook over the counter at a branch.

[44] The bank's argument that it had never accepted the transfer was misconceived. In as much as it had opened a bank account for the claimant into which electronic same day payments could be made, it had agreed in advance that his account could be credited in accordance with CHAPS procedures. For this purpose, the bank needed to do no more than transmit the LAK. The bank's further argument that, following receipt of the CHAPS transfer, it became the agent of Barclays, although true up to the moment of the transmission of the LAK, could not be correct after that had occurred. The proposition that HSBC had a period which extended beyond the transmission of the LAK in which to consider whether to accept the transfer as creating a debt from it to its customer

was inconsistent with its crediting the customer's account immediately upon completion of verification and transmission of the LAK. a

[45] Further, the bank's argument that, on the authority of the judgment of Kerr J in *Momm v Barclays Bank International Ltd* [1976] 3 All ER 588, [1977] QB 790, it had until the end of the value date to decide whether to credit the customer's account and that in this case it had decided by 16.14 hrs on that day to place a marker on the account and had therefore declined to make the funds available, b did not avoid the consequences that a debt had already been created by the CHAPS procedures which had caused the claimant's account to be credited before the decision to place a marker on it and that marker had not divested the credit balance.

[46] For the bank, it was submitted that there is nothing about the CHAPS system and no term of the banker/customer relationship which requires a banker c to accept moneys transmitted via CHAPS about which there is a genuine suspicion. Good banking practice set in the context of ss 93A–93D of the 1988 Act, as amended in 1993, and the statement 'Prevention of Criminal Use of the Banking System for the Purpose of Money-Laundering' issued in December 1988 by the Basle Committee on Banking Regulations and Supervisory Practices d supported this analysis. Specifically it was submitted that the 1988 Act did not impose on banks a reporting *obligation*, but merely provided a statutory defence by the reporting facility if a bank should entertain suspicion of money laundering. Thus, it would be an offence to receive, or retain in an account, money as to which the bank was suspicious. A bank is not required to put itself in the position where it is obliged to rely on a statutory defence to what would otherwise be e criminal conduct.

[47] Further, no debt could be created in favour of a customer unless and until the bank decided to accept a payment as such and represented that it did so. The reasoning of Hobhouse J in *TSB Bank of Scotland plc v Welwyn Hatfield DC* [1993] 2 Bank LR 267 in respect of the need for there to be acceptance by a creditor of a f tender of payment as discharge of a debt applied equally to acceptance of payment by a bank as creating a new debt. There was no special rule applicable to electronic funds transfer (EFT). The general principle was set out in the following passage from *Paget's Law of Banking* (12th edn, 2002) para 17.208:

> 'Mere receipt of funds by the beneficiary's bank is not enough to constitute g payment. It is the beneficiary's bank's decision to accept those funds for the beneficiary's account which is vital. The bank may have good reasons for not making that decision. The payment order may not adequately identify the beneficiary, or the bank may wish to check that it has the beneficiary's authority to accept the payment, or the bank may be concerned that it will h break the law by crediting the beneficiary's account, eg where regulations prohibit credits being made to the accounts of certain foreign nationals. Until the beneficiary's bank reaches its decision to accept the funds for the beneficiary's account, it holds those funds as agent for the originator and not for the beneficiary. The funds constitute an unaccepted tender by the j originator and not discharge of the underlying money obligation between the originator and the beneficiary. Of course, the beneficiary's bank must be aware that the funds have been transferred for the account of a particular beneficiary, if it is to accept them on that beneficiary's behalf. In *Royal Products Ltd v Midland Bank Ltd* ([1981] 2 Lloyd's Rep 194), it was held that a transfer of funds from a customer's account with one bank to its account

with another was complete only when the funds were available to the other bank and it was notified for whose credit they were to be held.'

[48] Mr Cousins QC further supports this point by reliance on the decision of the House of Lords in *A/S Awilco v Fulvia SpA di Navigazione, The Chikuma* [1981] 1 All ER 652, [1981] 1 WLR 314 to the effect that an obligation of charterers under a time charter to pay charter hire by a particular date 'in cash' was not satisfied in circumstances where on the date in question the shipowners' bank had received a transfer which had been credited to the shipowners' account on the relevant date but could only be drawn down on that date subject to an interest charge. Reliance is placed on the analogy with a case such as the present where the funds were not freely disposable by the bank's customer because of a marker. The marker was in place by the end of banking hours on 21 September and therefore, applying *Momm*'s case, no debt existed as between bank and customer by that day's deadline. *Sutherland v Royal Bank of Scotland plc* [1997] 6 Bank LR 132 is relied on for the proposition that in EFT the bank's facility to reverse entries continued until the close of banking on the value date as held in *Momm*'s case.

DISCUSSION

[49] It is first necessary to consider the relevant CHAPS rules applicable at the time (they have subsequently been amended). These included the following provisions:

'CHAPS CLEARING TIMETABLE

ITEMS FOR REPAIR SORTING CODES

By 12.00 Noon next business day. To be applied or returned to Payer Settlement Member, as soon as practicable but in any case no later than 12.00 Noon the next business day.

WRONGLY DELIVERED PAYMENTS

By 12.00 Noon next business day. To be applied or returned to Payer Settlement Member, as soon as practicable same day but in any case no later that 12.00 Noon the next business day.

WEEKLY RETURN OF NUMBER AND VALUE OF CHAPS PAYMENTS

Tuesday

(1) GENERAL

(a) A Clearing is to take place on each business day in England and Wales for the electronic exchange of CHAPS payment messages between the CHAPS Settlement Members.

In normal operation CHAPS payments are settled in real time across settlement accounts, maintained by Members at the Bank of England. The operation of these accounts and the settlement account movements associated with CHAPS payments are governed by the Bank of England's Reference Manual and Mandate Agreement ...

CONSTRUCTION OF RULES ...

(h) CHAPS Rules shall be construed in accordance with the laws and banking practices (including days of business) of England and Wales.

(2) CHAPS PAYMENTS

Payments to be included must: ...

(b) Be an irrevocable guaranteed unconditional sterling payment for settlement in real time across Members' settlement accounts at the Bank of England ...

(a) Be time-stamped by the Payer Settlement Members' Gateway before the end of the Settlement Period, excepting contingency situations set out in the CHAPS Procedural Documentation.

(3) PAYMENTS EXCLUDED ...

(b) One which is conditional or requires the transaction to be completed by a deadline.

(a) One which seeks to impose on the Payee Settlement Member any private arrangement which a Payer Settlement Member may have negotiated with a customer.

(4) RESPONSIBILITIES OF A SETTLEMENT MEMBER

(a) Each Settlement Member must comply with CHAPS Rules.

(b) Although a Payee Settlement Member will endeavour to expedite all payments, no responsibility except that specifically stated in CHAPS Rules, will be accepted in respect of transactions in which some further action is dependent upon the time of day for the receipt of funds.

(c) By sending to the Payer Settlement member a LAK (Logical Acknowledgement) for a CHAPS payment the Payee Settlement Member agrees, after authentication verification:–

(i) In the case of payments addressed to one of its own offices, to give same day value to the Payee Customer.

(ii) In the case of payments addressed to another organisation, to give same day value to that organisation ...

(7) REPAIR SORTING CODE NUMBER

Each Settlement Member must allocate a unique Sorting Code number to be known as the Repair Sorting Code Number.

(a) Payments received which cannot be applied due to:–

(i) Insufficient or incorrect Bank or beneficiary details

(ii) Authentication failure

(iii) Time stamping by the Payer Settlement Member's Gateway on normal payments after the close of business (or for any payment after the end of the Settlement Period).

(iv) The agreed constant "SETT" being omitted (by the sending bank) from the after hours field of any payment message received after the first LNP message has been received.

should be returned to the Repair Sorting Code Number of the Payer Settlement Member as soon as practicable but in any case no later than 12.00 Noon on the next business day, in which case there will be no interest penalty.

(b) Unapplied payments may also be returned by means other than CHAPS at any time, by mutual agreement, but no later than 12.00 Noon on the business day following the original remittance.

(8) WRONGLY DELIVERED AND TRANSMITTED PAYMENTS

(a) Wrongly Delivered Payments

A wrongly delivered payment is one which cannot be applied at the office indicated by the Payee Sorting Code, or is addressed to a non-existent or

invalid Sorting Code Number. Such payments must be redirected to the correct destination if within the same Settlement Member.

If by 4.00pm the Payer Settlement Member requests that the payment be returned then the Receiving Settlement Member should return the payment subject to having the full payment details as set out below.

If the Payer Settlement Member does not request the payment be returned until after 4.00pm then the Receiving Settlement Member will use best endeavours to return it that day.

In any event the Receiving Settlement Member will return the payment by 12 00 Noon the next day.

(b) Wrongly Transmitted Payments

A wrongly transmitted payment is one which incorporates valid payee details but is made in error (including where the payment has been duplicated) and has been applied to an account in accordance with the details given by the Payer Settlement Member. Nothing in these Rules requires the Receiving Settlement Member to return the payment until the Payer Settlement Member informs them of the problem together with all relevant information as specified below.

If before 4.00pm the Payer Settlement Member requests the payment be returned then the Receiving Settlement Member will return it that day, subject to receiving the correct payment information and gaining the authority of the account holder if appropriate.

In the event that a Receiving Settlement Member which has received a wrongly transmitted payment requires the permission of an account holder to return it, that Receiving Settlement Member shall use all reasonable endeavours to obtain such permission, providing that nothing in these Rules shall be taken to require or permit that Receiving Settlement Member to return that payment in the absence of any such permission from the account holder. The Receiving Settlement Member may, in the course of seeking such permission from the account holder, need to assure the account holder that such a payment has been received even though the account holder may not be able to identify the relevant credit.

(9) AUTHENTICATION FAILURES

The value of payments received by a Payee Settlement Member which do not contain valid Authentication Codes or valid Authentication Sequence Numbers must be returned to the Repair Sorting Code Number of the Payer Settlement Member as soon as practicable, but in any case no later than 12.00 Noon on the next business day in which case there will be no interest penalty.

All authentication failures within CHAPS must be handled according to the "Security Standards Code of Conduct".'

[50] The following points are material.

(i) The rules are to be 'construed in accordance with' the laws and banking practices of England and Wales. That does not indicate that express provisions of the rules are to be displaced if they are inconsistent with banking practices, but are to be given that meaning within the range of their ordinary and natural meaning which is consistent with banking practices rather than that which is not.

(ii) Payer banks remit funds on an irrevocable guaranteed unconditional basis, in sterling and for settlement in real time on the same day as between the accounts of CHAPS members at the Bank of England.

(iii) The relationship between 'payer bank and payee bank' is a self-contained regime identified in the rules and is not to be affected by private customer/bank transactions.

(iv) By the sending of a LAK after authentication and verification the payee bank agrees with the payer bank to give same day value to the beneficiary.

(v) The return of unapplied payments to the payer is provided for at rule (7). Four instances are given. The deadline for returns is 12 noon on the next business day. As appears from the context unapplied payments are those which have not yet been credited to the account holder. A similar deadline applies under rule (8)(a) to wrongly delivered payments. These are also by definition unapplied.

(vi) The only provision which deals with the return of applied payments is to be found at rule (8)(b). It is to be observed that this rule makes special provision for the need to obtain from the payee account holder authority for the return of payment, but it also expressly contemplates that in some cases such consent may be unnecessary. Those cases are not, however, identified. The requirement for the authority of a payee account holder for the return of funds is consistent only with the effect of such return being the discharge of a debt from the bank to the account holder at the time in question and inconsistent with the payee bank holding those funds as agent for the payor bank at the relevant time.

(vii) Payments which fail authentication must be returned no later than 12 noon on the next business day.

(viii) The deadline for the return of funds to the payer bank is in all cases 12 noon on the next business day.

[51] It is, thus to be observed that these rules, although they make provision for the return to the payer bank of payments that have not been applied, as well as payments that have been applied, aim to achieve finality of value transfer to the account holder in real time on the same day as the transfer by the payer bank and to achieve finality in the accounting position between the payer and payee banks by 12 noon on the following business day.

[52] It is next relevant to take into account the material provisions of the 1988 Act, as amended in 1993. The material provisions are as follows.

> '**93A.**—(1) Subject to subsection (3) below, if a person enters into or is otherwise concerned in an arrangement whereby—(a) the retention or control by or on behalf of another ("A") of A's proceeds of criminal conduct is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or (b) A's proceeds of criminal conduct—(i) are used to secure that funds are placed at A's disposal; or (ii) are used for A's benefit to acquire property by way of investment, knowing or suspecting that A is a person who is or has been engaged in criminal conduct or has benefited from criminal conduct, he is guilty of an offence.
>
> (2) In this section, references to any person's proceeds of criminal conduct include a reference to any property which in whole or in part directly or indirectly represented in his hands his proceeds of criminal conduct.
>
> (3) Where a person discloses to a constable a suspicion or belief that any funds or investments are derived from or used in connection with criminal conduct or discloses to a constable any matter on which such a suspicion or belief is based—(a) the disclosure shall not be treated as a breach of any restriction upon the disclosure of information imposed by statute or

otherwise; and (b) if he does any act in contravention of subsection (1) above and the disclosure relates to the arrangement concerned, he does not commit an offence under this section if—(i) the disclosure is made before he does the act concerned and the act is done with the consent of the constable; or (ii) the disclosure is made after he does the act, but is made on his initiative and as soon as it is reasonable for him to make it.

(4) In proceedings against a person for an offence under this section, it is a defence to prove—(a) that he did not know or suspect that the arrangement related to any person's proceeds of criminal conduct; or (b) that he did not know or suspect that by the arrangement the retention or control by or on behalf of A of any property was facilitated or, as the case may be, that by the arrangement any property was used, as mentioned in subsection (1) above; or (c) that—(i) he intended to disclose to a constable such a suspicion, belief or matter as is mentioned in subsection (3) above in relation to the arrangement; but (ii) there is reasonable excuse for his failure to make disclosure in accordance with subsection (3)(b) above.

(5) In the case of a person who was in employment at the relevant time, subsections (3) and (4) above shall have effect in relation to disclosures, and intended disclosures, to the appropriate person in accordance with the procedure established by his employer for the making of such disclosures as they have effect in relation to disclosures, and intended disclosures, to a constable …

93B.—(1) A person is guilty of an offence if, knowing that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he acquires or uses that property or his possession of it.'

A defence similar to that provided for under s 93A(4) and (5) applies by s 93B(5) and (6) to an offence under s 93(B)(1). Section 93C provides:

'(1) A person is guilty of an offence if he—(a) conceals or disguises any property which is, or in whole or in part directly or indirectly represents, his proceeds of criminal conduct; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of avoiding prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.

(2) A person is guilty of an offence if, knowing or having reasonable grounds to suspect that any property is, or in whole or in part directly or indirectly represents, another person's proceeds of criminal conduct, he—(a) conceals or disguises that property; or (b) converts or transfers that property or removes it from the jurisdiction, for the purpose of assisting any person to avoid prosecution for an offence to which this Part of this Act applies or the making or enforcement in his case of a confiscation order.

(3) In subsections (1) and (2) above, the references to concealing or disguising any property include references to concealing or disguising its nature, source, location, disposition, movement or ownership or any rights with respect to it …'

[53] Section 93D deals with tipping-off in cases where the person concerned knows or suspects that a money laundering investigation by a constable is under way or about to take place.

[54] It is to be observed that the availability of the statutory defences is designed to facilitate the police investigation of the suspected underlying criminal transaction, an objective similarly reflected in s 93D. However, these provisions contain nothing to indicate that the innocent recipient of a transfer of funds who suspects that their origin is an unlawful transaction is under a duty to dispose of the funds by returning them to the transferor. Whereas the offences are not defined to include as an element of the mens rea an omission to report the transfer to the police, omission to do so in the face of the relevant suspicion will deprive the recipient of the funds of a defence to the substantive offence.

[55] The 1993 regulations provide detailed requirements for giving effect to the 1988 Act. These include specific provision for the internal system of regulation of transactions by those who in the course of relevant financial business form a business relationship or carry out a one-off transaction, including the maintenance of internal reporting procedures.

[56] The JMLSG Money Laundering Guidance Notes 1997, while generally explaining the effect of the 1988 Act, contain specific recommendations as to compliance:

> 'Banks and Building Societies ...
>
> 1.13 All banks and building societies, as providers of a wide range of money transmission and lending services, are vulnerable to being used in the layering and integration stages of money laundering as well as the placement stage. Electronic funds transfer systems increase the vulnerability by enabling the cash deposits to be switched rapidly between accounts in different names and different jurisdictions. Mortgage and other loan accounts are often used as part of this process to create complex layers of transactions.
>
> 1.14 Some banks and building societies will additionally be susceptible to the attention of the more sophisticated criminal organisations and their "professional money launderers". Such organisations, possibly under the disguise of front companies and nominees, will create large scale but false international trading activities in order to move their illicit monies from one country to another. They will create the illusion of international trade using false/inflated invoices to generate apparently legitimate international trade wire transfers, and will use falsified/bogus letters of credit to confuse the trail further. Many of the front companies may even approach their bankers for credit to fund the business activity. Banks and building societies offering international trade services should be on their guard for laundering by these means ...
>
> 6.2 Where there is a business relationship, a suspicious transaction will often be one which is inconsistent with a customer's known, legitimate business or personal activities or with the normal business for that type of account. Therefore, the first key to recognition is knowing enough about the customer and the customer's business to recognise that a transaction, or series of transactions, is unusual.
>
> 6.3 Questions that a financial institution might consider when determining whether an established customer's transaction might be suspicious are:
>
> –is the size of the transaction consistent with the normal activities of the customer?

–is the transaction rational in the context of the customer's business or personal activities?

–has the pattern of transactions conducted by the customer changed?

–where the transaction is international in nature, does the customer have any obvious reason for conducting business with the other country involved?

...

Reporting of Suspicious Transactions

6.6 There is a statutory obligation on all staff to report suspicions of money laundering. Regulation 14 contains the provision to report to the "Appropriate Person" (for the purposes of these Guidance Notes called the Money Laundering Reporting Officer (MLRO)) in accordance with internal procedures.

6.7 All financial businesses have a clear obligation to ensure:

–that each relevant employee knows to which person he or she should report suspicions; and

–that there is a clear reporting chain under which those suspicions will be passed without delay to the Reporting Officer.

Once an employee has reported his/her suspicion to the "appropriate person", s/he has fully satisfied the statutory obligation ...

National Reporting Point for Disclosures

6.20 The national reception point for disclosure of suspicions is the Economic Crime Unit of the National Criminal Intelligence Service (NCIS).

6.21 The Economic Crime Unit is staffed by police and customs officers and its postal address is PO Box 8000, London SE11 5EN. The unit can be contacted during office hours on: 020 7238 8607. Outside office hours an answer phone operates on that number. Urgent disclosures can be transmitted by fax on 020 7238 8286 ...

Termination of a Business Relationship Following a Disclosure

6.27 The NCIS "consent" to undertake the transaction following a disclosure is provided to the reporting institution as a defence against a charge of assisting a money launderer. It is not intended to over-ride normal commercial judgment, and a financial sector business is not committed to continuing the relationship with the customer if such action would place the reporting institution at commercial risk. However, it is recommended that before terminating a relationship in these circumstances, the reporting institution should liaise with NCIS or the investigating officer to ensure that the termination does not "tip-off" the customer or prejudice the investigation in any other way.'

[57] It was against this background that the claimant's account was opened. In general terms therefore a customer who opens an account at a bank in this country must be taken to accept and be entitled to assume that the bank, if it forms a suspicion covered by the 1988 Act, will act in accordance with that Act and the 1997 guidelines and specifically that it will have in place a money laundering reporting system as indicated in the guidelines which, in the event of suspicion within the scope of the 1988 Act, it will, if necessary, deploy right up to the point of reporting to NCIS. Equally, if a customer opens an account which is of a kind into which CHAPS transfers can be made, that customer is entitled to assume that, if a transfer is made for the credit of that account, the bank will operate the account in accordance with the CHAPS rules, but subject always to

such course as may in the circumstances be required for the purpose of compliance with the 1988 Act, the 1993 regulations and 1997 guidelines.

[58] CHAPS transfers have now become such a vital part of daily financial transactions in this country, ranging from the conveyancing of private property to multi-million pound transfers on the money market and in all cases that transfer system is used for the purpose of effecting real time settlement giving same-day value. For example, in the year 2001, during the first quarter there was an average daily volume of 89,000 separate payments with an average transaction value of £2·31m and an average total daily value of £206bn. Such transactions proceed on the basis that once a transfer has been accepted it is safe for the beneficiary to treat the funds as irrevocably his own. The real time element is crucial. If the seller of a house in a chain of buyers and sellers could not rely on this assumption and had to wait until the bank employees were about to go home at the close of the banking day before he could with confidence rely on the transfer having become irrevocably his, so as to enable him to complete a purchase of another property, it would be necessary for conveyancing to return to the system of physical completion. There would also be massive uncertainties and risks involved in back-to-back money market transactions.

[59] In relation to the operation of the statutory money laundering regime alongside real time transfers it is to be noted that under s 93A(3)(b) the statutory defence by means of reporting to a constable extends to reports to the police made after the carrying out by the person concerned of what would otherwise be an unlawful act of facilitating money laundering provided that the report is made on that person's initiative and as soon as it is reasonable for him to make it. This flexibility has the dual effect of avoiding the suspecting party being placed in the position in which he interrupts a transaction which course may have the consequence of tipping-off the other person concerned and therefore hampering subsequent NCIS investigations.

[60] It is against this background that it can be concluded that the system of CHAPS transfers differs in important respects from other transfer systems and in particular from non-electronic or over-the-counter transfers for value. The CHAPS rules make specific provision for the return of unapplied transfers and for applied transfers made in error (rule (8)). The rules make no other specific provision for the reversal of credit entries following authentication. There must therefore be the very strong implication that following application to the customer's account, in the absence of error, the banking practice relating to CHAPS transfers is that they are ordinarily irreversible. I use that qualification advisedly because, in my judgment, there is an appropriate analogy with the practice in relation to documentary credits where at the time of presentation of documents, the bank with cogent evidence of fraud can decline to make payment: see *United Trading Corp SA v Allied Arab Bank Ltd* [1985] 2 Lloyd's Rep 554.

[61] The same exception is likely to apply in respect of illegal transactions: see *Mahonia Ltd v JP Morgan Chase Bank* [2003] EWHC 1927 (Comm), [2003] 2 Lloyd's Rep 911.

[62] That said, there is no unavoidable inconsistency between compliance with the requirements of the 1988 Act, as amended in 1993, and the finality of a CHAPS transfer, subject only to the exceptions specified in the rules. In particular, if a bank has advance warning of a transfer about to be made by CHAPS as to which it already entertains suspicions, it can report the matter to NCIS in advance, or it can withhold authentication while it informs NCIS or,

having credited the customers' account following authentification, it can report the matter to NCIS and wait for directions. If it fears that a transfer out of the customer's account is imminent it can temporarily freeze the account and inform NCIS, but with due regard to the dangers of tipping-off.

[63] The procedural and commercial problems facing a bank which has already received payments and credited them to its customer's account, but subsequently becomes aware of ongoing money laundering investigations by the police, were explored by the Court of Appeal in *Bank of Scotland v A Ltd* [2001] EWCA Civ 52, [2001] 3 All ER 58, [2001] 1 WLR 751. In that case the bank, having been asked by the police not to reveal to its customer information that would tip-off in respect of the investigations and being concerned that it was about to be instructed by its customer to pay money out of the account, applied to the court without notice to its customer seeking directions. The judge of his own volition granted an injunction against the bank restraining it from making any payment against the account without the court's permission. This injunction was discharged by another judge on the application of the customer and the bank was ordered to pay the costs. The transactions turned out to be innocent. The funds were in the meantime released to the customer and by the time the matter came before the Court of Appeal the only outstanding issue was as to who should pay the costs, the bank or the customer.

[64] The Court of Appeal held that the injunction should never have been granted in the first place but that the bank would have been perfectly justified in applying against the Serious Fraud Office and without notice to any other party for an interim declaration under CPR 25.1(1)(b). Lord Woolf CJ said (at [40]):

> 'The bank was, however, in a genuinely difficult situation. There was a dilemma as to what it should do. The mistake it made was not to recognise that there was no point in obtaining relief against A Ltd. It was reasonable to try to anticipate the proceedings which could be expected if it refused to honour instructions of A Ltd as to the moneys which stood to its credit in its accounts. However, the appropriate defendant to any application for directions was not A Ltd but the SFO. The question of the information which could properly be disclosed should have been capable of being resolved between the SFO and the bank, but if they could not reach agreement, then the court would have to resolve the dispute. The hearing could have been held in private and there would have been no question of A Ltd having to be served since it would not have been a party. If it was necessary for any order to be made in proceedings against the SFO, then the appropriate order would have been an interim declaration under CPR Pt 25.1(1)(b). The declaration could set out what information it would be proper for the bank to rely on. In determining the terms of any declaration which could be granted, the court would pay most careful attention to the views of the SFO as to what would or would not prejudice the SFO's investigation. With the assistance of the court, in the great majority of cases there is unlikely to be any difficulty in determining the terms of an interim declaration. The life of the interim declaration would probably be short since in the majority of cases it will only be necessary to conceal the existence of the investigations for a fairly limited period.'

[65] Accordingly, there is available to a bank a procedural course which normally should enable it to proceed consistently with the CHAPS rules at the same time as avoiding criminal liability under the money laundering legislation.

As observed by Lord Woolf CJ (at [41]), if, following continuing refusal to pay the customer out of the account, the customer commenced proceedings and applied for summary judgment on the debt, the bank, if it was still suspicious of the origin of the funds, could rely on the second ground for withholding summary judgment under CPR 24.2: '... and there is no other [compelling] reason why the case or issue should be disposed of at trial'. Where the circumstances were seriously suspicious 'they could well provide very good reason for the court not being prepared to grant summary judgment', although to oppose such a judgment the bank would have to draft its evidence with particular care—assisted by any prior advisory declaration made by the court.

[66] Accordingly, giving all due weight to the need to comply with the 1988 Act and to the objective of discouraging money laundering transactions or transactions involving the proceeds of crime, as reflected, for example, in the Basle Committee report, the argument that, in order to protect the interests of the bank, the express regime of the CHAPS rules can be ignored by the transferee bank by reference to some overriding concept of banking practice designed to achieve disengagement of the bank from a transfer of funds as to which it justifiably entertains suspicions can carry little weight unless there is cogent evidence of a settled banking practice to this effect. On the contrary, that regime can perfectly well accommodate the modus operandi of the money laundering legislation, albeit in some cases with the assistance of the court. In this connection, it is important not to lose sight of the fact that, notwithstanding the bank's justifiable suspicions, the transaction giving rise to the transfer may be perfectly lawful and the customer may therefore be entitled to expect performance by the bank of its banking contract, the effect of which I consider later in this judgment. If banks are to be entitled to depart from their contracts with customers, on the basis of suspicion of unlawfulness and of general banking practice, that practice has to be clearly proved. That such alleged practice goes well beyond what is necessary to protect the bank from unlawful activity may be a strong indication that no such practice exists.

[67] In his two reports, the bank's expert, Mr David Trower, had worked for Lloyds Bank and subsequently Lloyds TSB from 1956 to 1997 and had for a substantial period, starting in 1986, been responsible for compliance with legal and regulatory requirements and for prevention of fraud and money laundering. He stated, in substance, that HSBC had in this case got into the position, after transmission of the funds, where it was entitled without delay to re-transfer those funds and close the account in order to avoid criminal liability. It was not incumbent on it having frozen the account to refer the matter to NCIS. It was entitled to protect its own interests. At para 18 of his first report he stated:

> '... from a practical banking point of view, a bank in making its decision to accept or return a credit for its customer's account would not be conscious of the timing of the LAK. The bank has received a CHAPS payment and is suspicious about the source of the underlying funds. The bank would take the same course of action in returning the funds no matter how the funds have been received and it is therefore immaterial that the funds in question were received through CHAPS.'

[68] He further stated:

> '... whilst I do not wish to comment on the substance of the CHAPS Rules, for the reasons set out above I believe that a bank has every right to reject a

CHAPS payment should it have grounds to do so, as it would have with any payment received through another channel. Whilst a bank would have to adhere to the criteria of the Banker and Customer Relationship, abide by the CHAPS Rules and meet its obligations under the law, in the case under review the Money Laundering Regulations, first and foremost in the environment pertaining at the time of transaction under dispute the branch would have been conscious of the fraud and money laundering threat and the need to make a decision based on good banking practice and implement any such decision promptly.'

[69] Having observed that HSBC's Money Laundering Group Policy and Procedures for Electronic Payments-In stated—

'that all payments, which included those received through CHAPS, over £50,000 (or equivalent in currency) would be subject to a separate security check before being credited to the payee's account by the Bank's Multi-currency Payments Department ...'

He later, at para 18, stated:

'... from a practical banking point of view, "same day value" means that once a CHAPS payment has been unconditionally credited to a customer's account, the customer can access the funds instantly. It is for this reason that bankers have to have procedures in place (see para 11.3, above, re HSBC's procedures for CHAPS payments in excess of £50,000) to ensure that funds transferred electronically and that may be considered tainted are identified and the appropriate action taken before they are unconditionally credited to the customer's account.'

[70] Mr Trower conceded in cross-examination that he personally had never been concerned in the taking of a decision to return an electronic transfer of funds, although in one case he had been concerned with a decision to freeze an account when his bank had been suspicious of their origin.

[71] I am bound to say that, apart from his lack of personal experience of circumstances giving rise to a decision to re-transfer funds received electronically on the grounds of suspicion of money laundering or fraud, his assertion that a bank retains an overriding discretion to re-transfer funds already credited to an account without the consent of the customer entirely fails, in my judgment, to take into account well-established characteristics of the contractual relationship between the bank and its customer after the bank has accepted the transfer and credited it to the customer's account. If the implication of any such overriding practice as that to which Mr Trower refers is inconsistent with what would otherwise be the terms of that relationship, very strong evidence of such a practice would be necessary for its implication.

[72] Although much emphasis was placed in argument on behalf of HSBC on the need for the bank, as a matter of banking practice, to protect itself against the risk of criminal liability, reliance was also placed on the need to protect itself against the risk of being liable as constructive trustee if it dealt with the funds suspecting that they emanated from fraud and that suspicion turned out to be correct. In order to test this submission it is necessary to investigate the position of the bank on the assumption that the funds were in truth derived from a transaction of a kind which would give rise to a right of recovery in equity from a recipient of such funds.

[73] The circumstances in which a third party in a position analogous to that of a payee bank can be held liable as a constructive trustee were fully considered in the judgment of Lord Nicholls of Birkenhead, in the Judicial Committee of the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 All ER 97, [1995] 2 AC 378. Lord Nicholls, speaking of the accessory who is in a position where it is not entirely clear whether a transaction by a trustee is or is not in breach of trust so as to incur liability in equity, observed ([1995] 3 All ER 97 at 107, [1995] 2 AC 378 at 390–391):

> 'He is required to act honestly, but what is required of an honest person in these circumstances? An honest person knows there is doubt. What does honesty require him to do? The only answer to these questions lies in keeping in mind that honesty is an objective standard. The individual is expected to attain the standard which would be observed by an honest person placed in those circumstances. It is impossible to be more specific. Knox J captured the flavour of this, in a case with a commercial setting, when he referred to a person who is "guilty of commercially unacceptable conduct in the particular context involved": see *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700 at 761. Acting in reckless disregard of others' rights or possible rights can be a tell-tale sign of dishonesty. An honest person would have regard to the circumstances known to him, including the nature and importance of the proposed transaction, the nature and importance of his role, the ordinary course of business, the degree of doubt, the practicability of the trustee or the third party proceeding otherwise and the seriousness of the adverse consequences to the beneficiaries. The circumstances will dictate which one or more of the possible courses should be taken by an honest person. He might, for instance, flatly decline to become involved. He might ask further questions. He might seek advice, or insist on further advice being obtained. He might advise the trustee of the risks but then proceed with his role in the transaction. He might do many things. Ultimately, in most cases, an honest person should have little difficulty in knowing whether a proposed transaction, or his participation in it, would offend the normally accepted standards of honest conduct. Likewise, when called upon to decide whether a person was acting honestly, a court will look at all the circumstances known to the third party at the time. The court will also have regard to personal attributes of the third party such as his experience and intelligence, and the reason why he acted as he did.'

[74] In *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511, there was further discussion by the Court of Appeal of the elements of liability as a constructive trustee as indicated by Lord Nicholls. Having referred to a number of passages, including that already cited, from that judgment, Colman J observed (at 535):

> 'The observations that "for the most part dishonesty is to be equated with conscious impropriety" must involve that the person alleged to have assisted the breach of trust must be shown to have had, at the time when he provided the assistance, actual knowledge of facts which amount to a breach of trust or which suggest that a breach of trust has been or is to be committed. If the accessory knows facts which fall short of constituting a breach of trust, but which lead him to believe that other facts exist which do amount to an actual breach of trust or will involve a future breach, although he cannot be certain

that those facts exist, he will be judged to have been acting dishonestly if he renders assistance when in all the circumstances an honest man, having that knowledge, would not have done so; either at all or without making further enquiry or taking some other steps to satisfy himself that there was no breach of trust.'

[75] The proposition that a bank which in view of its suspicions about a CHAPS transfer which took the course discussed in [62]–[65], above would be running the risk of liability as a constructive trustee presents itself to me as wholly unrealistic. It finds itself subjected to an electronic transfer. It suspects the origin. If withdrawal appears to be imminent, it withholds authentication for the CHAPS transfer. Alternatively, it informs NCIS and discusses what course should be taken if withdrawal is attempted. If necessary and appropriate, it issues an application for an interim declaration against the Serious Fraud Office. In consequence, it declines its customer's instructions to make payment from the funds received. To characterise the bank's conduct in such circumstances as amounting to dishonest assistance, such as would found a claim against it as constructive trustee by the true beneficiary of the fund would, in my judgment, be inconsistent with the basis of that relief identified in the *Royal Brunei Airlines* and *Jyske Bank* cases. Far from giving dishonest assistance to the perpetrator of a fraud, the bank would be assisting the beneficiary of the fund by obstructing the course of possibly dishonest conduct.

[76] The Court of Appeal considered the relevance of a bank's exposure to the risk of liability as constructive trustee in *Bank of Scotland v A Ltd*. Having referred to the test as to such liability applied by Ungoed-Thomas J in *Selangor United Rubber Estates Ltd v Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073 at 1104, [1968] 1 WLR 1555 at 1590 and to the judgments in the *Royal Brunei Airlines* and *Jyske Bank* cases, Lord Woolf CJ observed ([2001] 3 All ER 58 at [37]–[38], [2001] 1 WLR 751):

'Nevertheless we are inclined to the view that it was open to the bank to seek directions on the footing that it was at least a putative fiduciary. If A Ltd had been the recipient of funds which were the proceeds of fraud (something which is not now contended for) and if the bank had such strong grounds for doubting its customer's honesty that it would itself have been dishonest to turn a blind eye to its doubts, then there was a clear risk of the bank incurring liability in equity as an accessory to breach of trust. A bank placed in that dilemma ought to be able to invoke equity's assistance. The fact that the bank was not formally constituted as a trustee and that a tracing process would attach, not to any assets of the bank, but to the chose in action representing the bank's obligation to its customer, ought not to be an insuperable obstacle. (The terms of Neuberger J's order, requiring the credit balance to be treated as if it had been paid into court, may provide a technique for surmounting the obstacle, although we would not wish to encourage that sort of technical expedient.) ... However, we do not find it necessary to express a final view on these points, which were not fully explored in argument, since with the development of the court's powers to grant declaratory relief in appropriate cases it is no longer necessary for the bank to establish the status of a trustee in order to obtain relief.'

And concluded his judgment with these words (at [47]):

'The use of the court's power to grant interim declarations in proceedings involving the SFO will protect a bank from criminal proceedings but it will not automatically provide protection for the bank against actions by customers or third parties. However, it seems almost inconceivable that a bank which takes the initiative in seeking the court's guidance should subsequently be held to have acted dishonestly so as to incur accessory liability. The involvement of the court should, however, enable, in the great majority of cases, a practical solution to be determined which protects the interests of the public but allows the interests of a bank to be safeguarded.'

[77] What emerges from those authorities is that, although the bank may be placed in a difficult commercial position vis-à-vis its customer by reason of the need to avoid criminal liability including tipping-off on the one hand and liability as a constructive trustee on the other, there now exist procedures which it is entitled to deploy in order to protect its position in both respects. These procedures do not necessarily lead to the bank having to disengage from the transfer and they certainly do not normally involve the re-transfer to the payor, a course which would be most unlikely to protect the rightful beneficiary of the fund and which might well involve tipping off those criminally responsible.

[78] What then is the legal analysis of the transactions on 21 and 22 September 2000?

[79] The starting point is to define the relationship between the bank and a pre-existing account holder relevant to external transfers into an account. There is a continuing duty on the bank to credit to the account all such transfers it receives from external sources and which comply with the terms subject to which the account is constituted. Thus, for example, a bank is entitled to decline to accept a transfer of an amount which is less than the minimum permissible for a deposit. Or it might be entitled to refuse to accept a post-dated cheque. Certainly, it could refuse to accept a cheque drawn on an account in relation to which transactions were prohibited by law, as where sanctions were in force against the country in which the drawee bank was located. However, the bank's entitlement to decline to accept a transfer is not in the nature of an option exercisable according to the bank's perception of what is commercially desirable but the consequence of the operation of the terms of the account contract with its customer.

[80] It follows that as a matter of analysis the analogy advanced on behalf of HSBC between the acceptance of discharge of a debt by a creditor and the acceptance of an external transfer to a bank so as to create a credit in its customer's favour is misplaced. The need for conduct amounting to acceptance of a tender of discharge of a one-off debt by a creditor identified in *TSB Bank of Scotland plc v Welwyn Hatfield DC* [1993] 2 Bank LR 267 arises from the fact that the pre-existing contractual relationship between debtor and creditor does not provide for a payment mechanism which entitles the debtor to the discharge of the debt if he complies with its terms. If the contract did include such a provision, and the debtor complied with such terms, the specific acceptance of the tender by the creditor would obviously not be required.

[81] This distinction was indicated in *Royal Products Ltd v Midland Bank Ltd and Bank of Valletta Ltd* [1981] 2 Lloyd's Rep 194 at 198 in which Webster J remarked:

'What, then, are the legal implications of those instructions? How are they to be regarded, as a matter of law? In my judgment they are to be regarded simply as an authority and instruction, from a customer to its bank, to

transfer an amount standing to the credit of that customer with that bank to the credit of its account with another bank, that other bank being impliedly authorized by the customer to accept that credit by virtue of the fact that the customer has a current account with it, no consent to the receipt of the credit being expected from or required of that other bank, by virtue of the same fact. It is, in other words, a banking operation, of a kind which is often carried out internally, that is to say, within the same bank or between two branches of the same bank and which, at least from the point of view of the customer, is no different in nature or quality when, as in the present case, it is carried out between different banks.'

And (at 201):

'The substance of Royal Products' contentions, through Mr. Tugendhat [counsel for the plaintiffs], as I understand them is that the instructions were not carried out until BICAL [Bank of Industry Commerce and Agriculture Ltd] had been "paid" and that in law payment is never complete until the payee has consented to the receipt of the payment or is estopped in one way or another from repudiating his consent. It may very well be in the ordinary course that that contention is correct, when one person instructs another to make payment to a third person. But this is not such a case. In the absence of special circumstances which may introduce expressly or by implication special conditions, I cannot see the necessity, either in practice or in law, for the consent of a bank to be obtained before it is to be treated as having received, in one way or another, money or credit which it in turn is to credit to the current account of one of its customers.'

[82] The same distinction is clear from a passage in the judgment of Hobhouse J in *TSB Bank of Scotland plc v Welwyn Hatfield DC* [1993] 2 Bank LR 267 at 272:

'The physical or ministerial aspect of payment involves the delivery of money by one person to another. Where the two persons meet face to face and the debtor seeks to hand to the creditor legal tender the physical act of delivery (in the absence of some misrepresentation or mistake) will not be achieved without the concurrence of the debtor [sic] [creditor]. Where the relevant contract or the terms of the debt require payment to be made in a particular way, as for example by payment into an identified account at a particular branch of a named bank, the payment will be effected by payment into that account. Prior authority has been given to discharge the debt or other obligation in that way; the debtor [sic] has authorised the bank (or other relevant person) to receive and accept the money on his behalf. No further act of concurrence or assent is required from the debtor [sic]. The creditor [sic] discharges his obligation by making the contractual payment in the contractually stipulated manner.'

[83] Consequently, when in the present case the claimant opened an account which, in accordance with the terms of the account, was available for receiving incoming CHAPS transfers, HSBC engaged that it would accept into his account all CHAPS transfers which complied with the CHAPS rules and which were otherwise in accordance with the terms of the account.

[84] Did the provisions of the 1988 Act provide the bank with a justifiable reason for declining to accept the transfers? To this the answer is undoubtedly

that they did not. That is because under s 93A an offence would not be committed merely by accepting a transfer suspecting that it emanated from fraud or other unlawfulness or that it was part of a money laundering operation, provided that the reporting procedures in sub-s (3) were implemented by the bank. An offence based on acceptance of such a transfer would not be proved by the prosecution unless it also proved non-compliance with either of the reporting procedures in sub-s (3)(b)(i) or (ii). Accordingly, it would not be open to HSBC to justify non-acceptance of the transfer on the grounds that its mere suspicion rendered acceptance illegal per se.

[85] It follows that once the claimant's account had been credited, following authentication and the transmission of the LAK, HSBC became indebted to the claimant in respect of the transfer. There was nothing that prevented acceptance of the transfer as a credit in accordance with terms of the account contract. Was the effect of the imposition of the marker later that day such as to disengage HSBC from its pre-existing indebtedness?

[86] The marker froze the account in the sense that from 16.14 hrs on that day it ceased to be possible for the claimant to walk into a branch of HSBC and, as he could have done after 14.03 hrs that afternoon, draw down funds from his account, including the transferred funds. Thus, funds which previously had been available for immediate withdrawal ceased to be so. That remained the position until on the following day at 14.44 hrs they were re-transferred to Barclays.

[87] As already indicated, the bank relies on the decision of the House of Lords in *The Chikuma* [1981] 1 All ER 652, [1981] 1 WLR 314 in support of the proposition that the marker rendered the transfer no longer immediately available and at the disposition of the claimant, further, that lack of availability continued into the next business day until re-transfer. It is thus submitted in reliance on *Momm v Barclays Bank International Ltd* [1976] 3 All ER 588, [1977] QB 790 that the bank had until the end of the first banking day to decline to make the transfer available to its customer and this it had done by imposing the marker.

[88] The decision in *The Chikuma* was concerned with whether the method of payment of charter hire adopted by the charterers was equivalent to payment in cash on the date for payment. In order to be equivalent to a payment in cash it had to be immediately available to the shipowners in its full amount. The mode of payment involved that although the account of the shipowners at their bank was credited with the full charter hire due on the date when it fell due (22 January 1976), the money would earn no interest until 26 January and, if and to the extent that any of it was drawn down before that date, the shipowners would have to pay back interest on the amount withdrawn. This was held not to be equivalent to a payment in cash on 22 January which would at once have earned interest and could at once have been drawn down without an interest penalty. The decision thus did not go to the question whether on 22 January the bank owed a debt to the shipowners. Had that question been raised, the answer would unquestionably have been that it did. There would certainly have been a debt due, but it would not have been fully payable and would not have been earning interest until 26 January. That case therefore does not assist with the issue in question.

[89] In my judgment, the imposition of the marker did not cancel the debt due to the claimant. Nor did it reverse the account entries on the bank's computer. It simply had the effect of postponing for an indefinite period the time when the bank would respond to an instruction from the claimant for payment out of the account. But the credit balance and the debt remained intact.

[90] Upon that analysis the applicability of *Momm*'s case becomes irrelevant. The dispute in that case arose out of a transfer of funds into the plaintiff's bank account on the first day, which was the value date, and, following the announcement that the transferor had ceased trading and was going into liquidation, on the second day the bank's reversing the entries and withdrawing the credit. The plaintiff customer not having been informed of the credit by the bank, the bank argued that up to the time of reversal of entries the transfer of the credit was only provisional and could be reversed. Kerr J rejected this argument and held that the deadline for the bank's decision whether to reverse an entry was the close of banking business on the first day. He concluded by reference to *Eyles v Ellis* (1827) 4 Bing 112, a decision of the Court of Common Pleas, that an account could be held to be effectively credited if the bank's book entries showed a credit and regardless of whether there was notice of that credit to the customer. Kerr J observed ([1976] 3 All ER 588 at 595, [1977] QB 790 at 799–800):

> 'The issue is whether or not a completed payment had been made by the defendants to the plaintiffs on 26 June. This is a question of law. If the answer is Yes, then it is not contested that the plaintiffs have a good cause of action. If there were no authorities on this point, I think that the reaction, both of a lawyer and a banker, would be to answer this question in the affirmative. I think that both would say two things. First, that in such circumstances a payment has been made if the payee's account is credited with the payment at the close of business on the value date, at any rate if it was credited intentionally and in good faith and not by error or fraud. Secondly, I think that they would say that if a payment requires to be made on a certain day by debiting a payer customer's account and crediting a payee customer's account, then the position at the end of that day must be in fact and in law that this has either happened or not happened, but that the position cannot be left in the air. In my view both these propositions are correct in law.'

[91] That case involved an incoming transfer for value on a particular date and the issue was whether the payment had been made on that date. The judgment is authority for the proposition that the question whether the payment had been made on the value date was to be tested by reference to an account entry at the close of business on that date. It is not authority for the proposition that once an account has been credited on the value date with an incoming transfer, the entry can be reversed at any time up to the end of business on that day. This decision does not assist the defendant bank in this case because at the end of the value date there was undoubtedly a credit balance in favour of the claimant, albeit the account was frozen. If the question had been whether Mr Eshhati had paid the claimant on that day, the answer would undoubtedly have been that he had done so.

[92] I would further add that, in as much as *Momm*'s case is concerned with payments on a given value date, it has no application to payments by CHAPS transfers to a customer's account. The concept that it is the entries only at the *end* of the day which evidence whether a transfer has been accepted is misconceived in the context of the CHAPS regime. That regime is designed not only to give same-day value but also to make real time transfers of funds. The CHAPS rules determine the circumstances under which and the time by which funds transferred can be returned to the payer bank, as already explained. Whatever the reason for the return, finality should be achieved by 12 noon on the

next business day. The payment via CHAPS having been unconditional, HSBC, having credited the claimant's account, were thereafter indebted to the claimant in the amount of the credit balance. The proposition that by reason of its justifiable suspicions, the bank retained an overriding discretion to reverse the transfer into the account after the 12 noon deadline on the next banking day on the basis of banking practice has not been established on the evidence. Any such practice would not only be fundamentally inconsistent with the bases of the contract with its customer and with the CHAPS rules, as I have demonstrated, but would go well beyond what was reasonably required either for compliance with the criminal law or for the reasonable protection of the bank against the risk of liability as a constructive trustee. As I have already indicated, any such practice would therefore have to be the subject of cogent evidence. Such evidence has not been adduced in this case.

[93] Accordingly, I conclude that the transfer by CHAPS of the sum of £944,114·23 to HSBC had by 14.03 hrs on 21 September 2000 created a valid credit on the claimant's account and a subsisting debt in that amount due from HSBC to the claimant. Repayment of that debt having been refused, that is the amount which is now payable with interest to the claimant.

THE CLAIM BASED ON BREACH OF CONTRACT

[94] The claimant advances an alternative case based on breach of an implied term in the banker/customer contract that HSBC would give same day value to the claimant in respect of any CHAPS payment received for the credit of the claimant's account. The term is said to be implied because it represents the reasonable usage of bankers, alternatively of settlement members of the CHAPS Clearing Co Ltd. The breach of contract is said to consist of failing to repay the moneys in response to oral and subsequent written demands for payment on 16 October 2002.

[95] This alternative case only has to be considered if, contrary to this judgment, the claimant is wrong in relation to his claim in debt. But that would arise only if HSBC were entitled, as against the claimant, to refuse to accept a CHAPS payment which it had already applied by way of crediting the claimant's account even though there were no error and no illegality involved. However, this hypothesis would clearly be inconsistent with the implication of the term for which the claimant contends. Investigation of this alternative route to recovery is thus intrinsically unrealistic.

[96] The bank submitted in respect of this damages claim that the claimant had failed to mitigate his loss by his failure to attempt to recover the price of the database from EN or from GPTC since Mr Eshhati had returned the money to that organisation. I have already decided that the claimant knew from 22 September 2000 that the money was to be re-transferred to Barclays. There is no evidence of any conduct on his part which was aimed at recovery of the money until he telephoned Mr Eshhati in July 2002 after the meeting with the bank on the 25th of that month. In my judgment, his claim against GPTC would have encountered some difficulty. In particular, GPTC could contend with no little substance that it had already paid the price by the agreed method of transmission of funds to the claimant's bank by means of the CHAPS system and accordingly the only basis for such a claim would be for unjust enrichment. Whether that principle would have provided any reasonable basis for a claim against GPTC even if promptly brought is doubtful. On balance, I am not persuaded that failure to mitigate would be a defence to a claim against the bank.

The proximate cause of the damage suffered by the claimant would have been the bank's failure to perform its contract in accordance with its terms by permitting the claimant to withdraw the price which had been paid by GPTC. The return of the money to Barclays, and Mr Eshhati's subsequent repayment to GPTC and the claimant's subsequent failure to pursue GPTC for the money are in my view collateral to the material chain of causation of loss. The proposition that the claimant was acting so unreasonably as to break the chain of causation between the bank's conduct and his loss is, in my view, ill-founded.

[97] The bank further alleges that the claimant could not recover damages on the ground that there would be unjust enrichment if there were recovery because the claimant would have the benefit of double recovery—both from HSBC and from GPTC. Reliance is placed on the observations of Pill LJ in *Crantrave Ltd v Lloyds Bank plc* [2000] 4 All ER 473 at 479, [2000] QB 917 at 924:

> 'There will be circumstances in which a court may intervene to prevent unjust enrichment either by the customer in having his money from the bank as well as having the claim of his creditor met, or by the creditor who has double payment of the debt. The onus is in my judgment on the bank to establish the unjust enrichment on the evidence. In this case not only is there no evidence of authorisation or ratification of the payment to the third party by the customer but there is no evidence of unjust enrichment by the customer. In the absence of authorisation or ratification of the payment, the bank must in my judgment meet this claim and recoup the sum paid, if they can, from the third party to which it was paid.'

[98] Those observations, when read in context, were directed to circumstances where a bank has already discharged its customer's debt to a third party, but without the authority of its customer, and faces a claim from the customer for repayment of the sum paid without authorisation. That is a fundamentally different case from one where, as here, the bank has without authority made a repayment to its customer's debtor, thus leaving the customer with a claim against the bank and a claim against the debtor. In such a case it is open to the customer to elect whether to sue the bank or the debtor. If he chooses to sue the bank, the existence of an alternative claim against the debtor which has not been pursued does not give rise to any question of unjust enrichment.

[99] Accordingly, the claimant is entitled to judgment in debt in the sum of £944,114·23 with interest from 21 September 2000.

Claim allowed.

James Wilson Barrister (NZ).

Vakante v Addey & Stanhope School

[2004] EWCA Civ 1065

COURT OF APPEAL, CIVIL DIVISION

BROOKE, MUMMERY LJJ AND LORD SLYNN OF HADLEY

5, 6, 30 JULY 2004

Race Relations – Discrimination – Employment – Illegality – Employee obtaining contract of employment by illegal conduct – Employer dismissing employee – Whether employee able to bring claim for race discrimination.

The applicant employee was a Croatian national. He applied for asylum and the Home Office acknowledgement of his application explicitly informed him that he could not work in the United Kingdom without permission. He later applied to the respondent school for a job as a graduate trainee teacher. He falsely indicated that he had the right of abode in the United Kingdom and that he did not need a work permit. He was dismissed after eight months' employment and presented a complaint of race discrimination and victimisation to the employment tribunal. The tribunal held that his illegal conduct prevented him from pursuing his claim. The Employment Appeal Tribunal upheld the employment tribunal's decision and the employee appealed to the Court of Appeal.

Held – The approach to be applied by employment tribunals considering an illegality defence in race discrimination cases was the same as that laid down in respect of sex discrimination cases, namely that the tribunal had to consider whether the applicant's claim arose out of or was so clearly connected or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct. That test enabled the tribunal to avoid arbitrary and disproportionate outcomes and to reach sensible and just decisions. The test did not restrict the tribunal to questions of causation. It had to consider matters of fact and degree; the circumstances surrounding the applicant's claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant's involvement in it and the character of the applicant's claim were all relevant. In the instant case, the employee had been solely responsible for his illegal conduct in working for the respondent and creating an unlawful situation, on which he had to rely in order to establish that there was a duty not to discriminate against him. His complaints were so inextricably bound with the illegal conduct that the tribunal would appear to condone that conduct, were it to permit him to recover compensation for discrimination. The appeal would, accordingly, be dismissed (see [7]–[9], [34]–[36], [38]–[40], below).

Hall v Woolston Hall Leisure Ltd [2000] 4 All ER 787 applied.

Notes

For illegality in the context of a contract of employment, and for race discrimination by employers, see respectively 16 *Halsbury's Laws* (4th edn reissue) para 16 and 13 *Halsbury's Laws* (4th edn reissue) para 405.

Cases referred to in judgments

Hall v Woolston Hall Leisure Ltd [2000] 4 All ER 787, [2001] ICR 99, [2001] 1 WLR 225, CA.

Leighton v Michael [1996] IRLR 67, [1995] ICR 1091, EAT.

National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School [1997] IRLR 242, [1997] ICR 334, CA.

Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd [2003] UKHL 33, [2003] 4 All ER 1113, [2003] ICR 867.

Still v Minister of National Revenue [1998] 1 FC 549, Can Fed CA.

Cases referred to in skeleton arguments

Anyanwu v South Bank Student Union (Commission for Racial Equality, interveners) [2001] UKHL 14, [2001] 2 All ER 353, [2001] ICR 391, [2001] 1 WLR 638.

Birds Eye Walls Ltd v Roberts Case C-132/92 [1993] ECR I-5579, ECJ.

Cleaver v Mutual Reserve Fund Life Association [1892] 1 QB 147, [1891–4] All ER Rep 335, CA.

Courage Ltd v Crehan Case C-453/99 [2001] All ER (EC) 886, [2002] QB 507, [2001] 3 WLR 1646, [2001] ECR I-6297, ECJ.

Cross v Kirkby [2000] All ER (D) 212, (2000) Times, 5 April, CA.

Draehmpaehl v Urania Immobilienservice ohG Case C-180/95 [1997] All ER (EC) 719, [1998] ICR 164, ECJ.

EC Commission v Italy Case 39/72 [1973] ECR 101, ECJ.

Hewison v Meridian Shipping Services Pte Ltd [2002] EWCA Civ 1821, [2003] ICR 766.

Holman v Johnson (1775) 1 Cowp 341, 98 ER 1120, [1775–1802] All ER Rep 98.

Ireks-Arkady GmbH v EC Council and Commission Case 238/78, [1979] ECR 2955, ECJ.

Johnston v Chief Constable of the Royal Ulster Constabulary Case 222/84 [1986] 3 All ER 135, [1987] QB 129, [1986] 3 WLR 1038, [1986] ECR 1651, ECJ.

Johnstone v Bloomsbury Health Authority [1991] 2 All ER 293, [1992] QB 333, [1991] 2 WLR 1362, CA.

Just (Hans) I/S v Danish Ministry for Fiscal Affairs Case 68/79 [1980] ECR 501, ECJ.

Kapniki Michaïlidis AE v Idryma Koinonikon Asphaliseon (IKA) Joined cases C-441/98 and C-442/98, [2000] ECR I-7145, ECJ.

Kreil v Germany Case C-285/98 [2000] ECR I-69, ECJ.

Lane v Holloway [1967] 3 All ER 129, [1968] 1 QB 379, [1967] 3 WLR 1003, CA.

Litster v Forth Dry Dock and Engineering Co Ltd [1989] 1 All ER 1134, [1990] 1 AC 546, [1989] 2 WLR 634, HL.

MacDonald v Ministry of Defence [2001] IRLR 431, [2002] ICR 174, Ct of Sess; *affd* [2003] UKHL 34, [2004] 1 All ER 339, [2003] ICR 937.

Marleasing SA v La Comercial Internacional de Alimentacion SA Case C-106/89 [1990] ECR I-4135, ECJ.

Ministero delle Finanze v IN.CO.GE '90 Srl Joined cases C-10/97 to C-22/97 [1998] ECR I-6307, ECJ.

Orphanos v Queen Mary College [1985] 2 All ER 233, [1985] AC 761, [1985] 2 WLR 703, HL.

Pearce v Governing Body of Mayfield Secondary School [2001] EWCA Civ 1347, [2001] IRLR 669, [2002] ICR 198; *affd* [2003] UKHL 34, [2004] 1 All ER 339, [2003] ICR 937.

Pye (JA) (Oxford) Ltd v Graham [2001] EWCA Civ 117, [2001] Ch 804, [2001] 2 WLR 1293; *rvsd* [2002] UKHL 30, [2002] 3 All ER 865, [2003] 1 AC 419, [2002] 3 WLR 221.

R v Lambert [2001] UKHL 37, [2001] 3 All ER 577, [2002] 2 AC 545, [2001] 3 WLR 206.

R v Secretary of State for the Home Dept, ex p Puttick [1981] 1 All ER 776, [1981] QB 767, [1981] 2 WLR 440, DC.

Revill v Newbery [1996] 1 All ER 291, [1996] QB 567, [1996] 2 WLR 239, CA.

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] 2 All ER 26, [2003] ICR 337.

Sigsworth, Re, Bedford v Bedford [1935] Ch 89, [1934] All ER Rep 113.

Sirdar v Secretary of State for Defence Case C-273/97 [1999] All ER (EC) 928, [2000] ICR 130, [1999] ECR I-7403, ECJ.

Standard Chartered Bank v Pakistan National Shipping Corp (No 2) [2000] 1 All ER (Comm) 1, CA; *rvsd* [2002] UKHL 43, [2003] 1 All ER 173, [2003] 1 AC 959, [2002] 3 WLR 1547.

Tinsley v Milligan [1993] 3 All ER 65, [1994] 1 AC 340, [1993] 3 WLR 126, HL.

Wilson v First County Trust Ltd [2001] EWCA Civ 633, [2001] 3 All ER 229, [2002] QB 74; *rvsd* [2003] UKHL 40, [2003] 4 All ER 97, [2004] 1 AC 816, [2003] 3 WLR 568.

Appeal

By notice of appeal dated 7 July 2003 Mihovil Vakante appealed from the decision of the Employment Appeal Tribunal (Burton J, D Bleiman and D Smith) on 25 November 2003 ([2003] All ER (D) 352 (Dec)) dismissing his appeal from the decision of the employment tribunal released following a rehearing on 4 February 2003 dismissing his complaint of race discrimination and victimisation against the governing body of Addey & Stanhope School. The rehearing was ordered by the Employment Appeal Tribunal (Judge Serota QC, Lord Davies of Coity and D Hodgkins) on 15 August 2002 ([2002] All ER (D) 79 (Oct)) on the appeal of the respondent from the decision of the employment tribunal on released on 18 February 2002 that Mr Vakante was not prevented by any illegality in his employment contract from making his complaint.

Jeremy Gordon (instructed by *Dotcom Solicitors*) for Mr Vakante.

Richard Lissack QC and *Keith Bryant* (instructed by *Kath Nicholson*) for the respondent.

Cur adv vult

30 July 2004. The following judgments were delivered.

MUMMERY LJ (giving the first judgment at the invitation of Brooke LJ).

INTRODUCTION

[1] Complaints to the employment tribunal based on the statutory torts of unfair dismissal and discrimination are sometimes met with the defence that the proceedings are barred by the applicant's involvement in illegal conduct. The general practice of the tribunal is to direct a preliminary hearing of an illegality issue, as was done in this case. Its resolution usually requires some oral evidence, as well as legal argument. A preliminary hearing is appropriate in most cases, as it would be a waste of time and money for the tribunal to conduct a full investigation into the merits of a complaint which, even if established, is liable to be rejected on public policy grounds.

[2] As appears from the authorities, such as the judgments in the recent decision of this court in *Hall v Woolston Hall Leisure Ltd* [2000] 4 All ER 787, [2001] ICR 99 (a sex discrimination case), and from the Law Commission consultation paper, *The Illegality Defence in Tort* (Law Com no 160) (2001), the precise basis and the exact

boundaries of the illegality defence in tort cases are problematical. This is not surprising where there is a clash of different aspects of public policy. In a case of alleged race discrimination at work, for example, the claimant seeks redress from the employer for unlawful treatment. On the one hand, the assertion that the claimant's involvement in illegal conduct disables him from pursuing the claim does not begin to address the factual and legal merits of the case against the defendant. Access to justice is a fundamental human right. Denial of it may confer the benefit of procedural immunity from legal process on a defendant also guilty of illegal conduct. On the other hand, the defence of illegality is an appeal to a self-evident legal principle or policy that justice, and access to it, does not require courts and tribunals to assist litigants to benefit from their illegal conduct, if it is inextricably bound up in their claim.

[3] The application of the illegality doctrine in an all-or-nothing way, operating as a complete bar, is obviously open to criticism and has invited proposals that the court should be given a discretion to bar a claim, after taking specified relevant factors into account, or to reduce the damages recoverable by the claimant, depending on the seriousness of the illegal conduct and the degree of connection between the illegal conduct and the claim.

[4] There are also real difficulties in formulating, either in case law or in legislation, a comprehensive legal test which works satisfactorily for all torts, ranging, as they do, across a wide spectrum of human conduct, involving different legally protectable interests and multifarious factual situations. Different public policy considerations may be relevant to different kinds of claim. Claims for personal injury and occupiers' liability in the workplace may raise different policy considerations from claims for unfair dismissal or discrimination in employment. The Law Commission observed in its consultation paper:

> '1.5 ... the problems with the clarity of the current law ... mean that it is difficult to predict an outcome or to explain the outcome in terms of the apparent rationale for the illegality defence, with the result that there is a risk of arbitrariness or possibly disproportionality. Arbitrary or disproportionate results could lead to conflict with the European Convention on Human Rights ...
>
> 2.2 ... it remains difficult to identify when a claim in tort will be barred on the basis of the defence of illegality: part of the difficulty stems from the wide variety of factual situations in which the illegal conduct may arise.'

[5] The topic was explored in detail in *Hall*'s case in the limited context of claims for sex discrimination in employment under the Sex Discrimination Act 1975. It is not disputed that *Hall*'s case is equally applicable to race discrimination in employment, which is alleged by the appellant in this case and is governed by a similar statutory scheme in the Race Relations Act 1976.

[6] The issue in *Hall*'s case was whether a female employee's claim of sex discrimination, based on dismissal for pregnancy, was barred by public policy, because the applicant was aware that the performance of her contract of employment by the employer involved illegality. The employer did not deduct income tax and national insurance contributions from her wages. The Court of Appeal unanimously rejected the notion that the applicant's involvement in the illegal performance of the employment contract by her employer denied her access to the tribunal to determine her complaint of discrimination in employment.

[7] In the leading judgment Peter Gibson LJ laid down an approach for the employment tribunal to follow in sex discrimination cases. It is binding on this

court. The tribunal purported to apply it to the facts of this case. The proper approach—

> 'should be to consider whether the applicant's claim arises out of or is so clearly connected or inextricably bound up or linked with the illegal conduct of the applicant that the court could not permit the applicant to recover compensation without appearing to condone that conduct.' (See [2000] 4 All ER 787 at 798, [2001] ICR 99 at 111–112 (para 42).)

[8] The strength of the *Hall* approach is that it is flexible. It enables the tribunal to avoid arbitrary and disproportionate outcomes and to reach sensible and just decisions in most cases. The proper application of the test should produce reasonably consistent and predictable results, more so, I am inclined to think, than would be the case if, in cases of illegal conduct involving the applicant, the tribunal were given a general statutory discretion, constrained by specific limiting factors.

[9] Although *Hall*'s case uses some of the familiar language of legal and factual causation ('connection', 'link'), the test does not restrict the tribunal to a causation question. Matters of fact and degree have to be considered: the circumstances surrounding the applicant's claim and the illegal conduct, the nature and seriousness of the illegal conduct, the extent of the applicant's involvement in it and the character of the applicant's claim are all matters relevant to determining whether the claim is so 'inextricably bound up ... with' the applicant's illegal conduct that, by permitting the applicant to recover compensation, the tribunal might appear to condone the illegality.

THE PROCEEDINGS

[10] The appeal is by Mr Vakante against the decision of the Employment Appeal Tribunal of 25 November 2003. Burton J, the President of the Employment Appeal Tribunal (the EAT), dismissed Mr Vakante's appeal from a preliminary ruling by the employment tribunal explained in extended reasons sent to the parties on 30 May 2003. The tribunal held that Mr Vakante could not, on the grounds of illegal conduct, proceed with his claim for direct race discrimination and victimisation against the governing body of Addey & Stanhope School (the respondent), a voluntary-aided school.

[11] The case has an unusual procedural history. There was an earlier hearing in the employment tribunal in February 2002, at which the illegality defence was rejected, followed by a successful appeal by the respondent to the EAT and an order in August 2002 remitting the case for rehearing in the same employment tribunal. This appeal is from the second ruling of the employment tribunal upheld by the EAT in November 2003.

THE FACTS

[12] Mr Vakante is a Croatian national aged 39. He has been resident in the United Kingdom since 1992. When his leave to stay expired in June 1992 he applied for asylum. The processing of his application is still not complete.

[13] In August 1999 he made a graduate teaching application under a new scheme for those with overseas qualifications to train as United Kingdom teachers. On 4 November 1999 he applied to the respondent for a post as a graduate trainee maths teacher. Although he had been informed by the Home Office that he could not work in the United Kingdom without a permit, he falsely indicated in his application form for a teaching post with the respondent that he did not need a

work permit. At some point in his time in the United Kingdom he acquired a national insurance number, which he was able to supply to the respondent.

[14] On 8 November 1999 he began paid employment at the school as a trainee maths teacher. He continued in that post until he was dismissed eight months later on 19 July 2000.

[15] On 18 September 2000 Mr Vakante presented a complaint of race discrimination and victimisation to the employment tribunal. The totality of his complaints are summarised as follows in the skeleton argument submitted by his counsel:

> '(a) the respondent failed to provide the applicant with the satisfactory level of quality training and support as they did for his colleague Mr John Anderson; (b) the respondent provided a negative reference to the Greater London Tutorial Agency [no longer pursued]; (c) Ms Lennon made many insulting and hurtful references to the applicant in relation to his professional background and his country of origin; (d) Ms Lennon humiliated the applicant in front of pupils and other members of staff; (e) [t]he displaying of a note on the staff room notice board; (f) Ms Lennon fabricated observation forms, trainee/mentor meeting notes, needs identification forms, minutes of meetings, and invented events that never occurred; (g) Ms Lennon encouraged others to make negative comments about the applicant; (h) Mr Whyte [the head of the school] fully supported Ms Lennon's actions in relation to the applicant's dismissal and ignored the applicant's complaints about Ms Lennon; (i) Mr Whyte refused to sign the applicant's [equal opportunities] declaration; (j) the respondent failed to provide the applicant with a written contract of employment until after his dismissal; (k) the applicant's terms of engagement were less favourable than those of his colleague; (l) the respondent deleted the equal opportunities declaration in his contract of employment; (m) the respondent refused to postpone the applicant's disciplinary hearing; (n) the respondent took no action to investigate the applicant's complaints that he was being discriminated against; (o) the respondent dismissed the applicant on grounds of his race; (p) the respondent victimised the applicant because he complained to his union representative about the race discrimination [no longer pursued]; (q) members of the respondent's staff conspired against the applicant, which led to his dismissal [no longer pursued].'

[16] If Mr Vakante establishes that the acts alleged in fact occurred during the course of his work for the respondent and that, on racial grounds, the respondent treated him less favourably than it treated or would treat other persons, he would be entitled to succeed in his claim for race discrimination under s 4(2)(b) and (c) of the 1976 Act. The general thrust of his case is that the respondent omitted to afford him access to opportunities for training and other benefits, facilities and services; and subjected him to dismissal and other forms of detriment on racial grounds.

[17] The substantive complaints of discrimination have not been heard on their merits and never will be if the respondent's objection to the proceedings against it is upheld. The employment tribunal held, and the EAT affirmed, that Mr Vakante is prevented from pursuing the complaints on the ground that they are 'so closely or clearly connected or inextricably bound up ... with illegal conduct that no claim should lie' and that if the application were permitted to go forward to a hearing 'the tribunal would appear to be endorsing the illegal actions of the complainant'.

ILLEGAL CONDUCT

[18] The illegality point was first taken by the respondent after Mr Vakante began the tribunal proceedings. There is no doubt that there has been illegal conduct in the form of Mr Vakante's employment by the respondent. In breach of s 24 of the Immigration Act 1971 Mr Vakante obtained his employment with the respondent contrary to the following terms of the Home Office's standard acknowledgment letter (SAL) sent to him in June 1992 when he applied for asylum following the expiration of his leave to stay in the United Kingdom. The letter must have been clear to Mr Vakante, who is an educated man able to read and speak English:

> 'The applicant may not take employment paid or unpaid. Permission to take employment may be granted if the application for asylum has not been resolved within a period of six months. Any application to take employment should be accompanied by this acknowledgement which will be endorsed accordingly.'

[19] Mr Vakante did not obtain permission to work in the United Kingdom until 18 June 2001. The SAL was not so endorsed or stamped, either when he applied for graduate teacher training in August 1999 or when he applied for the teaching post with the respondent on 4 November 1999. In fact he ticked a box indicating that he had a right of abode in the United Kingdom. He did not tick the box indicating that he needed a work permit.

[20] Mr Vakante may even have caused the respondent to commit a criminal offence under s 8(1) of the Asylum and Immigration Act 1996 for employing a person subject to immigration control, including a condition which precludes him from taking up the employment. It should be noted, however, that under s 8(2) of the 1996 Act, the Immigration (Restrictions on Employment) Order 1996, SI 1996/3225 and the Immigration (Restrictions on Employment) Order 2004, SI 2004/755 a defence is available to an employer if he proves that, before the employment began, certain requirements were complied with, such as the production to the employer of specified documents, including one issued by a previous employer or certain named agencies containing the national insurance number of the person named in the document.

[21] Throughout the period when he was working for the respondent Mr Vakante also claimed and continued to receive state benefits. In doing so he made fraudulent statements about his employment status.

EMPLOYMENT TRIBUNAL

[22] In its extended reasons sent to the parties on 30 May 2003 the employment tribunal dismissed the originating application, having concluded:

> 'All of the applicant's allegations fall within the *Hall v Woolston Hall* formula and the applicant is therefore prevented from pursuing them before the employment tribunal.'

[23] It was accepted by counsel then appearing for Mr Vakante in the tribunal that the contract of employment had been illegal on both sides and might well have been illegal throughout, with the effect of making the actions of both parties criminal offences.

[24] The tribunal found (para 24) that Mr Vakante had—

> 'knowingly entered into a contract to work while claiming benefits as unemployed and restricted from working by the terms of his leave to enter.

a He falsified a number of forms to achieve this and put the respondent in a position where it too was unwittingly committing a criminal offence. He, and the respondent, were in that position throughout his employment as a trainee teacher.'

[25] The tribunal analysed the nature of Mr Vakante's claims and concluded b that nearly all the complaints (as listed in [15], above) ((a), (c), (d), (f), (i), (k)–(n) and (q)) referred to the manner in which the respondent afforded Mr Vakante access to his training opportunity under his contract as a trainee teacher and to the benefits, facilities and services attached to that contract. It had been indicated by the EAT, in allowing the appeal by the respondent against the earlier decision of the c tribunal and in remitting the case to the tribunal for rehearing, that all of those complaints fell within the *Hall* test (para 22).

[26] Complaint (j) was a purely contractual point; and the contract was illegal (para 23). As for complaints (h) and (o), which related to discrimination in dismissal and its investigation by Mr Whyte, rather than to contract, they were so closely connected with the deliberate illegality of that contract on Mr Vakante's part that, d were the tribunal to allow the originating application to go forward to a hearing, it would appear to be endorsing Mr Vakante's illegal actions (para 25).

THE EMPLOYMENT APPEAL TRIBUNAL

[27] The EAT agreed, concluding that the contract of employment could never e have been entered into at all but for the fraudulent representations of Mr Vakante. It was void ab initio. It was his illegal conduct which rendered the contract void. The respondent was innocent in the matter. Unknown to it he was not entitled to enter into employment at all, either with the respondent or anyone else, without a permit. Burton J also held that a new point raised by Mr Vakante on EC law, which f I shall deal with below, did not help him to overcome the objection of illegal conduct.

APPELLANT'S SUBMISSIONS

[28] Many points were taken by Mr Jeremy Gordon on Mr Vakante's behalf. g The nature and the statutory basis of a claim for race discrimination was emphasised. It did not involve the assertion or enforcement of his rights under or based on a contract of employment. He was not basing his claim on a contract at all. His claim, it was argued, arose from the factual employment situation and from unlawful acts of the respondent (ie race discrimination), acting through its h employees, during the course of his employment and not from a wrong committed by Mr Vakante. There was said to be authority for the proposition that illegality could never defeat a discrimination claim: see *Leighton v Michael* [1996] IRLR 67, [1995] ICR 1091 (a sex discrimination case holding that the claim was not barred by the applicant's knowledge that the employer was not making the required j deductions from wages), which was approved by this court in *Hall*'s case and by Lord Rodger of Earlsferry in *Relaxion Group plc v Rhys-Harper, D'Souza v Lambeth London BC, Jones v 3M Healthcare Ltd* [2003] UKHL 33 at [210], [2003] 4 All ER 1113 at [210], [2003] ICR 867. If the illegality defence applies Mr Vakante will be left with no redress for discrimination suffered in the ordinary course of his employment, even against an employer who had failed to carry out any check at all on the lawfulness of employing the appellant.

THE EUROPEAN DIMENSION: EC POINTS

[29] The arguments based on EC law can be treated very briefly, as they are plainly unfounded. Mr Gordon relied on Council Directive (EC) 2000/43 (OJ 2000 L180 p 22) (the Race Directive), which implements the principle of equal treatment between persons irrespective of racial or ethnic origin. The directive was implemented in domestic law by the Race Relations Act 1976 (Amendment) Regulations 2003, SI 2003/1626, which came into force on 19 July 2003.

[30] Mr Gordon accepted that Mr Vakante was not entitled to rely on the directive to provide him with a cause of action for acts of race discrimination, which are alleged to have taken place in 1999 and 2000. The submission is that, as a result of the directive coming into force under art 16 on 19 July 2003 (that is, between the date of notification of the employment tribunal decision and the date of the hearing in the EAT), English courts and tribunals (including appellate bodies) are bound, as emanations of the state, not to permit the defence of illegality to succeed in a race discrimination case, because that would involve an impermissible derogation from the directive. The EAT should have remitted the matter to the employment tribunal for it to consider the effect of the directive on the illegality point.

[31] The point does not begin to get off the ground. The directive is of no assistance to Mr Vakante. In order to succeed on this appeal Mr Vakante has to establish that there is an error of law in the decision of, or in the proceedings before, the employment tribunal. There can be no error of law on the part of the tribunal in failing correctly to apply a law which was not in force at the date of its decision. The directive only came into force after Mr Vakante's cause of action arose and after the employment tribunal had heard and dismissed his originating application. The questions of law arising on an appeal necessarily relate to the interpretation and application of the law in force when the tribunal reached its decision, except in the extremely rare case in which legislation has retrospectively changed the law so as, for example, to take away a defence available when the cause of action arose or at the date of the tribunal decision. It is not argued that the directive has any such retrospective effect. For appeal tribunals and courts to do what Mr Gordon submits they are bound to do when a directive comes into force between the first instance decision and the hearing of the appeal would be to give to the directive a retrospective effect, which it clearly does not have.

[32] It is accordingly unnecessary and, I think, undesirable for this court to express any views on a host of interesting points, which were taken on the basis that the directive might be held to be in force at the material time. There were arguments on (a) whether the directive covered differences in treatment based on nationality; (b) whether Mr Vakante's claim of discrimination based on the fact that he is Croatian is one of race or nationality; (c) whether the directive has direct effect against the respondent as an emanation of the state (cf *National Union of Teachers v Governing Body of St Mary's Church of England (Aided) Junior School* [1997] IRLR 242, [1997] ICR 334); and (d) whether the directive had any impact on the defence of illegality under the domestic law applied by national courts.

CONCLUSION

[33] The application of the *Hall* approach to this case is comparatively straightforward. This case is clearly different from *Hall* and similar cases, in which (a) the illegal conduct was that of the employer in the performance of the contract and (b) the involvement of the applicant was one of awareness of the employer's illegal conduct and in deriving benefit from it. It is not a case where the applicant has been working in good faith in the belief that it was lawful for him to work: see

Still v Minister of National Revenue [1998] 1 FC 549 (a Canadian case concerning entitlement to state benefits during employment, which was believed to be lawful, but was unlawful for want of a work permit).

[34] As for the illegal conduct here (a) it was that of Mr Vakante; (b) it was criminal; (c) it went far beyond the manner in which one party performed what was otherwise a lawful employment contract; (d) it went to the basic content of an employment situation; (e) the duty not to discriminate arises from an employment situation which, without a permit, was unlawful from top to bottom and from beginning to end.

[35] It was not a case of innocent oversight or an acceptable misunderstanding. Mr Vakante had been clearly informed in writing of the true position. Instead of making an application for a work permit, he obtained work with the respondent by making a false statement. Mr Vakante was solely responsible for his illegal conduct in working for the respondent and creating an unlawful situation, on which he had to rely in order to establish that there was a duty not to discriminate against him. The fact that he had previously obtained employment and might, or would, have obtained a work permit if he had applied for it is not a defence to a criminal offence committed by him and is irrelevant to the illegal nature of his conduct at the material time.

[36] I agree with the employment tribunal that the complaints by Mr Vakante of his discriminatory treatment in employment are so inextricably bound with the illegality of conduct in obtaining and continuing that employment with the respondent that, if it were to permit him to recover compensation for discrimination, the tribunal would appear to condone his illegal conduct.

[37] It should be made clear, however, that the tribunal's refusal to allow the originating application to proceed does not condone any unlawful race discrimination that may have occurred during his employment by the respondent. The respondent denies that any race discrimination has occurred; but even if Mr Vakante were able to prove his allegations, the reason why he would still not be entitled to any compensation or other remedy is that he has, by his own illegal conduct in securing employment without the requisite permit, disqualified himself from pursuing his claim. Condonation of the alleged unlawful conduct by the respondent is out of the picture and out of the question.

RESULT

[38] In my judgment, there is no error of law in the decision of, or in the proceedings in, the employment tribunal. The EAT was right to dismiss the appeal. I would also dismiss the appeal.

LORD SLYNN OF HADLEY.

[39] I agree.

BROOKE LJ.

[40] I also agree.

Appeal dismissed.

Dilys Tausz Barrister.

R v Patrascu

[2004] EWCA Crim 2417

COURT OF APPEAL, CRIMINAL DIVISION

MAY LJ, EADY AND HUGHES JJ

24 AUGUST, 14 OCTOBER 2004

Criminal law – Witness – Intimidating a witness – Act which 'intimidates' another person – Requirements of act which 'intimidates' another person – Whether offence could be committed if victim not actually intimidated – Criminal Justice and Public Order Act 1994, s 51(1).

C attended court to give evidence in the defendant's trial for begging. After the trial was adjourned, C left court, but was accosted in the street by the defendant, who leant firmly against his shoulder and, shouting in his ear, urged him to give false evidence. The defendant was subsequently charged with intimidating a witness contrary to s 51(1)[a] of the Criminal Justice and Public Order Act 1994. A person was guilty of that offence if, inter alia, he did 'an act which intimidates' another person. At the defendant's trial on the intimidation charge, C gave evidence that he had found the defendant's behaviour intimidating, but that he had not been intimidated by it. The defendant was convicted. He appealed, relying on C's evidence that he not been intimidated, and contending that a person could not be convicted of an offence contrary to s 51(1) of the 1994 Act unless he had put someone in fear. The Court of Appeal was therefore required to determine what constituted 'an act which intimidates' for the purposes of s 51(1).

Held – A person did 'an act which intimidates' another person within s 51(1) of the 1994 Act if he put the victim in fear, but also if he sought to deter the victim from some relevant action by threat or violence. A threat unaccompanied by violence might be sufficient, and the threat need not necessarily be a threat of violence. Mere pressure, however, was insufficient. The pressure had to put the victim in some fear, or, if it did not, there nevertheless had to be an element of threat or violence such that the pressure was improper pressure. The intimidation did not necessarily have to be successful in the sense that the victim did not actually have to be deterred or put in fear, but it would obviously be material evidence if the victim was not in fact deterred or put in fear. A person might intimidate another person without the victim being intimidated. That apparent contradiction arose from different shades of meaning of the active and passive use of the verb. An act might amount to intimidation and thus intimidate, even though the victim was sufficiently steadfast not to be intimidated. In the instant case, the defendant had plainly been seeking to deter C from giving true evidence, his behaviour had been violent to an extent and his behaviour had been threatening to an extent. C's evidence was entirely sufficient to support a finding by a properly directed jury that the defendant had intimidated him. Accordingly, the defendant's conviction was safe, and the appeal would therefore be dismissed (see [18]–[20], below).

a Section 51(1) is set out at [6], below

Notes

For intimidation of witnesses, see Supp to 11(1) *Halsbury's Laws* (4th edn reissue) para 422A.

For the Criminal Justice and Public Order Act 1994, s 51, see 12 *Halsbury's Statutes* (4th edn) (2002 reissue) 1190.

Appeal against conviction

Andrew Patrascu appealed with leave of Morland J from his conviction in the Crown Court at Birmingham on 28 May 2004, following a trial before Mr Recorder Marsh and a jury, of an offence of intimidating a witness contrary to s 51(1) of the Criminal Justice and Public Order Act 1994. The facts are set out in the judgment of the court.

John Butterfield (assigned by the *Registrar of Criminal Appeals*) for the appellant.
Ian Ball (instructed by the *Crown Prosecution Service*, Birmingham) for the Crown.

Cur adv vult

14 October 2004. The following judgment of the court was delivered.

MAY LJ.

[1] On 28 May 2004, in the Crown Court at Birmingham before Mr Recorder Marsh and a jury, the appellant was convicted of intimidating a witness contrary to s 51(1) of the Criminal Justice and Public Order Act 1994. He was sentenced to six months' imprisonment to run consecutively with a sentence of 12 months' imprisonment for an unrelated matter. He appeals against his conviction by leave of the single judge, Morland J, who considered that it was at least reasonably arguable that the recorder gave too wide an interpretation of intimidation in s 51(1) of the 1994 Act in his direction to the jury.

[2] On 28 August 2003, Philip Chapman, the victim, was at Birmingham Magistrates' Court to give evidence at a trial of the appellant, who was charged with begging money from him in Birmingham city centre during the previous month. The appellant and Mr Chapman encountered each other at court before the trial started. The appellant said that he had known Mr Chapman for ages. Mr Chapman says that this was not right. The appellant was then encouraged by police officers to sit elsewhere, which he did.

[3] The trial was adjourned. Mr Chapman left court. His evidence was that the appellant called after him and came running to catch him up in Corporation Street. It was a busy afternoon. The appellant asked if Mr Chapman was going to say in evidence that he knew him. Mr Chapman said that he would say that he did not. Mr Chapman found the appellant a bit aggressive. The appellant was leaning firmly against his shoulder as they were walking down the street, so that he could only walk in one direction around other pedestrians. There was some pressure on his shoulder, but he could walk in a straight line. When Mr Chapman told the appellant that he was not going to stand up in court and lie, the appellant became a lot more forceful. He was talking more loudly, shouting in his ear. Mr Chapman said he was nervous, because he did not know whether the appellant was going to be violent. The appellant was pleading with him to lie for him. He would do anything for Mr Chapman. He said that the police were trying to ban him from the city centre, and he said he would be 'fucked if the police get a banning order'. As they reached High Street, the appellant was called over by

a plain clothes officer and the incident ended. Mr Chapman went straight to a police station and reported what had happened. *a*

[4] The recorder's summing up of further evidence by Mr Chapman was as follows:

> 'When he was asked further questions about the incident, he said he found it awkward. Not embarrassing; he just found it awkward. He said it went through his mind: is this man trying to intimidate me? And at one point he said: "I did form the view I was being intimidated", but then, when pressed on that, he said: "No, I was not intimidated." What he said when he was asked again about that was that he said he found the behaviour intimidating, but he was not intimidated by it. He said it annoyed him, and said it made him concerned about meeting Mr Patrascu again in court, but it did not in fact intimidate him.' *b c*

[5] The appellant did not give evidence. In interview, he said that he knew Mr Chapman. He did have a conversation with him, but he said that he had not intimidated him in any way.

[6] Section 51 of the 1994 Act provides (so far as material): *d*

> '(1) A person commits an offence if—(a) he does an act which intimidates, and is intended to intimidate, another person ("the victim"), (b) he does the act knowing or believing that the victim is assisting in the investigation of an offence or is a witness or potential witness or a juror or potential juror in proceedings for an offence, and (c) he does it intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with.' *e*

It is immaterial that the act is done otherwise than in the presence of the victim, or to a person other than the victim (s 51(3)). By sub-s (4), 'an intimidatory act which consists of threats' may threaten financial as well as physical harm. If it is proved that a defendant did an act falling within s 51(1)(a) with the requisite knowledge or belief, he is presumed, unless the contrary is shown, to have done the act with the intention required by sub-s (1)(c): see s 51(7). By sub-s (6), a person guilty of an offence under the section is liable on conviction on indictment to imprisonment for a term not exceeding five years or a fine or both. *f*

[7] Section 51(2) makes it a separate offence intentionally to harm or threaten to harm a person whom the defendant knows or believes has assisted in an investigation into an offence, given evidence in proceedings for an offence, or acted as a juror in proceedings for an offence. *g*

[8] The statutory offences in s 51 of the 1994 Act are related to but not, we think, identical with contempt of court and perverting or attempting to pervert the course of justice. For the offence in s 51(1), the defendant has both to intimidate the victim and to intend to do so. *h*

[9] The appellant's grounds of appeal are that the recorder was wrong to reject a submission on his behalf that there was no proper case to go to the jury; and that the recorder misdirected the jury as to the meaning of 'an act which intimidates' in s 51(1)(a). The main factual case in support of each submission is that Mr Chapman said that he was not intimidated. The broad issue in this appeal is whether an act can intimidate a victim, when the victim himself does not feel intimidated. *j*

[10] When the recorder rejected the submission of no case, he identified evidence of Mr Chapman (apart from his evidence that he did not feel

intimidated) which was in our judgment capable of supporting a finding by a properly directed jury that the appellant did an act which intimidated Mr Chapman. We have referred to this evidence earlier in this judgment.

[11] The recorder considered that, in the absence of a statutory definition of what intimidation is, the definition was wide. It did not need just to be intimidation in the sense of being put in fear. It was 'behaviour which does and is intended to have a material effect on the way in which a witness gives their evidence or [on] whether they give that evidence at all'. Commonly intimidation would comprise putting a witness in fear. But if a defendant is so irritating and annoying to a witness in a way designed to unsettle the witness, that was capable of amounting to intimidation even though the conduct does not put the witness in fear. The recorder said that he had not yet formulated the direction he would give the jury. But he considered it proper to direct them that Mr Chapman did not need to have been intimidated in the sense that he was put in fear. A wide definition was appropriate and there was sufficient evidence to support a conviction on that basis. The recorder also rejected as being too late an application by the prosecution to add a count to the indictment of attempting to intimidate a witness.

[12] As will appear, we consider that the recorder was entitled to conclude that Mr Chapman's evidence was capable of supporting a conviction under s 51(1) of the 1994 Act. We agree with him that 'an act which intimidates' does not have to result in the victim being put in fear. We do not consider that the recorder's eventual construction of the section in his summing up was entirely correct. But, since we consider that the evidence was capable of supporting a conviction upon a correct construction of the section, we reject this ground of appeal.

[13] The recorder directed the jury to consider whether the appellant told Mr Chapman to change his evidence; whether he tried to persuade him to say that he knew the appellant. The jury also had to be sure that the appellant's actions intimidated Mr Chapman, and that the appellant intended to intimidate Mr Chapman with the intention of obstructing or interfering with the course of justice. He did not direct them as to the statutory presumption in s 51(7), but that omission was favourable to the appellant. He then said:

> 'What does the word "intimidation" mean in this charge? You have to consider both whether Mr Chapman was intimidated and whether Mr Patrascu intended to intimidate him. It is right that you consider the question of intimidation from Mr Chapman's point of view. You have to consider what effect Mr Patrascu's actions actually had on Mr Chapman, and indeed what effect they were intended to have. If Mr Chapman was not intimidated you must acquit this defendant. Intimidation can mean different things. It can, for example, mean to be made fearful or frightened. That might be the result of actions much more aggressive than those which were alleged against Mr Patrascu in this case—for example, a witness who is threatened with serious harm unless they change their evidence. That is not the case here. But intimidation can be something less than causing someone to be frightened or in fear. *It can include being pressurised to change evidence.* When you are considering all the evidence—and, in particular, Mr Chapman's—consider whether it amounts to *him being and feeling pressurised by the defendant.* If you conclude that [Mr Chapman] *felt pressurised by the defendant and the defendant intended to pressurise him* with a view to

Mr Chapman changing his evidence, you may conclude that the effect on Mr Chapman, and the intended effect, was to intimidate him.' (Our emphasis.)

The recorder emphasised that the jury should give considerable weight to Mr Chapman's evidence that he did not feel intimidated. But they had to consider the evidence as a whole.

[14] Mr Butterfield, on behalf of the appellant, submits that the usual meaning of 'to intimidate' is to put someone in fear. It should be so construed in s 51(1). This would not unduly diminish the scope of the section, since a charge of attempting to pervert the course of justice would encompass conduct which did not succeed in intimidating the victim. In the present case, the prosecution had proceeded on the wrong charge. Mr Butterfield conceded that inappropriate approaches to witnesses should be regarded as a serious problem, but it would be illogical and unfair to conclude that evidence of a witness who states that he was not intimidated can support a conviction for intimidation. The appellant may have been intimidating, but Mr Chapman was not intimidated. He submits that the editors of *Archbold's Criminal Pleading, Evidence and Practice* (2004 edn) p 2437 (para 28-148) are correct to submit that the requirement in sub-s (1)(a) that the act must actually intimidate would not extend to conduct which was simply likely to intimidate.

[15] Mr Ball, for the prosecution, submits that there is more than one meaning of 'to intimidate'. He accepts that one meaning is to put someone in fear. He points to what the *Oxford English Dictionary* (2nd edn, 1989) vol VIII, pp 7–8 refers to as a 'modern use' as 'to force to or deter from some action by threats or violence'. He submits that the meaning should include behaviour which falls short of actually putting someone in fear. It is sufficient if someone finds themselves coerced, discouraged, cowed, restrained or daunted by the behaviour of another.

[16] 'Intimidation' and 'to intimidate' are ordinary English words with a normally understood primary meaning of putting someone in fear. Fear is part of the Latin derivation. As with most words, there are shades of possible meaning, such that to attempt a definition which is intended to be comprehensive is unnecessary and undesirable. An intention by the defendant to intimidate is not alone enough, for that is the other limb of the relevant part of the statutory offence. Accordingly we consider that the appellant was entitled to be acquitted if 'an act which intimidates ... another person' is limited to circumstances where in consequence the victim is intimidated in the sense that he is put in fear.

[17] We accept, however, that the *Oxford English Dictionary*'s modern usage of 'to intimidate' as including 'to force to or deter from some action by threats or violence' is capable of embracing a shade of meaning whereby the intimidator does not in fact succeed in putting the victim in fear. For this meaning, some element of threat or violence is necessary.

[18] In our judgment, a person does an act which intimidates another person within s 51(1)(a), if he puts the victim in fear. He also does so if he seeks to deter the victim from some relevant action by threat or violence. A threat unaccompanied by violence may be sufficient, and the threat need not necessarily be a threat of violence. The act must be intended to intimidate. The person doing the act has to know or believe that the victim is assisting in the investigation of an offence or is a witness or potential witness or juror or potential

juror in proceedings for an offence. He has to do the act intending thereby to cause the investigation or the course of justice to be obstructed, perverted or interfered with. If the other ingredients are established, this intention is presumed unless the contrary is proved (sub-s (7)). The intimidation does not necessarily have to be successful in the sense that the victim does not have actually to be deterred or put in fear. But it will obviously be material evidence if the victim was not in fact deterred or put in fear. A person may intimidate another person without the victim being intimidated. This apparent contradiction arises from different shades of meaning of the active and passive use of the verb. An act may amount to intimidation and thus intimidate, even though the victim is sufficiently steadfast not to be intimidated.

[19] In the present case, the recorder's directions to the jury did not include this element of threat or violence. He only referred, in the passages we have italicised earlier in this judgment (see [13], above), to the victim being and feeling pressurised. In our judgment pressure to change evidence alone is insufficient. Pressure alone might be unexceptionable and entirely proper, at least if applied in the honest belief, for instance, that what was sought was evidence which would be truthful. Alternatively, pressure might be improper, but lack any element of intimidation, for example a bribe. For a person to intimidate another person, the pressure must put the victim in some fear, or, if it does not, there must nevertheless be an element of threat or violence such that the pressure is improper pressure. Mere pressure is insufficient. The recorder's direction was to this extent insufficient.

[20] In the light of this, we have to consider whether the appellant's conviction was safe. We conclude that it was safe. The jury plainly accepted Mr Chapman's evidence, which we have summarised earlier in this judgment. The appellant was plainly seeking to deter Mr Chapman from giving true evidence. The appellant was aggressive and Mr Chapman was nervous because he did not know whether the appellant was going to be violent. The appellant's actions were to an extent violent. The violence was not great, but probably amounted to an actionable assault. His behaviour was to an extent threatening. We bear well in mind that Mr Chapman, who no doubt had a fair understanding of the meaning of intimidation, said that he was not intimidated. But he also said that the appellant's behaviour was intimidating. He thus recognised the different shades of meaning between the active and passive use of the word. In our judgment, this evidence was entirely sufficient to support a finding by a properly-directed jury that the appellant intimidated Mr Chapman. We consider therefore that the appellant's conviction was safe. For these reasons, the appeal against conviction is dismissed.

[21] It is not therefore necessary to address Mr Ball's submission that the recorder should have acceded to his application to amend the indictment by adding a count of attempting to intimidate a witness. We only observe that our construction of s 51(1) means that there could only rarely be an offence of attempting to commit this statutory offence.

Appeal dismissed.

Sanchia Pereira Barrister.

Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd and others

[2004] EWCA Civ 19

COURT OF APPEAL ,CIVIL DIVISION

POTTER, LAWS AND ARDEN LJJ

11, 12 DECEMBER 2003, 28 JANUARY 2004

Conflict of laws – Contract – Proper law of contract – Bank – Bank entering into Islamic financing agreements with defendants – Governing law clause providing for English law subject to principles of Sharia'a – Defendants defaulting on agreements – Bank issuing proceedings – Whether agreements governed by English law alone or English law subject to principles of Sharia'a – Contracts (Applicable Law) Act 1990, Sch 1, art 1.

The claimant bank was incorporated under the laws of Bahrain. Bahrain embraced and encouraged Islamic banking practice as national policy, and the bank held itself out as applying Islamic banking principles. The bank entered into a number of financing agreements with the first and second defendants, in respect of some of which the third to fifth defendants had provided guarantees. The governing law clause in the financing agreements provided that, 'subject to the principles of the Glorious Sharia'a', the agreements should be governed and construed in accordance with English law. Various defaults and terminating events (defined under the terms of the financing agreements) occurred and the bank issued proceedings in the English courts. On an application made by the bank for summary judgment, the defendants argued, inter alia, that on a true construction of the governing law clause, the financing agreements were enforceable only in so far as they were valid and enforceable both (i) in accordance with the principles of Sharia'a, and (ii) in accordance with English law; and that in fact the agreements were invalid and unenforceable under the principles of Sharia'a. The judge granted the bank's application for summary judgment and held that he was not concerned with the principles of Sharia'a at all: the defendants were, in essence, submitting that the contract was governed by both English law and Sharia'a, whereas it was agreed that there could not be two separate systems of law governing the contract; moreover, the Rome Convention on the Law Applicable to Contractual Obligations 1980 (as set out in Sch 1 to the Contracts (Applicable Law) Act 1990), art 1(1)[a], only made provision for the choice of the law of a country, and did not provide for the choice or application of a non-national system of law such as Sharia'a; the words 'Subject to Glorious Sharia'a' were no more than a reference to the fact that the bank purported to conduct its affairs according to the principles of Sharia'a. The defendants appealed, arguing, inter alia, that the financing agreements were governed by English law, but that they were enforceable only in so far as they were consistent with the principles of Sharia'a.

a Article 1, so far as material, is set out at [48], below

Held – The financing agreements were governed by English law alone. The intention of the parties at the outset had been for the agreements to be binding, and the court should lean against a construction which would or might defeat that commercial purpose. The reference to the principles of Sharia'a was simply intended to reflect the Islamic banking principles according to which the bank held itself out as doing business, rather than incorporating a system of law intended to 'trump' the application of English law as the law to be applied in ascertaining the liability of the parties under the terms of the agreement. Having chosen English law as the governing law, it would have been unusual and improbable for the parties to have intended the English court to proceed to determine and apply the principles of Sharia'a in relation to the legality and enforceability of the obligations clearly set out in the agreement, and the appeal would therefore be dismissed (see [47], [54], [62], [63], below).

Decision of Morison J [2003] 2 All ER (Comm) 849 affirmed.

Notes

For the construction of clauses making an express choice of applicable law, see 8(3) *Halsbury's Laws* (4th edn reissue) para 351.

For the Contracts (Applicable Law) Act 1990, Sch 1, art 1, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 250.

Cases referred to in judgments

Al-Bassam v Al-Bassam [2002] EWHC 2281 (Ch), [2003] WTLR 1.

Associated Japanese Bank (International Ltd) v Crédit du Nord SA [1988] 3 All ER 902, [1989] 1 WLR 255.

Bell v Lever Bros Ltd [1932] AC 161, [1931] All ER Rep 1, HL.

Brennan v Bolt Burdon (a firm) [2003] EWHC 2493 (QB), [2003] All ER (D) 488 (Oct), (2003) Times, 7 November.

Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd, The Amazonia [1990] 1 Lloyd's Rep 236, CA.

Glencore International AG v Metro Trading International Inc [2001] 1 All ER (Comm) 103.

Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd [2002] EWCA Civ 1407, [2002] 2 All ER (Comm) 999, [2003] QB 679, [2002] 3 WLR 1617.

Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV (13 February 2002, unreported).

Kleinwort Benson Ltd v Lincoln City Council [1998] 4 All ER 513, [1999] 2 AC 349, [1998] 3 WLR 1095, HL.

Nea Agrex SA v Baltic Shipping Co Ltd [1976] 2 All ER 842, [1976] QB 933, [1976] 2 WLR 925, CA.

Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co [1976] 3 All ER 570, [1976] 1 WLR 989, HL.

Swain v Hillman [2001] 1 All ER 91, CA.

Appeal

The defendants, Beximco Pharmaceuticals Ltd, Bangladesh Export Import Co Ltd, Ahmad Sohail Fasiuhur Rahman, Ahmed Salman Fazlur Rahman and Beximco (Holdings) Ltd, appealed with permission of Clark LJ from the judgment of Morison J [2003] EWHC 2118 (Comm), [2003] 2 All ER

(Comm) 849, dated 1 August 2003, in which the claimant, Shamil Bank of Bahrain EC, was given summary judgment. Permission to appeal was granted only in relation to a single issue relating to the construction and effect of the governing law clause contained in financing agreements made between the bank and the first and second defendants as principal debtors and the third to fifth defendants as guarantors. The facts are set out in the judgment of Potter LJ.

Richard Hacker QC and *Mark Arnold* (instructed by *Jaswal Johnston*) for the defendants.

Brian Doctor QC and *Sara Partington* (instructed by *Norton Rose*) for the bank.

Cur adv vult

28 January 2004. The following judgments were delivered.

POTTER LJ.

INTRODUCTION

[1] This is an appeal from the judgment of Morison J dated 1 August 2003 whereby he gave summary judgment in favour of the claimant Shamil Bank of Bahrain EC (the bank) against the first and second defendants as principal debtors in respect of moneys advanced to them by the bank under various financing agreements and against the third, fourth and fifth defendants as guarantors of certain of those agreements. The total judgment sum awarded was some $US 49·7m. The defendants were refused permission to appeal by Morison J, but permission was granted by Clarke LJ on 17 September 2003 in relation to a single issue relating to the construction and effect of the form of the governing law clause contained in the financing agreements. That clause reads: 'Subject to the principles of Glorious Sharia'a, this agreement shall be governed by and construed in accordance with the laws of England.'

[2] It is not in dispute that 'the principles of Glorious Sharia'a' referred to are the principles described by the defendants' expert, Khalil-Ur-Rehmam Khan J (retired) as—

> 'the law laid down by the Qur'an, which is the holy book of Islam, and the Sunnah (the sayings, teachings and actions of Prophet Mohammad (pbuh)). These are the principal sources of the Sharia. The Sunnah is the most important source of the Islamic faith after the Qur'an and refers essentially to the Prophet's example as indicated by the practice of the faith. The only way to know the Sunnah is through the collection of Ahadith, which consists of reports about the sayings, deeds and reactions of the Prophet ...'

[3] One principle expressly stated in the Qur'an and Sunnah is that the charging of interest upon a loan, in whatever form, is 'Riba' and is contrary to the Sharia'a. At Sura II, 275-79 of the Qur'an (*The Quran*, translated by Muhammad Zafrulla Khan, Curzon Press, 1971) it is stated:

> '... Allah has made buying and selling lawful and has made the taking of interest unlawful. Remember, therefore, that he who desists because of the admonition that has come to him from his Lord, may retain what he

has received in the past; and his affair is committed to Allah. But those who revert to the practice, they are the inmates of the fire; therein shall they abide ... O Ye who believe, be mindful of your duty to Allah and relinquish your claim to what remains of interest, if you are truly believers. But if you do not, then beware of war from the side of Allah and his Messenger. If, however, you desist, you will still have your capital sums; thus you will commit no wrong, nor suffer any wrong yourself.'

Sura III 130 states: 'O Ye who believe, devour not interest, for it goes on multiplying itself; and be mindful of your obligation to Allah that you may prosper.'

THE FACTUAL BACKGROUND

[4] The bank is incorporated under the laws of Bahrain and licensed to act as a bank by the Ministry of Commerce and Bahrain Monetary Agency. The Kingdom of Bahrain is a constitutional monarchy and 95% of its population are Muslims. None the less, while embracing and encouraging Islamic banking practice as a national policy, the principles of Islamic law, in particular the prohibition of Riba, have not been incorporated into the commercial law of Bahrain and there is an absence of any legal prescription as to what does and does not constitute 'Islamic' banking or finance. In his survey of the commercial laws of the Arab Middle East (W M Ballantyne *Commercial Law in the Arab Middle East: the Gulf States* (1986) p 133), Professor Ballantyne states:

'In our other jurisdictions, banking interest is, in practice, tolerated (Saudi Arabia) and even sanctioned by banking laws (Bahrain, Qatar and Oman), while any theoretical or hypothetical conflicts have been largely ignored.'

[5] The unchallenged position as far as the charging of interest in Bahrain is concerned is that stated in *Unlawful Gain and Legitimate Profit in Islamic Law: Nabil Saleh* (2nd edn) p 9:

'The matter of interest is regulated as far as commercial transactions are concerned by the provisions of Article 81 of the Commercial Code of 1987. The latest amendment of Article 81, affected by Law no.4 of 1992, gives the following instructions to courts: (1) interest on overdue payments of commercial debts becomes due by the mere occurrence of maturity dates unless otherwise provided for by law or agreement. (2) Under no circumstances, and with regard to debts whose settlement does not exceed a period of seven years, may the aggregate amount of interest paid to the creditor exceed the initial indebtedness. (3) The provisions of the preceding (2) do not apply to debts which were contracted in foreign currencies. (4) The creditor is entitled to claim complementary damages in addition to interest on overdue payments with no need to prove that the additional damage was caused by the debtor's fraud or his serious fault.'

[6] None the less, the bank holds itself out as applying Islamic principles in the course of its business. The bank's full title is 'Shamil Bank of Bahrain EC

(Islamic Bankers)'. The main objects clause in its memorandum of association is in general terms:

> '3. Notwithstanding the provisions of this Article, the company shall undertake at all times to comply with the Bahrain Monetary Agency Law and any circulars, rules or regulations issued by the BMA from time to time ... According to the above, the company will carry on all banking, investment, financial activities, offshore units and all services relating thereto of various commercial, industrial, agricultural, real estate, tourism, housing and other services in the State of Bahrain and outside it.'

However, cl 34 of the articles of association provide for the ordinary general meeting to elect and appoint a religious supervisory board 'which shall comprise at least three persons who are recognised specialists and qualified in Islamic jurisprudence, religious provisions and Islamic economy'.

[7] Clauses 35 and 36 of the articles provide:

> '35. The Religious Supervisory Board shall ascertain that the Company's investments and activities (and the activities of its subsidiary and affiliated companies) conform with the principles and provisions of Islamic Sharia'a. It shall, in particular, discuss with the members of the Board of Directors, managers of the Company or of any subsidiary or affiliated company under its control, such conformity and the business carried out by them and shall request any information it deems necessary. In particular, the Religious Supervisory Board shall adopt all the crucial decisions for applying the provisions of Islamic Sharia'a to ensure the realisation of the objects for which the Company was incorporated. Also, to ensure that the members of the Board of Directors, managers and employees are co-ordinating their activities according to such decisions which will be binding upon all the shareholders. The Religious Supervisory Board shall within six months from the end of the Company's financial year, submit a written report stating that it fulfilled the obligations indicated herein and ascertained that the Company's investments and business activities (including its subsidiary companies) conform with the provisions of Islamic Sharia'a ...
>
> 36. The Board of Directors shall take the necessary actions to ensure that all the investments and other business transactions have been referred to the Religious Supervisory Board for approval before carrying out any other business transactions by the Company or by any subsidiary or affiliate company under its control.'

[8] As made clear by the bank's expert witness, provisions of this kind are not unusual. In the absence of legal prescription as to what does and what does not constitute 'Islamic' banking or finance, most Islamic banks create religious or Sharia'a supervisory boards which review annually the operations of the bank and determine whether or not these have been carried out in accordance with Islamic law. They examine on a test basis each type of transaction entered into by the bank and evidence to show that the transaction and dealings entered into by the bank are in compliance with Sharia'a rules and principles, submitting an annual report to the shareholders

in that respect. In this case the bank's own religious supervisory board certified in respect of the years 1995 and 1996 that—

> 'The Board believes that all the bank's business throughout the said year, including investment activities and banking services, were in full compliance with Glorious Islamic Sharia'a.'

[9] A certificate of compliance was also issued for that period by the bank's auditors, reviewing the bank's operation on the basis of the financial accounting standards issued by the Accounting and Auditing Organisation for Islamic Financial Institutions.

[10] Until their defences were filed in this action, the defendants had never given any indication to the bank that they were dissatisfied on religious grounds with the arrangements agreed between the parties or that they sought to challenge them on the grounds that they did not comply with the principles of Sharia'a.

[11] The first two defendants are Bangladeshi companies (part of the Beximco group) involved in the manufacture, export and import of pharmaceuticals. The third and fourth defendants are directors of the first and second defendants and of the fifth defendant which is their parent company. I shall refer to the third, fourth and fifth defendants collectively as 'the guarantors'.

[12] In 1995 the Beximco group wished to raise additional working capital to be used in its commercial activities. To this end, there were meetings between the bank and, principally, Mr Chowdhury the Beximco group director of finance and a director of the first and second defendants. The moneys were advanced pursuant to the terms of two 'Morabaha financing agreements' which, in form, related to the sale of goods.

[13] It is not in dispute that a Morabaha agreement is a sale contract recognised as valid by Islamic law whereby the seller (the financier institution) agrees to purchase goods desired by the buyer and to sell them to the buyer (the client) for a deferred price, the difference between the original purchase price to be paid by the financier and the deferred price payable by the client being a stated profit known to and agreed upon by both seller and buyer. In order to avoid the appearance or characteristics of a loan at interest and to provide for and preserve the features of a contract of sale, the financier purchases the goods in its own name, and the goods must come into its possession (actual or constructive), remaining at its risk until the commodity is sold to the client. However, for that purpose the financier may appoint the client as agent for the purchase on behalf of the financier and, once the client effects such purchase as the agent of the financier, the client may retain possession of the commodity on its own behalf. The detailed form and content of Morabaha agreements varies. There are no standard forms and, in practice, the detailed terms and conditions will be agreed by the bank and its customer around the essential characteristics I have mentioned. It is the function of an Islamic bank's religious supervisory board to ensure that the Morabaha agreement complies with Islamic law as interpreted by the religious supervisory board.

[14] Following negotiations in which each side was advised, the bank and the first and second defendants entered into a Morabaha financing agreement dated 28 December 1995 (the 1995 Morabaha agreement) under which, pursuant to cll 2.1, 2.2 and 4.2, the bank agreed to purchase, through the

second defendant acting as its agent, certain goods from specified sellers for immediate onward sale to the first defendant. In return, pursuant to cl 2.1, the first defendant agreed to pay to the bank the Morabaha price, defined in the agreement as the aggregate of the purchase price of goods purchased plus the profit element, calculated by reference to cl 2 of a market rate agreement also entered into between the parties. Pursuant to cl 4.5 of the Morabaha agreement, the payments to be made were set out in a letter from the bank to the defendants dated 28 December 1995 (the 1995 payment schedule letter). Pursuant to cl 3 of the 1995 market rate agreement, if any payment due remained unpaid for any period after its due date, compensation would be payable to the bank.

[15] In accordance with cl 4.1 of the 1995 Morabaha agreement, the bank advanced to the second defendant $US 15m ostensibly for the purposes of purchasing the specified goods. Between 28 March 1996 and 28 September 1997, the first defendant made seven payments in accordance with the 1995 payment schedule letter.

[16] In April 1996, following an approach by the second defendant seeking further funds, the bank agreed to advance the second defendant a further sum of $US 15m. On 11 July 1996 the bank and the first and second defendants entered into a further Morabaha agreement (the 1996 Morabaha agreement) and market rate agreement in terms similar to those of the 1995 agreements.

[17] In accordance with cl 4.1 of the 1996 Morabaha agreement, on 15 July 1996, the bank paid to the first defendant $US 15m ostensibly for the purpose of purchasing the specified goods. Between 15 October 1996 and 12 August 1997, the second defendant made four payments in accordance with the 1996 payment schedule letter.

[18] By December 1999 the first and second defendants had not paid the amounts due under the 1995 and 1996 Morabaha agreements, although admitting and agreeing in writing that such sums were owed. Following negotiations, the bank and the first and second defendants agreed to enter into new agreements to discharge the first and second defendants' obligations in exchange for the first and second defendants undertaking alternative obligations to the bank which the third, fourth and fifth defendants were to guarantee.

[19] On 14 September 1999 the bank and the first and second defendants entered into two exchange in satisfaction and user agreements, one relating to the 1995 Morabaha agreement (the first ESUA) and the other relating to the 1996 Morabaha agreement (the second ESUA) which were each subsequently amended and restated by agreement on 4 February 2001 and 30 January 2002. The re-amended ESUAs became effective on 4 April 2002. Under cl 2.1 of the ESUAs the bank agreed to discharge on the effective date the amount then outstanding under the 1995 and 1996 Morabaha agreements in exchange for being granted the right to receive unencumbered title to certain assets. Pursuant to cll 3.1 and 3.3, the bank agreed to grant the first and second defendants the right to use those assets in the ordinary course of their respective businesses in consideration for payment by instalments of a user fee determined in accordance with cl 3.4. The first and second defendants were also obliged to make certain payments of accrued compensation. Under cl 4.1 of the ESUAs, it was a condition precedent that the third, fourth and fifth defendants guaranteed the first and second defendants' obligations under the ESUAs.

[20] The form of the ESUAs, whereby the bank, having acquired the ownership of the first and second defendants' assets, permitted their retention and use in return for regular payment of the scheduled user fees was in principle a method of financing recognised as legitimate by the Sharia'a as 'Ijarah', the giving of something in rent. However, when that method of financing is adopted by a bank in place of a simple interest-bearing loan, the question of whether the transaction is legitimate according to the principles of Sharia'a depends upon an analysis of the particular terms and conditions of the agreement and may prove controversial.

[21] In this case, various defaults and 'termination events' provided for under the ESUAs occurred and, as the bank was entitled to do, it sent two default letters dated 18 August 2002 to the defendants under the terms of the first and second ESUAs in respect of the sums subsequently claimed in this action.

THE BANK'S CLAIMS AGAINST THE FIRST AND SECOND DEFENDANTS

[22] The bank's claims against the first and second defendants are made up as follows:

> '(1) $US 25,207,000 being the amount due under the first ESUA relating to the 1995 Morabaha agreement; (2) $US 21,472,800 being the amount due under the second ESUA relating to the 1996 Morabaha agreement; (3) $US 1,147,540·76 being accrued compensation due under cl 4.2.4 of the first ESUA; (4) $US 1,884,169·75 being accrued compensation due under cl 4.2.4 of the second ESUA.'

THE BANK'S CLAIMS AGAINST THE GUARANTORS

[23] On 6 February 2001 the bank and the third and fourth defendants entered into two personal guarantees, one relating to the first ESUA and one relating to the second ESUA (the personal guarantees). On the same date the bank and the fifth defendant entered into two corporate guarantees, one relating to the first ESUA and one relating to the second ESUA (the corporate guarantees). The guarantees were all in materially similar terms. Each states that it is 'governed by and shall be construed in accordance with English law', with provision also for the jurisdiction of the English courts. There is no reference to the principles of Sharia'a.

[24] Each guarantee recites the relevant Morabaha financing agreement, the 'outstanding amount' pursuant thereto and the relevant ESUA agreement as amended.

[25] The relevant provisions of the guarantee for the purposes of this appeal are as follows:

> '2.1 Covenant to pay
>
> In consideration of Shamil agreeing to discharge the Outstanding Amount in return for being granted the right to acquire title to the Assets and Shamil permitting Beximco and BEIC to use the Assets in return for the User Fee pursuant to the Exchange Agreement [ie the ESUA] the Guarantor hereby guarantees to Shamil Beximco and BEIC's obligation to transfer title to the Assets to Shamil and guarantee to pay to Shamil, on demand by Shamil, the User Fee and all monies and discharge all obligations and liabilities now or hereafter due, owing or incurred by

Beximco and BEIC (or either of them as the case may be) to Shamil under or pursuant to the Exchange Agreement and the other New Transaction Documents when the same become due for payment or discharge whether by acceleration or otherwise, and whether such monies, obligations or liabilities are express or implied, present, future or contingent, joint or several, incurred as principal or surety, originally owing to Shamil or purchased or otherwise acquired by it, denominated in Dollars or in any other currency, or incurred on a banking account or any other manner whatsoever ...

2.2 Guarantor as principal debtor; indemnity

As a separate and independent stipulation, the Guarantor agrees that if any purported obligation or liability of Beximco and/or BEIC (as the case may be) which would have been the subject of this Guarantee had it been valid and enforceable is not or ceases to be valid or enforceable against Beximco and/or BEIC (as the case may be) on any ground whatsoever whether or not known to Shamil (including, without limitation, any irregular exercise or absence of any corporate power or lack of authority of, or breach of duty by, any person purporting to act on behalf of Beximco and/or BEIC (as the case may be) or any legal or other limitation ... the Guarantor shall nevertheless be liable to Shamil in respect of that purported obligation or liability as if the same were fully valid and enforceable and the Guarantor were the principal debtor in respect thereof ...'

[26] The bank claims against each of the guarantors the same sums as are claimed against the debtors as set out in [22], above.

THE ISSUES ON THIS APPEAL

[27] A number of defences were advanced by the defendants before the judge below, certain of which were regarded by the judge as having the hallmarks of trumped-up defences designed to avoid or delay payment. However, the principal defence advanced was that, (a) on a true construction of the governing law clause quoted in para [1], above, the Morabaha agreements and the ESUAs were only enforceable in so far as they were valid and enforceable both (i) in accordance with the principles of the Sharia'a (ie the rules or laws of Islam) and (ii) in accordance with English law; (b) in fact, the agreements were unlawful, invalid and unenforceable under the principles of the Sharia'a in that, despite their form as Morabaha agreements, in the case of the 1995 and 1996 Morabaha agreements, and as Ijarah leases, in the case of the first and second ESUAs (which would be enforceable if they were a true reflection of the underlying transaction), the transactions were in truth disguised loans at interest. As such they amounted to unlawful agreements to pay Riba and were thus void and/or unenforceable.

[28] In this connection it was stated in the witness statement of Mr Choudhury for the defendants that he made it clear that the moneys sought from the bank by the first and second defendants were required as working capital for the Beximco group and that it was the bank which required that the transaction be structured in the forms adopted in order to comply with Sharia'a law. The fourth defendant, as a director of the first, second and fifth defendants' and a personal guarantor of the ESUAs, stated:

> '... it is not uncommon for banks, in their enthusiasm to make profitable loans, to use a Morabaha Agreement to disguise what is, as a matter of commercial reality, an interest-bearing loan. That is precisely what happened in the present case and both the Claimant and the Defendants were quite content that this should happen. Neither was under any illusion as to the commercial realities of the transactions, and the claimant was happy to dress the loan transactions up as Morabaha sales (or Ijarah leases), whilst taking no interest in whether the proper formalities of such a sale or lease were actually complied with.'

[29] The rival expert evidence as to the validity of the agreements under Islamic law was as follows. The bank's expert, Dr Lau, the former director of the Centre of Islamic and Middle Eastern Law, stated that the precise scope and content of Islamic law in general, and Islamic banking in particular, are marked by a degree of controversy within the Islamic world, best exemplified by the fact that the actual practice of Islamic banking differs widely within the Islamic world. Even within particular jurisdictions, such as Pakistan, which are committed and constitutionally obliged to introduce Islamic financial systems, the issue is subject to ongoing debate and a high degree of uncertainty. In the absence of any agreement on the boundaries of 'Islamic banking' or, indeed, on what ought to be the precise ingredients of a Morabaha agreement, it is in practice up to individual banks to determine the issue. In the absence of any legal prescription as to what does and what does not constitute Islamic banking or finance, most Islamic banks, including those in Bahrain, seek the advice of Islamic scholars who examine and approve particular agreements and forms of agreement, the role of the religious supervisory committee being to formulate the bank's interpretation of the Sharia'a.

[30] Strictly interpreted 'the Glorious Sharia'a' refers to the divine law as contained in the Qur'an and Sunnah. However, most of the classical Islamic law on financial transactions is not contained as 'rules' or 'law' in the Qur'an and Sunnah but is based on the often divergent views held by established schools of law formed in a period roughly between 700 and 850 CE. The particular form and content of Morabaha agreements varies. If a bank's religious supervisory board is satisfied that the bank's activities are in accordance with Sharia'a law, that concludes the matter, there being no provision in Bahrain law, or Islamic law generally, for an appeal by a customer of the bank against the board's rulings and certifications. Finally, even if the relevant agreements amounted to agreements to pay Riba, the principal sums advanced could be validly claimed.

[31] Dr Lau's conclusion was that the concern of the defendants that the sums advanced were not used to purchase the goods and/or equipment, the subject of the 1995 and 1996 Morabaha agreements, but rather as part of the general working capital of the first and second defendants was of no relevance to the question whether or not the Morabaha agreements complied with Islamic law. He stated:

> 'In my opinion for the Morabaha Agreements to be in accordance with Islamic law all that is required is that they are certified as such by Shamil Bank's Religious Supervisory Board and the principal amounts are dispensed in accordance with the terms of the 1995 and 1996 Morabaha Agreements.'

[32] The position of the defendants' expert, Khan J, former chairman of the Sharia'a Appellate Bench of the Supreme Court of Pakistan, shortly stated, was as follows. He acknowledged that— a

> 'wherever a question of interpretation of the principles contained in the Qur'an and Sunnah is involved, the application of the rules of Sharia'a has and will continue to give rise to disputes between different jurists.' b

He also did not contradict the assertion of Dr Lau that most of the classical Islamic law on financial transactions was not to be found in the Qur'an and Sunnah. However, he made clear (as Dr Lau did not dispute) that the injunction against the payment of Riba is contained in both those holy books and that it is uncontroversial that under Islamic law interest charged on loans c by banks is Riba and prohibited. Equally, any agreement in which, in substance, interest is being charged upon a loan is unlawful, void and unenforceable.

[33] Khan J acknowledged that the Sharia'a recognises two modes of financing as permissible, namely Morabaha and Ijarah agreements, but d asserted that, for such transactions to be valid, the requirements prescribed and provided for in the agreement must be fulfilled, failing which the transaction as a whole will be void according to the principles and rules of Sharia'a. On the basis of the (uncontradicted) assertion of the defendants that the advances were never applied or intended to be applied in the purchase or lease of any property, the relevant agreements were void. The ESUAs were e similarly void and unenforceable on the basis of a number of arguments advanced, the principal one of which was that, irrespective of their form as purported Ijarah leases of assets, the ESUAs simply constituted a rescheduling or roll-over of the 1995 and 1996 Morabaha agreements, the bank charging interest or an additional amount over and above the sums due in consideration of the giving of time. This too was Riba and accordingly f prohibited and void.

[34] Finally, so far as the position of the bank's religious supervisory board was concerned, Khan J stated that certification by the board that the operations of the bank were according to the Sharia'a would not be a decision binding on any court dealing with the dispute under the law of Sharia'a. The g dispute would fall to be resolved by the court in the light of its own view of the position under Sharia'a law. In any event there was no evidence that the board had had knowledge of, nor was it required to approve, the particular transaction in this case, its function being one of overall supervision and approval of the methods and procedures adopted by the bank in the course of h its business.

[35] So far as the liability of the guarantors was concerned, two arguments were advanced before the judge which are of relevance to this appeal. The first was simply that, under the general law of guarantee, if the principal debtor was discharged from liability in respect of the obligations guaranteed, then the j guarantors were similarly discharged.

[36] The second defence raised was that the guarantees had been entered into by the parties on the basis of a common mistake of a fundamental nature, namely that the first and second defendants were under enforceable obligations to the bank under the Morabaha agreements at the time when, and in respect of which, the ESUAs and guarantees were entered into.

THE DECISION OF MORISON J

[37] The paragraph numbers referred to in this section reflect the numbered paragraphs of the judgment of Morison J.

[38] The judge held ([2003] EWHC 2118 (Comm) at [32], [33], [2003] 2 All ER (Comm) 849 at [32], [33]), and it is accepted by the bank on this appeal, that if, on a proper construction of the applicable law clause, the court is obliged to concern itself with the application of Sharia'a law and its impact on the lawfulness of the agreements, it is arguable which of the two parties' experts was right and that it would offend the principles underlying CPR Pt 24 to seek to resolve the conflict between them before a trial. That is so not only in respect of the recoverability of sums which were effectively interest upon the capital sums advanced, but also of the capital sums themselves.

[39] However the judge concluded that, on the proper construction of the applicable law clause, he was not concerned with the principles of Sharia'a at all for the following reasons.

[40] First, it was common ground by concession that there could not be two separate systems of law governing the contract ([2003] 2 All ER (Comm) 849 at [30]). Yet, by contending that Sharia'a law and not English law would determine the enforceability of the agreement, the defendants were in substance contending that the agreements were governed both by English and Sharia'a law (at [35]). The judge declined to construe the wording of the clause as a choice of Sharia'a law as the governing law for the following reasons. First, art 3(1) of the Rome Convention on the Law Applicable to Contractual Obligations 1980 (as set out in Sch 1 to the Contracts (Applicable Law) Act 1990) (the convention) (which by s 2(1) of the 1990 Act has the force of law in the United Kingdom) contemplates that a contract 'shall be governed by *the* law chosen by the parties' (my emphasis) and art 1(1) of the convention makes it clear that the reference to the parties' choice of the law to govern a contract is a reference to the law of a country. There is no provision for the choice or application of a non-national system of law such as Sharia'a law (at [27]–[30], [35]–[37]). In any event (at [38]), the principles of the Sharia'a are not simply principles of law but principles which apply to other aspects of life and behaviour. Even treating the principles of Sharia'a as principles of law, the application of such principles in relation to matters of commerce and banking were plainly matters of controversy. In particular there is controversy as to the strictness with which principles of Sharia'a law will be interpreted or applied. In consequence it was highly improbable that the parties to the agreements intended an English court to determine any dispute as to the nature or application of such controversial religious principles which would involve it in the task of deciding between opposing points of view which themselves might be based on geopolitical and particular religious beliefs (at [36]–[40]).

[41] The judge accepted the submission of the bank that the words 'Subject to the principles of Glorious Sharia'a' were no more than a reference to the fact that the bank purported to conduct all its affairs according to the principles of Sharia'a. However, in respect of what those principles were and their effect upon the contract, the judge concluded the relevant part of his judgment:

> '[39] Whilst in one sense this court will answer any question posed to it, however difficult, it is improbable, in the extreme, that the parties were truly asking this court to get into matters of Islamic religion and orthodoxy. This

is especially so when the bank has its own religious board to monitor the compliance of the bank with the board's own perception of Islamic principles of law in an international banking context.

[40] So far as the bank was concerned, that is likely to have been sufficient for its own regulatory purposes and there is no suggestion that the defendants were in any way concerned about the principles of Sharia'a law either at the time the agreement was made or at any time before the proceedings were started. The Sharia'a law defence is, I think, a lawyers' construct but, for the reasons I have given, in my view it does not work.'

THE SUBMISSIONS OF THE DEFENDANTS

[42] Before this court, Mr Hacker QC for the defendants has not resiled from his concession that there can only be one governing law of the agreements. He accepts, and indeed asserts that it was his case below, that the governing law is English law and English law alone. However, he submits that this does not preclude the possibility that the principles of Sharia'a have relevance. He submits that all the parties have done is to choose English law as the governing law but, at the same time, to stipulate as a condition precedent that the contract is only to be enforceable in so far as it is consistent with the principles of Sharia'a, which principles amount to legal rules ascertainable and applicable by an English court. He submits that that is something different from an assertion that Sharia'a law governs the agreements.

[43] Mr Hacker accepts that the convention precludes the choice of Sharia'a, as a governing law, being concerned only with a potential choice between the laws of different countries. However, he submits that the construction of the governing law clause for which he contends produces a result no different from the incorporation by reference of a codified system of rules, such as the Hague Rules (the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (Brussels, 25 August 1924; TS 17 (1931); Cmd 3806) or the Warsaw Convention 1929 (as set out in Sch 1 to the Carriage by Air Act 1961), into a contract governed by English law (cf *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 All ER 842, [1976] QB 933 in which this court rejected the conclusion of Donaldson J at first instance that a paramount clause provision was to be treated as ineffective to incorporate the Hague Rules into a charterparty). He submits that such a construction is fully consistent with the bank's self-proclaimed mode of business as an Islamic bank carrying on an Islamic banking business.

[44] Mr Hacker submits that, contrary to the view of the judge, it is neither unusual nor improbable that the parties to the contract should intend the English court to determine and apply the Sharia'a, nor, as he submits, is the English court ill-equipped to do so when assisted by expert evidence, in which respect he refers to the decision of Moore-Bick J in *Glencore International AG v Metro Trading International Inc* [2001] 1 Lloyd's Rep 284 at 313–315 (paras 113–125) and that of Hart J in *Al-Bassam v Al-Bassam* [2002] EWHC 2281 (Ch), [2003] WTLR 1.

[45] He further submits that the reasoning of the judge was influenced by an erroneous view that the principles of Sharia'a constituted a body of controversial religious (as opposed to legal) principles, which view he was wrong to form on the evidence before him. In this respect, Mr Hacker relies heavily upon the fact that the evidence of Khan J was that the principles of

Sharia'a *raised in this case* ie the proscription of Riba and the essentials of a valid Morabaha agreement are not controversial. In this respect he referred us to the judgment of Tomlinson J in *Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV* (13 February 2002, unreported) in which, it is clear that, when giving expert evidence in that case, Dr Lau did not suggest that there was any difficulty in identifying the requirements for an effective Morabaha contract under Sharia'a law. He therefore submits that the judge's conclusion that the principles of Sharia'a law *relevant to this case* were controversial, so as to render it improbable that the parties would have chosen the English court to resolve a dispute as to the enforceability of the agreements, was incorrect or, at the very least, involved him in conducting a mini-trial in relation to the parties' expert evidence contrary to the principles laid down in *Swain v Hillman* [2001] 1 All ER 91.

DISCUSSION

The governing law clause

[46] The central question in this appeal is one of construction in respect of the relevant 'governing law' clause, expressly so described and couched in the short form already quoted at para [1], above. The task of construction is to ascertain the presumed intention of the parties bearing in mind (see *Reardon Smith Line Ltd v Hansen-Tangen, Hansen-Tangen v Sanko Steamship Co* [1976] 3 All ER 570 at 574, [1976] 1 WLR 989 at 995–996 per Lord Wilberforce) that—

> 'In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.'

[47] It is common ground in the context of the summary judgment application that, when the parties entered into the Morabaha agreements and subsequently, neither side was under any illusion as to the commercial realities of the transactions, namely the provision by the bank of working capital on terms providing for long term repayment, and both were content (see [28], above)—

> 'to dress the loan transactions up as Morabaha sales (or Ijarah leases), whilst taking no interest in whether the proper formalities of such a sale or lease were actually complied with.'

Nor, as Mr Hacker expressly accepted at the outset, was it ever intended in relation to any of the agreements made that they should be other than binding on the parties. In those circumstances, as it seems to me, the court, in approaching its task, should lean against a construction which would or might defeat the commercial purpose of the agreements. Accordingly, in so far as each of the clauses provides in clear terms that 'this agreement shall be governed by and construed in accordance with the laws of England', the proviso that such provision shall be 'Subject to the principles of Glorious Sharia'a' should be approached on a basis which is reconcilable with the purpose evident from the words which follow, rather than operating to defeat such purpose.

[48] It is conceded by Mr Hacker that there cannot be two governing laws in respect of these agreements. He further concedes that the governing law

is that of England. It seems to me that he is rightly driven to this concession. The wording of art 1(1) of the convention ('The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries') is not on the face of it applicable to a choice between the law of a country and a *non*-national system of law, such as the lex mercatoria, or 'general principles of law', or as in this case, the law of Sharia'a. Nevertheless, that wording, taken with art 3(1) ('A contract shall be governed by *the* law chosen by the parties' (my emphasis)) and the reference to choice of a 'foreign law' in art 3(3), make it clear that the convention as a whole only contemplates and sanctions the choice of the law of a country (cf *Dicey and Morris on the Conflict of Laws* (13th edn, 2000) notes, p 1223 (para 32-079) and Adrian Briggs *The Conflict of Laws* (2002) p 159).

[49] Mr Hacker thus opts for a construction that the wording is apt, and intended, to incorporate into English law for the purposes of its application to the contract, the 'principles of ... Sharia'a'. In this respect, and no doubt to avoid the difficulty that the principles of Sharia'a, generally stated, are of broad nature and application (indeed they are unexplored for the purposes of this litigation), Mr Hacker argues that the clause should be read as incorporating simply those specific rules of Sharia'a which relate to interest and to the nature of Morabaha and Ijarah contracts, thus qualifying the choice of English law as the governing law only to that extent.

[50] In that respect, he seeks to rely upon the passage in *Dicey and Morris* p 1226 (para 32-086) which expounds the distinction between reference to a foreign law as a choice of law to govern the contract (or part of a contract) on the one hand and incorporation of some provisions of a foreign law as a term or terms of the contract in question. While observing that it is sometimes difficult to draw the distinction in practice, it is there stated:

> 'It is open to the parties to an English contract to agree, *e.g.* that the liability of an agent to his principal shall be determined in accordance with the relevant articles of the French Civil Code. In such a case the foreign law becomes a source of law upon which the governing law may draw. The effect is not to make French law the governing law of the contract but rather to incorporate the French articles as contractual terms into an English contract. This is a convenient "shorthand" alternative to setting out the French articles verbatim. The court will then have to construe the English contract, "reading into it as if they were written into it the words" of the French statute.
>
> 32-087 It often happens that statutes governing the liability of a sea carrier, such as the former Harter Act in the United States, or statutes implementing the Hague Rules ... are thus "incorporated" in a contract governed by a law other than that of which the statute forms part. The statute then operates not as a statute but as a set of contractual terms agreed upon between the parties. The parties may make an express choice of one law (*e.g.* English law) and then incorporate the terms of a foreign statute. In such a case the incorporation of the foreign statute would only have effect as a matter of contract.'

[51] It does not seem to me that the passage cited, or the authorities referred to in the notes thereto, assist the defendants. The doctrine of incorporation can only sensibly operate where the parties have by the terms of their contract sufficiently identified specific 'black letter' provisions of a

foreign law or an international code or set of rules apt to be incorporated *as terms of the relevant contract* such as a particular article or articles of the French Civil Code or the Hague Rules. By that method, English law is applied as the governing law to a contract into which the foreign rules have been incorporated. In such a case, in construing and applying those rules, where there is ambiguity or doubt as to their ambit or effect, it may be appropriate for the court to have regard to evidence from experts in foreign law as to the way in which the provisions identified have been interpreted and applied in their 'home' jurisdiction. However, that is still only as an end to interpretation by the English court in the course of applying English law and rules of construction to the contract with which it is concerned. The authority of *Nea Agrex SA v Baltic Shipping Co Ltd* [1976] 2 All ER 842, [1976] QB 933 is no more than an illustration of this. The trial judge had held that a reference in the contract to the incorporation of a 'paramount clause' was ineffective for uncertainty, finding that he could not say whether the parties intended to incorporate the Hague Rules or part of the Hague Rules or, if so, which part. However, the Court of Appeal held that the clear meaning of 'paramount clause' was ([1976] 2 All ER 842 at 846–847, [1976] QB 933 at 943–944 per Lord Denning MR):

> 'It brings the Hague Rules into the charterparty so as to render the voyage, or voyages, subject to the Hague Rules, so far as applicable thereto; and it makes those rules prevail over any of the exceptions in the charterparty. The judge, however, took a different view. He said that there are many different paramount clauses and he could not say which of them was applicable ... I do not share the judge's view. It seems to me that when the "paramount clause" is incorporated, without any words of qualification, it means that all the Hague Rules are incorporated. If the parties intend only to incorporate part of the rules (for example, art IV), or only so far as compulsorily applicable, they say so. In the absence of any such qualification, it seems to me that a "clause paramount" is a clause which incorporates all the Hague Rules.'

[52] The general reference to principles of Sharia'a in this case affords no reference to, or identification of, those aspects of Sharia'a law which are intended to be incorporated into the contract, let alone the terms in which they are framed. It is plainly insufficient for the defendants to contend that the basic rules of the Sharia'a applicable *in this case* are not controversial. Such 'basic rules' are neither referred to nor identified. Thus the reference to the 'principles of ... Sharia'a' stand unqualified as a reference to the body of Sharia'a law generally. As such, they are inevitably repugnant to the choice of English law as the law of the contract and render the clause self-contradictory and therefore meaningless.

[53] In these circumstances, having rightly conceded that English law is the governing law of the contract, Mr Hacker is left with little room for manoeuvre, save to assert that the court should accept his submission on the basis that otherwise the proviso to the governing law clause would be mere surplusage.

[54] I do not agree. It seems to me that there is an appropriate alternative construction, namely that favoured by the judge, ie that the words are intended simply to reflect the Islamic religious principles according to which the bank holds itself out as doing business rather than a system of law

intended to 'trump' the application of English law as the law to be applied in ascertaining the liability of the parties under the terms of the agreement. English law is a law commonly adopted internationally as the governing law for banking and commercial contracts, having a well-known and well-developed jurisprudence in that respect which is not open to doubt or disputation on the basis of religious or philosophical principle. I share the judge's view that, having chosen English law as the governing law, it would be both unusual and improbable for the parties to intend that the English court should proceed to determine and apply the Sharia'a in relation to the legality or enforceability of the obligations clearly set out in the contract. Reference to authority does not assist the defendants in this respect. In *Glencore International AG v Metro Trading International Inc* [2001] 1 All ER (Comm) 103 the judge was concerned with, and heard evidence in relation to, the meaning and scope of the word 'ghasb' (misappropriation) as a term used but undefined in art 1326 of the Fujairah Civil Code which was the governing law in the case before him. As such he was obliged to interpret and apply the term in the dispute before him, with the assistance of rival experts in the law of Fujairah. The decision has no relevance to this case. As to the decision in *Al-Bassam v Al-Bassam* [2002] EWHC 2281 (Ch), [2003] WTLR 1 the court was concerned with Sharia'a law as being the law which the parties agreed was the law of succession applied in Saudi Arabia as the country of the deceased's domicile at the date of his death. Again, it has no relevance to this case, other than demonstrating that, where it is clear that a particular system of law governs a dispute before the English court, the court is obliged to apply it, with the assistance of expert evidence. Neither case was concerned with the construction of a disputed choice of law clause.

[55] Finally, so far as the 'principles of ... Sharia'a' are concerned, it was the evidence of both experts that there are indeed areas of considerable controversy and difficulty arising not only from the need to translate into propositions of modern law texts which centuries ago were set out as religious and moral codes, but because of the existence of a variety of schools of thought with which the court may have to concern itself in any given case before reaching a conclusion upon the principle or rule in dispute. The fact that there may be general consensus upon the proscription of Riba and the essentials of a valid Morabaha agreement does no more than indicate that, if the Sharia'a law proviso *were* sufficient to incorporate the principles of Sharia'a law into the parties' agreements, the defendants would have been likely to succeed. However, since I would hold that the proviso is plainly inadequate for that purpose, the validity of the contract and the defendants' obligations thereunder fall to be decided according to English law. It is conceded in this appeal that, if that is so, the first and second defendants are liable to the bank.

The guarantors' liability

[56] It has necessarily been conceded that, if that is so, then the guarantors are similarly liable. The sole point relied on in this appeal to avoid their liability is the plea that the bank and the guarantors entered into the guarantees on the basis of a mutual mistake, namely that the ESUAs constituted a binding obligation on the part of the bank to discharge a pre-existing enforceable obligation, ie payment of the outstanding amounts as defined in the ESUAs. In this connection the guarantors rely upon the

general law of guarantee and the fact that the opening line of the covenant to pay in cl 2.1 of the guarantees expressly made clear that they were given in consideration of the bank agreeing to discharge the outstanding amount under the Morabaha agreements.

[57] Although it is not necessary so to decide, I consider that the judge was correct in his view that a common mistake as to the legal consequences of the Morabaha agreements in this case would not qualify as a mistake apt to give rise to a defence.

[58] Mr Hacker relies on recent authority to submit that, for the doctrine of mutual mistake to be operative at common law, it is no longer necessary for it to be a mistake of fact as opposed to a 'mere' mistake of law. He relies upon the decision of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1998] 4 All ER 513, [1999] 2 AC 349, in which the House of Lords held that there is no rule that only a mistake of fact would entitle a party to claim restitution on the grounds of mistake; also upon the statement of the position in *Chitty on Contracts* (28th edn, 1999) vol 1, p 303 (para 5-018) and the recent decision of Morland J in *Brennan v Bolt Burdon (a firm)* [2003] EWHC 2493 (QB), [2003] All ER (D) 488 (Oct), (2003) Times, 7 November concerning the setting aside of a compromise agreement on the grounds of mistake of law when that agreement had been reached on the basis of a decision of the court of first instance which was subsequently overturned by the Court of Appeal. In coming to his decision that the agreement should be set aside, Morland J relied upon the speeches of Lord Goff of Chieveley and Lord Hoffmann in the *Kleinwort Benson* case [1998] 4 All ER 513 at 536 and 532–553, [1999] 2 AC 349 at 379 and 398–399 respectively and the paragraph in *Chitty*, as well as upon persuasive Commonwealth authority. Assuming, without deciding, that the decision of Morland J was correct, it was none the less reached upon the basis that the parties' common mistaken assumption as to the law ([2003] All ER (D) 488 (Oct) at [52]) 'was the fundamental basis for and precondition of the compromise agreement, indeed its only springboard'.

[59] Before this court Mr Hacker has submitted that the mistake as to Sharia'a law was properly to be regarded as a mistake of fact by analogy with the position in respect of a mistake of *foreign* law (see *Furness Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd, The Amazonia* [1990] 1 Lloyd's Rep 236 at 250 per Dillon LJ).

[60] If that analogy is correct, it is of course necessary for the guarantors to show that the mistake is such as to 'render the subject matter of the contract essentially and radically different from the subject matter which the parties believed to exist' (see *Associated Japanese Bank (International Ltd) v Crédit du Nord SA* [1988] 3 All ER 902 at 912–913, [1989] 1 WLR 255 at 268 per Steyn J) or that it renders 'the thing [contracted for] essentially different from the thing [that] it was believed to be' (see *Bell v Lever Bros Ltd* [1932] AC 161 at 218, [1931] All ER Rep 1 at 28 per Lord Atkin, as adopted and confirmed by this court in *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407, [2002] 2 All ER (Comm) 999, [2003] QB 679). Whether the mistake asserted should rightly be regarded as a mistake of fact or of law, it is plain to me that it is not a mistake based on a common assumption fundamental to the agreements in question. In that respect, the submissions of Mr Hacker inevitably founder upon the factual assertions of the defendants themselves, which demonstrate that their sole interest was to obtain advances of funds to be used as working capital and that they were

indifferent to the form of the agreements required by the bank or the impact of Sharia'a law upon their validity.

CONCLUSION

[61] In my view the judge was correct in the conclusion to which he came, broadly for the reasons which he gave. I would dismiss this appeal.

LAWS LJ.

[62] I agree.

ARDEN LJ.

[63] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

Dr Beynon and Partners v Customs and Excise Commissioners

[2004] UKHL 53

HOUSE OF LORDS

LORD NICHOLLS OF BIRKENHEAD, LORD STEYN, LORD HOFFMANN, LORD SCOTT OF FOSCOTE AND LORD WALKER OF GESTINGTHORPE

10, 11, 25 NOVEMBER 2004

Value added tax – Exemptions – Medical care – Medical practitioners providing pharmaceutical services to certain patients – Medical practitioners personally administering drugs to patients to whom they provided pharmaceutical services – Whether supply of drugs separate from supply of medical care – Value Added Tax Act 1994, Sch 9, Group 7, item 1(a) – National Health Service (Pharmaceutical Services) Regulations 1992, SI 1992/662, reg 20.

Under reg 20[a] of the National Health Service (Pharmaceutical Services) Regulations 1992 doctors were able to provide pharmaceutical services to such patients (reg 20 patients) as did not have a pharmacy nearby. The supply of drugs by a doctor in accordance with a requirement or authorisation under reg 20 of the 1992 regulations was zero-rated for value added tax (VAT) purposes (as was the supply of drugs dispensed on prescription in the ordinary way by a pharmacist). The supply of medical care itself was an exempt supply under item 1(a)[b] of Group 7 of Sch 9 to the Value Added Tax Act 1994. The doctors formed a medical practice which was registered for VAT. They considered that, for VAT purposes, when they actually administered a drug to a reg 20 patient, by for instance injecting a vaccine, they were making separate supplies of medical care and of the drug. The commissioners took the view that the provision of the drug was merely ancillary to the single exempt supply of medical services, with the result that the doctors were not entitled to deduct or seek repayment of the input tax paid on the supply of the drugs to the practice. The VAT and Duties Tribunal upheld the commissioners' ruling. The doctors' appeal to the High Court was unsuccessful and they appealed. The Court of Appeal allowed their appeal; while it noted that at a particular level of generality it could be said that there was one transaction, it held that, in reality, consultation and medical diagnosis were a supply of services dissociable from the supply of a drug for the purposes of treatment, and its administration. The commissioners appealed.

Held – The level of generality which corresponded with social and economic reality, and did not involve artificial dissection, was to regard the transaction as the patient's visit to the doctor for treatment. On that view the correct classification of the personal administration of a drug to a patient was that it

a Regulation 20, so far as material, is set out at [8], below

b Item 1, so far as material, provides: 'The supply of services by a person registered … in … (a) the register of medical practitioners …'

was a single supply of medical services. While, in some cases, the element of skill on the part of the doctor would be at a minimum, it was essential for practical reasons to have a rule which applied across the board to all transactions of a certain kind when applying the classifications required by VAT. The commissioners' appeal would, accordingly, be allowed (see [1], [2], [31]–[33], [35]–[36], below).

Card Protection Plan Ltd v Customs and Excise Comrs Case C-349/96 [1999] All ER (EC) 339 applied.

Notes

For composite and separate supplies, and for supplies of health and welfare, see 49(1) *Halsbury's Laws* (4th edn reissue) paras 25, 151.

For the Value Added Tax Act 1994, Sch 9, Group 7, item 1, see 50 *Halsbury's Laws* (4th edn) (2003 reissue) 310.

For National Health Service (Pharmaceutical Services) Regulations 1992, SI 1992/662, reg 20, see *Halsbury's Statutory Instruments* (2004 issue) 70.

Cases referred to in opinions

Card Protection Plan Ltd v Customs and Excise Comrs Case C-349/96 [1999] All ER (EC) 339, [1999] 2 AC 601, [1999] 3 WLR 203, [1999] ECR I-973, ECJ.

Customs and Excise Comrs v British Telecommunications plc [1999] 3 All ER 961, [1999] 1 WLR 1376, HL.

Customs and Excise Comrs v Madgett and Baldwin (t/a Howden Court Hotel), Madgett and Baldwin (t/a Howden Court Hotel) v Customs and Excise Comrs Joined cases C-308/96 and C-94/97 [1998] STC 1189, [1998] ECR I-6229, ECJ.

Faaborg-Gelting Linien A/S v Finanzamt Flensburg Case C-231/94 [1996] All ER (EC) 656, [1996] ECR I-2395, ECJ.

Moyna v Secretary of State for Works and Pensions [2003] UKHL 44, [2003] 4 All ER 162, [2003] 1 WLR 1929.

Cases referred to in list of authorities

Auto Lease Holland BV v Bundesamt für Finanzen Case C-185/01 [2003] ECR I-1317, ECJ.

Bophuthatswana National Commercial Corp Ltd v Customs and Excise Comrs [1993] STC 702, CA.

British Airways plc v Customs and Excise Comrs [1990] STC 643, CA.

British Railways Board v Customs and Excise Comrs [1977] 2 All ER 873, [1977] 1 WLR 588, CA.

Card Protection Plan Ltd v Customs and Excise Comrs [2001] UKHL 4, [2001] 2 All ER 143, [2002] 1 AC 202, [2001] 2 WLR 329.

College of Estate Management v Customs and Excise Comrs [2004] EWCA Civ 1086, [2004] STC 1471.

Customs and Excise Comrs v FDR Ltd [2000] STC 672, CA.

Customs and Excise Comrs v Leightons Ltd, Customs and Excise Comrs v Eye-Tech Opticians (No 1) and Eye-Tech Opticians (No 2) [1995] STC 458.

Customs and Excise Comrs v Wellington Private Hospital Ltd, Customs and Excise Comrs v St Martins Hospitals Ltd, Customs and Excise Comrs v British United

Provident Association Ltd, British United Provident Association Ltd v Customs and Excise Comrs [1997] STC 445, CA.

D'Ambrumenil v Customs and Excise Comrs Case C-307/01 [2004] QB 1179, [2004] 3 WLR 174, ECJ.

EC Commission v France Case C-76/99 [2001] ECR I-249, ECJ.

EC Commission v UK Case 353/85 [1988] 2 All ER 557, [1988] ECR 817, ECJ.

Staatssecretaris van Financiën v Shipping and Forwarding Enterprise Safe BV Case C-320/88 [1991] STC 627, [1990] ECR I-285, ECJ.

Woodings and ors [1999] V&DR 294.

Appeal

The Commissioners of Customs and Excise, with permission of the House of Lords Appeal Committee given on 18 July 2003, appealed from the decision of the Court of Appeal (Aldous, Chadwick LJJ, and Munby J) on 20 December 2002 ([2002] EWCA Civ 1870, [2003] STC 169) allowing the appeal of Dr Beynon and partners from the decision of Lawrence Collins J on 27 March 2002 ([2002] EWHC 518 (Ch), [2002] STC 699) dismissing the partners' appeal from the decision of the Manchester Value Added Tax and Duties Tribunal (chairman: J D Demack) released on 5 June 2001 ((2001) VAT Decision 17275) dismissing the partners' appeal from the decision of the commissioners that the supply of a drug provided by a doctor and personally administered by the doctor to a patient who fell within the category of patients to whom doctors were required and authorised to provide pharmaceutical services was part of a single exempt supply of medical services. The facts are set out in the opinion of Lord Hoffmann.

Melanie Hall QC and *Valentina Sloane* (instructed by the *Solicitor for the Customs and Excise*) for the commissioners.

David Ewart (instructed by *Hempsons*) for the doctors.

Their Lordships took time for consideration.

25 November 2004. The following opinions were delivered.

LORD NICHOLLS OF BIRKENHEAD.

[1] My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend Lord Hoffmann. For the reasons he gives, with which I agree, I would allow this appeal.

LORD STEYN.

[2] My Lords, I have had the advantage of reading the opinion of my noble and learned friend Lord Hoffmann. I agree with it. I would also allow the appeal and restore the decision of the tribunal ((2001) VAT Decision 17275) and Lawrence Collins J ([2002] EWHC 518 (Ch), [2002] STC 699).

LORD HOFFMANN.

[3] My Lords, the issue in this appeal is whether the personal administration of a drug such as a vaccine by an NHS doctor to a patient is a taxable supply for the purposes of value added tax (VAT). The European Council Directive (EEC) 77/388 (on the harmonisation of the laws of the member states relating to turnover taxes—common system of value added tax: uniform basis of assessment) (OJ 1977 L145 p 1) (the Sixth Directive) requires that the provision of medical care in the exercise of the medical and paramedical professions should be exempt from VAT: see art 13A(1)(c). On the other hand, the supply of goods (defined in art 5(1) as 'the transfer of the right to dispose of tangible property as owner') is taxable. The question is therefore whether the doctor is making a single supply of medical services to which the provision of the drug is merely ancillary or whether he is also supplying goods when, for example, the injected drug passes through the needle into the patient's arm.

[4] The Commissioners of Customs and Excise take the view that there is a single exempt supply. The consequence is that the doctor is not entitled to deduct or seek repayment of the input tax which was paid on the supply of the drugs to him. That is the normal position of a supplier of exempt services. He is treated as if he was a consumer and bears the burden of the whole of the VAT which has been paid when he receives supplies of goods or services for the purposes of his business or profession. His expenses on VAT, like his other expenses, are matters which he must take into account when deciding what to charge his customers.

[5] A doctor in the NHS cannot of course include an allowance for VAT in what he charges his patients because he cannot charge at all. Instead, he must recover his expenses, one way or another, from the NHS. The great majority of doctors do not register for VAT at all. The services they provide are not taxable and the VAT charged on their purchases is not recoverable. In the case of drugs which a doctor buys for use in his practice, the NHS refunds him an amount calculated according to a formula which includes an allowance for VAT: see para 44.2 of the Statement of Fees and Allowances (the Red Book) made pursuant to reg 34 of the National Health Service (General Medical Services) Regulations 1992, SI 1992/635 (the General Regulations).

[6] There is however a small minority of doctors who do register for VAT because they are, exceptionally, permitted to dispense drugs as well as administer them. This requires some explanation. In principle, doctors prescribe drugs and registered pharmacists dispense them. By s 43 of the National Health Service Act 1977, the NHS is ordinarily prohibited from making arrangements for doctors to supply 'pharmaceutical services', which are defined by s 41 as—

> 'drugs and medicines and listed appliances which are ordered for [the patient] by a medical practitioner in pursuance of his functions in the health service ...'

[7] This rule is however subject to an exception. The NHS has a duty under s 41 of the 1977 Act to arrange, in accordance with regulations, for the supply to persons in their area of 'proper and sufficient' pharmaceutical services. Normally this duty is satisfied by arrangements with pharmacists. But there are some rural areas which do not have pharmacies within easy reach of all

residents. The Area Health Authority must therefore make arrangements for doctors to provide such residents with pharmaceutical services.

[8] Such arrangements are made under reg 20 of the National Health Service (Pharmaceutical Services) Regulations 1992, SI 1992/662 (the Pharmaceutical Regulations). This provides that if a patient would have 'serious difficulty in obtaining any necessary drugs or appliances from a pharmacy by reason of distance or inadequacy of means of communication' and in certain other circumstances, he may ask that his doctor provide him with pharmaceutical services and the Family Health Services Authority may make arrangements for the doctor to do so. In such a case, the doctor acts as if he was a pharmacist. He orders the drug by prescription and then he, or someone in his practice, dispenses the drug to the patient.

[9] When drugs are dispensed on prescription in the ordinary way by a registered pharmacist, they are zero-rated for VAT: see s 30(2) and item 1 of Groups 12 of Sch 8 to the Value Added Tax Act 1994. And by item 1A(a), inserted into Group 12 of Sch 8 by the Value Added Tax (Supply of Pharmaceutical Goods) Order 1995, SI 1995/652, the same treatment is accorded to drugs supplied 'in accordance with a requirement or authorisation under regulation 20'.

[10] That means that if the doctor registers for VAT, he will be able to obtain a refund of the input tax paid on the drugs or appliances supplied to him for dispensing to patients under reg 20. If a doctor does a sufficient turnover in these goods, it becomes worth his while to register and claim back the input tax. The Red Book says, in para 44.4, that practices normally register when they dispense enough drugs under reg 20 to have to employ a registered pharmacist to do the dispensing. We were told that in England, about 180 medical practices (out of about 4,000) are registered for VAT.

[11] Where a doctor is registered for VAT, the NHS does not make any allowance for input VAT when it pays him for the drugs which he has dispensed under reg 20. That is logical, because he is entitled to claim repayment from the commissioners. But the problem which has given rise to these proceedings is that the Department of Health takes the same view about the VAT on drugs which the doctor administers personally. He receives no allowance for VAT because the department assumes that he will be able to recover it from the commissioners. But the commissioners, as I have said, take a different view. They accept that when a doctor dispenses drugs under reg 20, he supplies goods exactly as if he were a pharmacist. But they say that when he administers a drug personally, he is not supplying goods. He is supplying an exempt service.

[12] The doctors registered for VAT have thus become involved in what appears to be an inter-departmental dispute. But the result is that neither the NHS nor the commissioners are prepared to refund or make an allowance for VAT paid on personally administered drugs by practices registered for VAT. These proceedings were commenced by way of an appeal from a ruling of the commissioners to the Manchester VAT Tribunal (JD Demack, chairman, the Hon Mrs Angela Widdows, JTB Strangward) ((2001) VAT Decision 17275) by a VAT registered medical practice in Beverley. The commissioners dismissed the appeal. An appeal to the judge (Lawrence Collins J) was unsuccessful ([2002] EWHC 518 (Ch), [2002] STC 699) but the doctors succeeded in the Court of Appeal (Aldous and Chadwick LJJ and Munby J) ([2002] EWCA Civ 1870, [2003] STC 169). The Court of Appeal held that injections and so forth were separate

supplies of the goods injected and that they were zero-rated. The commissioners appeal to your Lordships' House.

[13] The logical order in which to consider the issues is first to decide whether, in the case of personal administration, there is any supply of goods and then, if there is, to decide whether it is zero-rated or standard-rated. But I propose to reverse this order and consider whether, assuming there to be a supply of goods, it would be zero-rated. I do so because I think that the answer throws some light on the first question. The tribunal and Lawrence Collins J thought that such a supply of goods would not be zero-rated. To fall within item 1A(a) of Group 12 the drug must be supplied 'in accordance with a requirement or authorisation under regulation 20'. Like the tribunal and the judge, I find it impossible to see how the personal administration of a drug by a doctor to a patient who happens to be entitled to a supply of drugs under reg 20 can be described as a supply 'in accordance with a requirement or authorisation under regulation 20'. The doctor has no need of any authorisation under reg 20 to give a patient an injection. It is done all the time by doctors who have no authorisation to make any reg 20 supplies. The doctor would probably have sufficient authority to do simply by virtue of para 12(1) of the Terms of Service for Doctors in Sch 2 to the General Regulations:

> '... a doctor shall render to his patients all necessary and appropriate personal medical services of the type usually provided by general medical practitioners.'

[14] If, however, this was not enough, reg 19(b) of the Pharmaceutical Regulations provides that any doctor may 'provide to a patient any appliance or drug, not being a Scheduled drug, which he personally administers or applies to that patient'.

[15] Thus the Pharmaceutical Regulations make a clear distinction between the administration of a drug to the patient by the doctor himself and the dispensing to the patient of drugs which the doctor has ordered for him. The former is something which any doctor may do—indeed, must do, if that would be an appropriate personal medical service which it is the doctor's duty to provide under para 12 of his terms of service. The latter is normally the function of a pharmacist. A doctor can do it only if the patient is the subject of arrangements under reg 20.

[16] In the Court of Appeal, Aldous LJ, having held that there was a separate supply of goods, went on to say ([2003] STC 169 at [47]) that it was zero-rated. Chadwick LJ did not deal expressly with the point but he and Munby J agreed with Aldous LJ. But Aldous LJ gave no reasons for his decision on this point and made no comment on the reasoning of the tribunal and the judge which had led them to the opposite conclusion. In my opinion this was an error. If personally administered drugs are a supply of goods, they must be standard-rated.

[17] This conclusion has, as I indicated earlier, some relevance to the main question in the appeal. If Parliament had thought that the personal administration of drugs by doctors was a separate supply of goods, it would be very strange that it was not also zero-rated. So the restricted scope of item 1A(a) suggests that Parliament never contemplated that personal administration involved any supply of goods at all.

[18] However, whatever Parliament may have thought, the question of whether there is one supply or two involves the application of principles of European law in compliance with the Sixth Directive. In *Card Protection Plan Ltd v Customs and Excise Comrs* Case C-349/96 [1999] All ER (EC) 339 at 363, [1999] ECR I-973 at 1012 (para 26) the Court of Justice of the European Communities (the Court of Justice) gave authoritative guidance on the test for deciding—

> 'whether a transaction which comprises several elements is to be regarded as a single supply or as two or more distinct supplies to be assessed separately.'

[19] In the course of argument your Lordships were also referred, as were the courts below, to a number of cases, both in this country and in the Court of Justice, which were decided before the *Card Protection* case. Submissions were made as to whether the principles upon which those cases were decided had application to this case. Their Lordships think that there is no advantage in referring to such earlier cases and their citation in future should be discouraged. The *Card Protection* case was a restatement of principle and it should not be necessary to go back any further.

[20] The Court of Justice observed ([1999] All ER (EC) 339 at 363, [1999] ECR I-973 at 1012–1013 (paras 27–29)), that the diversity of commercial operations made it impossible to give exhaustive guidance as to how to approach the problem correctly in all cases. Regard should always be had to the circumstances in which the transaction took place. Every supply of 'a service' is by definition distinct and independent but a supply which 'from an economic point of view' comprises a *single* service should not be artificially split into separate 'services'. What matters is 'the essential features of the transaction'. The court went on to say ([1999] All ER (EC) 339 at 363, [1999] ECR I-973 at 1013 (para 30)):

> 'There is a single supply in particular in cases where one or more elements are to be regarded as constituting the principal service, whilst one or more elements are to be regarded, by contrast, as ancillary services which share the tax treatment of the principal service. A service must be regarded as ancillary to a principal service if it does not constitute for customers an aim in itself, but a means of better enjoying the principal service supplied (see the judgment in [*Customs and Excise Comrs v Madgett and Baldwin (t/a Howden Court Hotel), Madgett and Baldwin (t/a Howden Court Hotel) v Customs and Excise Comrs* Joined cases C-308/96 and C-94/97 [1998] STC 1189 at 1206, [1998] ECR I-6229 at 6259 (para 24)]).'

[21] As an example of the need to examine the circumstances in which the transaction takes place, the Court of Justice referred to its earlier decision in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* Case C-231/94 [1996] All ER (EC) 656 at 665–666, [1996] ECR I-2395 at 2411–2412, which concerns the classification of restaurant meals. The court laid down the following general principles:

'13. The supply of prepared food and drink for immediate consumption is the outcome of a series of services ranging from the cooking of the food to its physical service in a recipient, whilst at the same time an infrastructure is placed at the customer's disposal, including a dining room with appurtenances (cloak rooms, etc), furniture and crockery. People, whose occupation consists in carrying out restaurant transactions, will have to perform such tasks as laying the table, advising the customer and explaining the food and drink on the menu to him, serving at table and clearing the table after the food has been eaten.

14. Consequently, restaurant transactions are characterised by a cluster of features and acts, of which the provision of food is only one component and in which services largely predominate. They must therefore be regarded as supplies of services within the meaning of art 6(1) of the Sixth Directive. The situation is different, however, where the transaction relates to "take-away" food and is not coupled with services designed to enhance consumption on the spot in an appropriate setting.'

[22] In the present case, the tribunal made the following findings about the circumstances in which drugs are administered by doctors to their patients:

'26. Generally, patients self-administer medicines ... But the administration, and application and fitting, of some medications, dressings and appliances requires the employment of the medical expertise of a doctor or nurse. Injections, such as vaccines, are the most common example of this, but there are others such as the fitting of certain contraceptive devices. In those cases, the GP is expected to provide in-house stock to administer to his patient ...

27. In those circumstances, the NHS considers the supply of drugs, dressings or appliances to be part of the provision of treatment whereby the doctor's skills and knowledge [are] applied in rendering all necessary and appropriate personal medical services of the type usually provided by general medical practitioners, as required by para 12(1) of Sch 2 to the [General Regulations].

28. The importance and appropriateness of the supply of drugs and appliances administered by a GP varies with the medical condition of, and other circumstances particular to, the patient. Immunisations provide a good example ... As all vaccines require storage at controlled temperatures ... it militates against patients obtaining vaccines by prescription and dispensary, and then taking them to a surgery for administration. It requires professional expertise to decide whether a patient is in a group which will benefit from immunisation. Questions to be considered include ... Are there any relevant contra-indications? ... Does the immunisation need to be postponed?

29. The doctor then needs to decide which vaccine to use (e g oral or by injection), its strength, the number of doses required and at what intervals, whether it should be given intradermally, subcutaneously or intramuscularly, with what length of needle it must be injected and in what part of the body ... Where a patient has a cut or other skin wound, parallel considerations are also needed. The GP must decide whether the injury is one requiring skin closure, whether closure is required without delay,

a what type of skin closure should be used, and whether it is appropriate for the GP to carry out the closure procedure himself. If so, he must choose an appropriate product or products (eg the type of suture material and needle).'

[23] Apart from home visits, which are nowadays relatively infrequent, b drugs will be personally administered by the doctor in his surgery. This provides a convenient setting where stocks of drugs are maintained, facilities and equipment are accessible, the patient's records are kept and the assistance of colleagues and nurses is available.

[24] Applying the guidance provided by the Court of Justice in the *Card Protection* case, the tribunal came to the conclusion, that the personal c administration of drugs to the patient by a doctor was merely ancillary to his supply of exempt medical services:

'74. ... there is a single supply from an economic point of view: the commercial reality is that the appellants in personally administering or d applying drugs and appliances to their ... patients provide a single package of medical services of the type usually provided by GPs ... it is artificial to regard supplies of drugs and appliances personally administered or applied ... as independent and distinct supplies: they are supplied as part of a single package of medical services ... the essential feature of the supply of a drug or appliance personally administered to a ... patient is that of medical e services appropriate and proportionate to the condition of the patient at the time of administration: the supply is not an aim in itself, having no free-standing utility to the patient, but merely a means of his obtaining the benefit of medical services provided by the appellants ... as no prescription charge is made for drugs and appliances personally administered or applied f to any patient ... (a fact which we find indicative of the NHS expecting the drug or appliance to be supplied by the doctor from in-house stock), there is no separate price that might point to the supply being separate from that of medical services ...'

g [25] There was some discussion in the judgments of Lawrence Collins J and the Court of Appeal as to whether the application of the principles laid down by the Court of Justice involved a question of law or a question of fact. The appeal from a VAT Tribunal to the judge is only on a question of law and the judge thought that the decision was one of fact, or at any rate 'appreciation of the facts' (see [2002] STC 699 at [73]). He went on to say that in any case he h agreed with the tribunal's conclusion, substantially for the reasons it had given.

[26] In the Court of Appeal ([2003] STC 169), Aldous LJ said (at [19]) that the classification of the transaction as a supply of services or of goods and services was a question of law. He cited in support the decision of this House in *Customs and Excise Comrs v British Telecommunications plc* [1999] 3 All ER 961 at 966, j [1999] 1 WLR 1376 at 1381 in which Lord Slynn of Hadley said that the 'characterisation of the supply as provided for here in the contractual documents is a matter of law'. Aldous LJ pointed out that the facts found by the tribunal were not in dispute. The issue was as to their legal consequences.

[27] In my opinion the weight of authority supports the view of the Court of Appeal on this point. The courts have not treated VAT classification in the

same way as some questions of classification (for example, whether a contract is of service or for services) which, notwithstanding that there are no facts in dispute, are deemed to be questions of fact so as to exclude on appeal on a question of law: see the discussion in *Moyna v Secretary of State for Works and Pensions* [2003] UKHL 44 at [22]–[25], [2003] 4 All ER 162 at [22]–[25], [2003] 1 WLR 1929. On the other hand, as Lord Hope of Craighead said in the *British Telecommunications* case ([1999] 3 All ER 961 at 971, [1999] 1 WLR 1376 at 1386) the question is one of fact and degree, taking account of all the circumstances. In such cases it is customary for an appellate court to show some circumspection before interfering with the decision of the tribunal merely because it would have put the case on the other side of the line.

[28] Aldous LJ was impressed by the fact that when a doctor administered a drug to any patient, whether he was a reg 20 patient or not, he made out a prescription for that drug. The tribunal and the judge had thought that prescriptions were made out only for reg 20 patients, but the parties agreed that in order to obtain payment from the NHS, the doctor had to make out a prescription for all personally administered drugs. Aldous LJ thought that this was a serious error which vitiated the tribunal's decision, because in his opinion it led to the conclusion that there was really no difference between dispensing drugs under reg 20 and administering them personally. In both cases a prescription is prepared and the drug is 'dispensed' either to the patient under reg 20 or to the doctor for administration to the patient.

[29] In my opinion this exaggerates the significance of writing prescriptions for personally administered drugs. The sole purpose is to enable the doctor to vouch his claim for payment by the NHS. It is true that this shows that, at least from the point of view of the NHS, there is a separate payment for the drugs. But, as Lord Hope of Craighead said in the *British Telecommunications* case ([1999] 3 All ER 961 at 970, [1999] 1 WLR 1376 at 1385), the fact that a price for the supply in question can be separately identified is not determinative. The fundamental distinction made by the Pharmaceutical Regulations between the administration and dispensing of drugs remains. The doctor does the first as part of the ordinary services which he provides. He can do the second only with special authorisation under reg 20.

[30] Aldous LJ acknowledged ([2003] STC 169 at [37]), that 'at a particular level of generality' it could be said that there was one transaction. But he said (at [49]) that when a doctor administered a drug to a patient he was 'in reality dispensing the drug to the patient and then administering it'. Chadwick LJ likewise divided the transaction into three elements: first, the consultation and diagnosis, secondly the supply of the drug for the purposes of treatment and thirdly its administration. The first stage, he said (at [60]), was 'dissociable' from the second and third and constituted a separate supply. Although there might be some medical skill involved at the third stage, the dominant element was the supply of the drug and it was therefore to be classified as a supply of goods.

[31] Besides raising the question of what authority a doctor would have to dispense drugs to patients who were not reg 20 patients, this approach seems to me to involve the kind of artificial dissection of the transaction which the Court of Justice warned against in its judgment in the *Card Protection* case [1999] All ER (EC) 339 at 363, [1999] ECR I-973 at 1013 (para 29). In my opinion the level of generality which corresponds with social and economic reality is to

regard the transaction as the patient's visit to the doctor for treatment and not to split it into smaller units. If one takes this view, then in my opinion the correct classification is that which the NHS has always taken of the personal administration of drugs to non-reg 20 patients, namely that there is a single supply of services.

[32] It is true that in some cases, the nature of the drug which is administered will assume a greater importance than in other cases. It is easy to think of examples in which the element of skill on the part of the doctor is at a minimum and what matters is that the patient should receive, for example, a particular injection for travel to a foreign country. But in applying the classifications required by VAT, it is essential for practical reasons to have a rule which applies to all transactions of a certain kind. For example, in the case of the restaurant meals for which the Court of Justice laid down a general rule in *Faaborg-Gelting Linien A/S v Finanzamt Flensburg* [1996] All ER (EC) 656, [1996] ECR I-2395, one could imagine cases in which the services provided by the restaurant were insignificant compared with the value of the food or wine. It would however be administratively impossible to deal with each meal on a case-by-case basis. It is essential to have a rule which applies across the board.

[33] I would therefore allow the appeal and restore the decision of the tribunal and Lawrence Collins J. This means that practices such as the respondents' which are registered for VAT will not be able to recover input taxfrom the commissioners on personally administered drugs. If the Department of Health continue to apply their current practice, they will not obtain an allowance from the NHS either. The department is not a party to these proceedings and your Lordships' decision is not binding upon them. But as the practice is based upon the assumption that the doctors will be able to recover input tax from the commissioners and, if your Lordships agree with my opinion, that assumption will be shown to be wrong, it may be hoped that the department will reconsider the matter. It does not appear to me that there is anything in the Red Book which would prevent it from doing so. Paragraph 44.4 provides:

> 'Unless a dispensing practitioner is registered with HM Customs and Excise for VAT purposes ... a VAT allowance shall be paid to cover the VAT payable on his or her purchase of drugs and appliances and containers.'

[34] This paragraph applies only to 'dispensing practitioners', that is to say, those authorised to dispense drugs under reg 20, and in my opinion it was intended only to apply to VAT charged on drugs etc purchased for the purposes of being so dispensed. For the reasons given earlier in this opinion, that would be perfectly logical. What would be illogical would be to extend it to VAT on drugs purchased by the same practitioners for personal administration, where no recovery of VAT from the commissioners is possible. An allowance for the VAT on such purchases should be recoverable under para 44.2(v), whether the practitioner is registered for VAT or not.

LORD SCOTT OF FOSCOTE.

[35] My Lords, I have had the advantage of reading the opinion prepared by my noble and learned friend Lord Hoffmann. I agree with it and for the reasons Lord Hoffmann has given. I, too, would allow this appeal.

LORD WALKER OF GESTINGTHORPE.

[36] My Lords, I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with it and for the reasons given by Lord Hoffmann I too would allow the appeal.

Appeal allowed.

Celia Fox Barrister.

Office of Fair Trading and others v IBA Healthcare Ltd

[2004] EWCA Civ 142

COURT OF APPEAL, CIVIL DIVISION

SIR ANDREW MORRITT V-C, MANCE AND CARNWATH LJJ

3, 4, 19 FEBRUARY 2004

Competition – Merger – Substantial lessening of competition – Belief that 'it may be the case' that merger 'may be expected' to result in substantial lessening of competition – Enterprise Act 2002, ss 33(1), 120(4).

A company engaged in the supply of software and systems to the healthcare applications market offered to acquire the issued share capital of another such company in circumstances which brought into effect the merger provisions of the Enterprise Act 2002 (a relevant merger situation). The offer was notified to the Office of Fair Trading (the OFT). Section 33(1)[a] of the 2002 Act provided that the OFT was to make a reference to the Competition Commission if it believed 'that it is or may be the case' that (a) arrangements were in progress or in contemplation which would result in the creation of a relevant merger situation, and (b) the creation of that situation 'may be expected' to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods and services. A third company engaged in the same market complained to the OFT about the effect of the anticipated merger. The OFT initiated an investigation and concluded that the creation of the relevant merger situation would not fall within s 33(1)(b) of the 2002 Act. It therefore did not refer the proposed merger to the commission. The third company applied to the Competition Appeal Tribunal for a review of the decision of the OFT under s 120[b] of the 2002 Act which provided that the tribunal, in determining such an application, should apply the same principles as would be applied by a court on an application for judicial review. The tribunal concluded that it should quash the decision of the OFT and refer the matter back to the OFT for reconsideration because it was not satisfied that the OFT had applied the right test or that it had reached a conclusion that was reasonably open to it. The tribunal held that the words 'it may be the case' in s 33(1) implied a two-part test, namely that the decision makers at the OFT had to satisfy themselves (i) that as far as the OFT was concerned there was no significant prospect of a substantial lessening of competition and (ii) there was no significant prospect of an alternative view being taken in the context of a fuller investigation by the commission. The OFT and the merger companies appealed to the Court of Appeal on the points of law (i) whether the tribunal had correctly interpreted and applied s 33(1) of the 2002 Act and (ii) whether the tribunal had properly applied the principles of judicial review as required by s 120(4) in relation to (a) the legal onus; (b) the application of the test of an act or decision which was so unreasonable as to be an act or decision which no person or tribunal properly instructed and taking account of

a Section 33, so far as material, is set out at [2], below

b Section 120, so far as material, is set out at [5], below

all but only relevant considerations could do or make (the *Wednesbury* test); and (c) whether the OFT's reasons had justified its conclusion.

Held – (1) The two-stage test formulated by the tribunal could not be justified. The relevant belief for the test imposed by s 33(1) of the 2002 Act was that the merger may be expected to result in a substantial lessening of competition, not that the commission may in due course decide that the merger may be expected to result in a substantial lessening of competition. The test to be applied was that stated in s 33(1) in ordinary English words which should be applied in accordance with their ordinary meaning. The court should not substitute other words, or paraphrase or gloss them. It was necessary for the OFT to form the relevant belief; that required some form of mental assent. The belief had to be reasonable and objectively justified by relevant facts. Consistent with its function as a first screen the test for the OFT was only whether the anticipated merger may result in a relevant merger situation or not. Accordingly, although the word 'may' appeared in the opening phrase of s 33(1) and in para (b), the opening phrase imported a lower degree of likelihood than para (b) would by itself involve. However, the words 'may be the case' excluded the purely fanciful. Thus, in between the fanciful and a degree of likelihood of less than 50% there was a wide margin in which the OFT was required to exercise its judgment (see [38], [42]–[48], below).

(2) The tribunal had not reversed the burden of proof or wrongly applied the *Wednesbury* test of unreasonableness. It had been right to conclude that either the OFT had applied the wrong test as to likelihood or had failed adequately to explain or justify its conclusion in accordance with the right test. Accordingly, the tribunal had properly applied the principles of judicial review as required by s 120(4) of the 2002 Act and despite having adopted a wrong test as to likelihood, its ultimate conclusion was right and should be upheld. The appeal would therefore be dismissed (see [55], [57], [60], [61], [64], [75]–[78], [101], below).

Secretary of State for Education and Science v Metropolitan Borough of Tameside [1976] 3 All ER 665 applied.

Notes

For the duty to make references in relation to anticipated mergers and for review of decisions, see Supp to 47 *Halsbury's Laws* (4th edn) (2001 reissue), paras 140A.7, 140E.6.

For the Enterprise Act 2002, ss 33, 120, see 47 *Halsbury's Statutes* (4th edn) (Current Statutes Service) 70, 162.

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Brind v Secretary of State for the Home Dept [1991] 1 All ER 720, sub nom *R v Secretary of State for the Home Dept, ex p Brind* [1991] 1 AC 696, [1991] 2 WLR 588, HL.

Council of Civil Service Unions v Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374, [1984] 3 WLR 1174, HL.

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Grayan Building Services Ltd (in liq), Re [1995] Ch 241, [1995] 3 WLR 1, CA.

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R v Director General of Telecommunications, ex p Cellcom Ltd [1999] ECC 314.

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R v Monopolies and Mergers Commission, ex p Argyll Group plc [1986] 2 All ER 257, [1986] 1 WLR 763, CA.

R v Panel on Take-overs and Mergers, ex p Guinness plc [1989] 1 All ER 509, [1990] 1 QB 146, [1989] 2 WLR 863, CA.

R v Secretary of State for Health, ex p London Borough of Hackney (25 April 1994, unreported), DC.

R (on the application of Daly) v Secretary of State for the Home Dept [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532, [2001] 2 WLR 1622.

R (on the application of London and Continental Stations and Property Ltd) v Rail Regulator [2003] EWHC 2607 (Admin), [2003] All ER (D) 88 (Nov).

R (on the application of T-Mobile (UK) Ltd) v Competition Commission [2003] EWHC 1566 (Admin), [2003] All ER (D) 377 (Jun).

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Cases referred to in skeleton arguments

Doody v Secretary of State for the Home Dept [1993] 3 All ER 92, sub nom *R v Secretary of State for the Home Dept, ex p Doody* [1994] 1 AC 531, [1993] 3 WLR 154, HL.

Edinburgh City Council v Secretary of State for Scotland [1998] 1 All ER 174, [1997] 1 WLR 1447, HL.

Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading [2002] EWCA Civ 796, [2002] 4 All ER 376.

Pepper (Inspector of Taxes) v Hart [1993] 1 All ER 42, [1993] AC 593, [1992] 3 WLR 1032, HL.

R (Association of British Civilian Internees: Far East Region) v Secretary of State of Defence [2003] EWCA Civ 473, [2003] QB 1397, [2003] 3 WLR 80.

R (on the application of Alconbury Developments) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23, [2001] 2 All ER 929, [2003] 2 AC 295, [2001] 2 WLR 1389.

R (on the application of Khatun) v Newham London BC [2004] EWCA Civ 55, [2004] 3 WLR 417.

R (on the application of London and Continental Stations and Property Ltd) v Rail Regulator [2003] EWHC 2607 (Admin), [2003] All ER (D) 88 (Nov).

R (on the application of Mahmood) v Secretary of State for the Home Dept [2001] 2 FCR 63, [2001] 1 WLR 840, CA.

R (on the application of Westminster City Council) v National Asylum Support Service [2002] UKHL 38, [2002] 4 All ER 654, [2002] 1 WLR 2956.

R v Independent Television Commission, ex p TSW Broadcasting Ltd [1996] EMLR 291, HL.

R v IRC, ex p Taylor [1989] 1 All ER 906, CA.

R v Secretary of State for the Dept of the Environment, ex p Islington London BC [1991] CA Transcript 761.

R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd [2001] 1 All ER 195, [2001] 2 AC 349, [2001] 2 WLR 15, HL.

Save Britain's Heritage v Secretary of State for the Environment [1991] 2 All ER 10, sub nom *Save Britain's Heritage v Number 1 Poultry Ltd* [1991] 1 WLR 153, HL.

Savoy Hotel Ltd, Re [1981] 3 All ER 646, [1981] Ch 351, [1981] 3 WLR 441.

Appeal

The Office of Fair Trading, iSoft Group plc and Torex plc appealed, with the permission of the Competition Appeal Tribunal, under s 120(6) of the Enterprise Act 2002, from the decision of the tribunal (Sir Christopher Bellamy, P Clayton and A Scott) on 3 December 2002 ([2003] CAT 27, [2003] All ER (D) 77 Dec) made on the application of IBA Healthcare Ltd (i) quashing the decision of the OFT dated 6 November 2003 not to refer a proposed merger between iSoft and Torex to the Competition Commission; and (ii) referring the matter back to the OFT for reconsideration. Torex did not appear on the appeal. The facts are set out in the judgment of Sir Andrew Morritt V-C.

Peter Roth QC and *Daniel Beard* (instructed by the *Treasury Solicitor*) for the OFT.
David Anderson QC and *Kelyn Bacon* (instructed by *Ashurst Morris Crisp*) for iSoft.
Nicholas Green QC and *Aidan Robertson* (instructed by *Macfarlanes*) for IBA.

Cur adv vult

19 February 2004. The following judgments were delivered.

SIR ANDREW MORRITT V-C.

INTRODUCTION

[1] On 23 July 2003 iSoft Group plc (iSoft) offered to acquire the issued share capital in Torex plc (Torex) in exchange for iSoft shares. Both iSoft and Torex were and are engaged in the supply of software and systems to the healthcare applications market on such a scale that the offer, if accepted, would lead to a relevant merger situation as defined in s 23 of the Enterprise Act 2002 which had come into force on 20 June 2003. The offer was notified to the Office of Fair Trading (the OFT) by iSoft on 1 August 2003. On 15 August 2003 IBA Healthcare Ltd (IBA), a company incorporated in the State of Victoria, Australia and also engaged in the same market complained to the OFT about the effect of the anticipated merger.

[2] Section 33(1) of the 2002 Act provides:

a 'The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that—(a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United b Kingdom for goods or services.'

[3] The OFT initiated an investigation. It is not and never has been disputed that the terms of s 33(1)(a) are satisfied. On 30 September 2003 the OFT sent to iSoft and Torex, but not IBA or any other third party, what is called an 'issues letter' (the issues letter). It set out what were described as hypotheses, which did c not necessarily represent the views of the OFT, all of which tended to demonstrate that s 33(1)(b) was satisfied too. On 3 October 2003 officials of the OFT met representatives of iSoft and Torex. On 6 October 2003 the OFT received written submissions from solicitors acting for iSoft and Torex. They relied, amongst other considerations, on the effect of the National Programme d for IT (NPfIT). NPfIT is a new regime, proposed by the Department of Health in June 2002, to update IT systems as used in the National Health Service (NHS) in England. It will provide for cross-referencing of patients' records by creating a complete electronic medical record for each patient across all NHS providers in England.

[4] In its written decision dated 6 November 2003 the OFT concluded that e whilst the strong base of installed systems might give the parties a large market presence it was unlikely, in itself, to confer significant market power in view of the changes being brought about by the NPfIT. The OFT considered that such a fundamental change had altered the future competitive landscape so that competitive constraints must be viewed under a new scenario. It added:

f '... OFT does not believe that it is or may be the case that, if carried into effect, the creation of this relevant merger situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods and services.'

g Accordingly the OFT did not refer the proposed merger to the Competition Commission.

[5] IBA was dissatisfied with this conclusion. On 21 November 2003 it applied to the Competition Appeal Tribunal (the CAT) under s 120 of the 2002 Act for a review of the decision of the OFT. Section 120(4) of the 2002 Act requires the h CAT in determining such an application to 'apply the same principles as would be applied by a court on an application for judicial review'.

[6] The application was heard and determined by the CAT with commendable speed. In their judgment dated 3 December 2003 ([2003] CAT 27) the CAT described in detail the basis on which they concluded that they should j quash the decision of the OFT and refer the matter back to it for reconsideration. That basis was summarised in these terms (at para 266):

'... we are not satisfied that the OFT applied the right test, or that the OFT reached a conclusion that was reasonably open to them. We are not satisfied that the facts are sufficiently found in the decision or that all material considerations have been taken into account. We are unable to verify

whether there was material on which the OFT could reasonably base important findings in the decision.' a

[7] The OFT, iSoft and Torex (collectively 'the appellants') now appeal to this court, with the permission of the CAT, under s 120(6) of the 2002 Act. Such an appeal lies on a point of law only. The points of law are: (1) whether the CAT correctly interpreted and applied s 33(1) of the 2002 Act; and (2) whether the CAT properly applied the principles of judicial review as required by s 120(4) of the 2002 Act. Before dealing with either of those issues it is necessary to describe the relevant facts and the statutory background and framework in some detail. b

THE FACTS c

[8] iSoft provides software systems to hospitals and other healthcare providers in the United Kingdom. Between 1999 and 2002 it acquired a number of businesses in the healthcare sector. In the year to 30 April 2003 it had a worldwide turnover of £91·5m of which £74m represented sales in the United Kingdom and other EU states. Torex is concerned in both the primary, ie GPs, and the secondary, ie hospitals, healthcare sectors. It provides both software and systems and hardware, including installation and support. In the year to 31 December 2002 its worldwide turnover was £161·8m of which £65·6m was in respect of healthcare technology sales in the United Kingdom and the Republic of Ireland and £41·8m for retail sales of software and systems in the United Kingdom, the Republic of Ireland and other parts of Europe. d e

[9] The principal software systems supplied by iSoft and Torex to the secondary healthcare sector, that is to hospitals, are electronic patient records (EPRs) and laboratory information management systems (LIMS). The OFT recorded that the combined share of iSoft and Torex in respect of such systems as are installed in United Kingdom hospitals, described as 'legacy', is 44% of EPRs and 66% of LIMS. It described iSoft and Torex as— f

'key suppliers in each country of the United Kingdom, particularly in the supply of LIMS (where in Scotland and Wales, their legacy systems will account for 100% of the installed base) ...' g

and 'clearly the two leading suppliers of IT software to the healthcare sector in the United Kingdom'.

[10] Formerly such systems were bought by hospitals or their strategic health authorities on an individual basis as and when required. Consequently the NHS had many different installed IT systems thereby giving rise to problems of compatibility. In the summer of 2002 the Department of Health proposed the new regime now known as NPfIT. This will allow for cross-referencing of patients' records by the creation of a complete medical record for each patient across all NHS providers in England. National projects will create a national spine of archived records and introduce an electronic system for appointments. The proposal envisaged the creation in England of five regions with a single local service provider (LSP) as project manager to oversee the implementation of NPfIT. LSPs and their preferred application providers, known as PAPs, are to be appointed by the Department of Health. They will be responsible for developing and managing the transition from legacy systems to the new systems. The OFT described the consequence as a fundamental change to the procurement process, h j

significantly reducing the number whilst increasing the size of contracts available in England.

[11] The first phase of NPfIT was announced by the Department of Health in January 2003. It involved funding of £2·3bn spread over three years. In February 2003 the department invited applications from those who wished to be considered as a LSP. Initially Torex applied but, on 30 June 2003, withdrew its application. In May 2003 the output based specification (OBS) for the integrated care record service (ICRS) was issued. It was revised in August 2003. It contained a number of passages in which the importance of legacy systems and their continued use is emphasised. Thus para 980 is headed 'Legacy Management'. Paragraph 980.2 deals with the continuation of legacy systems. Paragraph 980.2.2 requires LSPs who assume responsibility for a legacy system to continue the same level of service. If legacy systems are to be replaced then detailed migration plans are required to be produced for approval (para 980.4). One of the assumptions is that 'existing infrastructure/services will be used wherever possible in order to minimise duplication and enable earlier implementation of the IRCS'.

[12] At the commencement of its investigation the OFT invited comments from third parties and got them from 30 interested parties, including representatives of the purchasing departments of the national health authorities. As I have already indicated the issues letter was sent to the merger parties on 30 September 2003. It set out what were described as main background assumptions with regard to EPRs and LIMS.

[13] On the basis of those assumptions the letter set out nine competition concerns. It described them as hypotheses which the OFT was still in the course of evaluating. They may be summarised as: (1) the proposed merger would result in the loss of direct bidding competition between iSoft and Torex, which, since 1998, had occurred on 21 out of 39 EPR contracts and 16 of 31 LIMS contracts; (2) though Torex had not won a relevant contract in the previous three years its updated and extended product range as well as its strong installed or legacy base would enable it to be an active competitor in the future; (3) iSoft and Torex would between them hold more than 50% of the installed base of EPRs and LIMS thereby giving rise to a significant structural change and substantial lessening of competition in the market because of the smallness of the next competitor and the significant advantages in market coverage and potential incumbency the merged company would enjoy; (4) as the EPR and LIMS systems were specific to the United Kingdom and conversion of foreign systems would be expensive there were high barriers to the entry on the United Kingdom market of foreign competition; (5) it was unclear whether the existing competitors in the market could provide competition to the merged company given their current lack of success in winning contracts; (6) it might be difficult for an LSP to exercise buyer power with respect to the larger contracts to be expected under NPfIT in view of the existence of the PAPs; (7) the broader product range of the merged company might encourage 'one stop shopping' by NHS hospitals; (8) it is inappropriate to judge the effects of the proposed merger only by reference to the NPfIT programme as such programme covers only England, will not exclude purchases by individual hospitals and is uncertain both as to timing and effect; (9) iSoft and Torex are key suppliers of EPRs and LIMS to the NHS but, if the merger proceeds, will not compete with each other in the development and supply of new and improved systems. The letter concluded by inviting the parties to put forward any evidence they wished on any of those issues and to

consider appropriate undertakings to remedy the potential competition concerns.

[14] As I have indicated these issues were considered by representatives of iSoft and Torex with officials of the OFT at a meeting held on 3 October 2003. This was followed by detailed submissions in writing sent to the OFT by the solicitors for iSoft and Torex on 6 October 2003. The OFT also had the benefit of the answers given by IBA on 7 October 2003 to certain questions it was asked by the OFT. These materials were considered by the OFT at an internal meeting held on 8 October 2003 at which the relevant decision was reached.

[15] The decision was put into writing and is dated 6 November 2003. In paras 1–13 the OFT described the parties, the proposed merger, the changes to be made by NPfIT, the product market and the geographic market. Paragraphs 14 and 15 contain what is described as the 'Competition Assessment'. They are in the following terms:

> '14. The main suppliers of secondary healthcare software currently installed in United Kingdom hospitals are iSOFT, Torex/IBA, McKesson and Siemens. The parties' share of installed ("legacy") systems is significant, with the parties supplying 44% of EPRs and 56% of LIMS to the United Kingdom public sector. They are key suppliers in each country of the United Kingdom, particularly in the supply of LIMS (where in Scotland and Wales, their legacy systems will account for 100% of the installed base). The pace of innovation in healthcare IT systems and changes to the procurement process suggest, however, that the installed base is not the best guide as to whether the parties will have market power in the future.
>
> 15. Since most public sector contracts are awarded following a competitive tender, a better measure of potential market power may be the parties' success in winning competitive bids in the past few years. While the existence of an installed base may give incumbent bidders reputational or informational advantages in bidding for new contracts, if the system required is substantially different from existing systems these advantages are unlikely to be significant. The presence of other bidders should act as a competitive constraint on the parties as they bid for new contracts, requiring them to put forward innovative solutions at competitive prices.'

[16] In paras 16–18 the OFT dealt with the effect of NPfIT. They pointed out that NPfIT had attracted bids from two major United States companies. They had been selected as PAPs by several of the short-listed LSPs. Consequently the installed or legacy base of other suppliers would be displaced to that extent. The OFT considered it to be uncertain whether individual NHS trusts would have the funds to enable them to acquire systems outside NPfIT but that if they did the value of such purchases would be small. The OFT noted that iSoft's EPR system had been selected by half of the short-listed LSPs but that no LSP had selected any system of Torex. Further, though over the previous three years Torex had been short-listed as the preferred supplier on a number of occasions and selected on three of them, none of them proceeded because they were incompatible with NPfIT. The OFT also noted that if contracts were awarded to the two competitors from the United States for their integrated systems, modular systems such as those supplied by iSoft and Torex would be excluded.

[17] In paras 19 and 20 the OFT considered barriers to entry. Although they might be expected to be high the OFT pointed out that the significant amounts provided by the Treasury for NPfIT had in fact attracted bids from the two

United States competitors. They thought that the presence of such suppliers in the market would have a knock-on effect on the market outside NPfIT, namely £850m pa in England, £25m in both Northern Ireland and Wales and £125m in Scotland and provide opportunities for smaller suppliers with innovative solutions.

[18] In paras 21–23 the OFT considered buyer power and thought that it would be increased as it would be concentrated in the hands of five LSPs rather than 177 NHS trusts. In para 24 the OFT pointed out that there were none of the difficulties usually associated with a vertical merger. In paras 25–28 the OFT noted the concerns of a number of third parties. Generally the third parties considered that the merger would lead to a substantial lessening of competition because the merger parties had both knowledge of existing systems and a broader portfolio of products, in particular they were concerned at the effect of the 'bundling' of products. IBA was concerned at the high market share of the merged company. Several hospitals were worried that they would be encouraged to abandon existing and useful systems in order to adopt the new ones at an increased cost. Except for Northern Ireland, the national health authorities were unconcerned because, in their view, there was sufficient competition.

[19] The assessment and conclusion of the OFT contained in paras 29–34 is in the following terms:

> '29. In terms of their legacy contracts to the United Kingdom public sector, iSOFT and Torex are clearly the two leading suppliers of IT software to the healthcare sector in the United Kingdom. In a bidding market, competition is *for* the market rather than *in* the market so that the competitive advantage acquired from the legacy base is unlikely to be strong, especially where a new procurement strategy is being introduced.
>
> 30. The NPfIT has created five LSP regions, and bidders for the five regions have pre-selected their preferred sub-contractors. Torex's products have not been selected (although in line with its claim that its strengths lie in this area it has been selected as a service provider providing support and installation services) (see note 3) [not reproduced]. Absent the merger, this means that Torex is likely to face significantly reduced opportunities to sell its products (or those of IBA) to hospital users in England. Expenditure elsewhere in the United Kingdom is significantly lower and may not justify the costs involved in updating Torex's existing portfolio of products.
>
> 31. The NPfIT is a high profile strategy, supported by government, which gives effect to a commitment to increase spending on updating IT healthcare systems in England. The increase in funding has attracted international LSP bids from well known and established global companies and has allowed for partnerships between the LSPs and United States IT healthcare providers, Cerner and IDX, as well as iSOFT. The presence of these international competitors makes it likely that competition for future contracts will remain active. There is a reasonable prospect that international competitors with a United Kingdom base will bid for contracts in the regions with the likely effect of increased competition for contracts in Northern Ireland, Scotland and Wales.
>
> CONCLUSION
>
> 32. iSOFT and Torex have been the two leading suppliers of IT software to the healthcare sector in the United Kingdom. While a strong legacy base

may give the parties a large presence it is unlikely, in itself, to confer significant market power in view of the changes being brought about by the NPfIT. Such a fundamental change has altered the future competitive landscape with the effect that competitive constraints must be viewed under a new scenario.

33. For these reasons, the OFT does not believe that it is or may be the case that, if carried into effect, the creation of this relevant merger situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods and services.

DECISION

34. This merger will therefore not be referred to the Competition Commission under s 33(1) of the Act.'

[20] As I have already indicated the application of IBA to the CAT for a review of that decision was successful. The CAT remitted the matter to the OFT for reconsideration in the light of the CAT's decision. The OFT, iSoft and Torex applied for permission to appeal. This was granted on 18 December 2003 for reasons given by the CAT in a further detailed judgment. There was some issue as to whether we could or should have regard to CAT's explanations in that judgment of what they intended by statements in their first judgment. I see no reason why we should not, but, as will be seen I have not found it necessary to do so. For completeness I should record that the merger was completed on 23 December 2003 and undertakings were then given by iSoft under s 71 of the 2002 Act. We were told that the OFT has completed its reconsideration and is now in a position to give its revised decision. It will not do so pending a decision of this court. We were also told that some 31 cases are pending 3 or 4 of which are likely to be affected by our conclusion.

THE STATUTORY BACKGROUND AND FRAMEWORK

[21] Part 3 of the 2002 Act superseded Pt V of the Fair Trading Act 1973. Under the 1973 Act the Secretary of State might refer a merger situation to the Monopolies and Mergers Commission 'where it appears to him that it is or may be the fact that' two or more relevant enterprises had ceased to exist with three alternative consequences (s 64). In that event the commission investigated and reported to the Secretary of State whether a merger situation, as defined, had been created and if so, whether it would or might be expected to operate against the public interest (s 69). Matters to which the commission was to have regard in considering questions of public interest were enumerated in s 84. The Secretary of State might exercise his powers to remedy any adverse effect disclosed by a report of the commission (s 73). A power was conferred on the Secretary of State by s 75 in the case of an anticipated merger similar to that conferred by s 64 in the case of an actual merger and with the same consequences. By s 76 it was the function of the Director General of Fair Trading to keep himself informed about actual or prospective mergers and to make recommendations to the Secretary of State as to the action he should take.

[22] Thus the Secretary of State had the power to make a reference to the commission for investigation but was under no duty to do so. The statutory test was whether the merger might be expected to operate against the public interest though, in practice, references were made on competition grounds. The commission had no power to prohibit the merger or remedy its consequences, only the Secretary of State might do so. The function of the Director General of

Fair Trading was, in the relevant respects, advisory only. In each of those respects the 2002 Act made important changes.

[23] First, the decision whether or not the commission should investigate a completed or anticipated merger is to be made by the OFT. Second, the responsibility is cast on the OFT by means of a statutory duty, as opposed to a statutory power or discretion, in the case of actual mergers by s 22 of the 2002 Act and in the case of anticipated mergers by s 33. Section 22 is, mutatis mutandis, in the same terms as s 33. I have quoted s 33(1) in [2], above and need not repeat it. However the duties imposed by ss 22(1) and 33(1) are in each case subject to sub-ss (2) and (3). Subsection (2) entitles the OFT not to make a reference 'if it believes that' the relevant markets are not sufficiently important, in the case of an anticipated merger the arrangements are not sufficiently far advanced and in both cases any relevant customer benefits, as defined in s 30, outweigh the substantial lessening of competition arising from the merger. Subsection (3) precludes any reference if, inter alia, the OFT is considering whether to accept undertakings under s 73 instead.

[24] Sections 35 and 36 set out the questions to be decided by the commission in relation to, respectively, completed and anticipated mergers. Again, mutatis mutandis, they are the same so that I need only quote the questions posed by s 36(1). They are—

> '(a) whether arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and (b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services.'

[25] Section 42 confers power on the Secretary of State to intervene in certain public interest cases. Subsections (1)(a) and (2) provide a contrast between two alternative legislative formulae. The first imposes the condition that 'the Secretary of State has reasonable grounds for suspecting that ...'. The second applies 'if [the Secretary of State] believes that it is or may be the case that ...'. If the Secretary of State has intervened under s 42 then by s 44(2) the OFT is required to report to the Secretary of State in relation to the case. By s 44(4) the report is required to include decisions as to—

> 'whether the OFT believes that it is, or may be, the case that—[(a) a relevant merger situation has been or will be created] (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods and services ...'

By s 45(2) power is given to the Secretary of State if he has given an intervention notice and received a report from the OFT to make a reference to the commission—

> 'if he believes that it is or may be the case that—(a) a relevant merger situation has been created; (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services; [(c) and

(d) there is a relevant public interest consideration and on balance the merger would be against the public interest].' a

[26] By s 73(2), if the OFT considers that it is under a duty to make a reference under ss 22 or 33 it may instead accept undertakings from the parties 'for the purpose of remedying, mitigating or preventing the substantial lessening of competition concerned'. Section 103 requires the OFT in deciding whether to make a reference under ss 22 or 33 to have regard with a view to the prevention or removal of uncertainty to the need to make its decision as soon as is reasonably practicable. Section 104 obliges the OFT, so far as practicable, to consult any person who appears to them likely to be adversely affected by their decision whether or not to make a reference under ss 22 or 33. b

[27] Section 106 obliges the OFT to publish general advice and information 'about the making of references by it under section 22 or 33'. Such advice is to be prepared— c

'with a view to—(a) explaining relevant provisions of this Part to persons who are likely to be affected by them; and (b) indicating how the OFT ... expects such provisions to operate.' d

Such advice may include advice about the factors which the OFT may take into account in considering whether, and if so how, to exercise a function conferred by that part. Clearly such advice cannot control the interpretation of the 2002 Act: that is a matter of law for the court. But, given the duty to provide it, the skill and experience of those required to do so and the purpose for which it is to be provided, the court should, in my view, treat with caution any suggestion that the 2002 Act should be interpreted in a sense contrary to such advice. Section 107(1) requires the OFT to publish, inter alia, any decision made by it not to make a reference under s 33. Such obligation includes the obligation also to 'publish [OFT's] reasons for the ... decision' (s 107(4)). e f

[28] Section 120(1) enables any person aggrieved by a decision of, inter alia, the OFT in connection with a possible reference to apply to the CAT 'for a review of that decision'. Subsection (4) provides:

'In determining such an application the Competition Appeal Tribunal shall apply the same principles as would be applied by a court on an application for judicial review.' g

An appeal lies from a decision of the CAT to the Court of Appeal 'on any point of law arising' from that decision (sub-s (6)). h

[29] I should also note the power conferred on the OFT by s 131 to make a market investigation reference. In this case the power is exercisable 'if the OFT has reasonable grounds for suspecting' the relevant matters. Section 154 authorises the OFT to accept undertakings for the purpose of remedying, mitigating or preventing any adverse effect on competition instead of making a reference under s 131. But in that event s 139 entitles the Secretary of State to intervene by notice to the OFT if, inter alia, he 'believes that it is or may be the case that one or more than one public interest consideration is relevant to the case'. If the Secretary of State gives such a notice then s 150(1) precludes the OFT accepting undertakings without the consent of the Secretary of State. Section 150(2) provides that the Secretary of State shall not withhold his consent j

'if he believes that it is or may be the case that the proposed undertaking will, if accepted, operate against the public interest'.

[30] In May 2003 the OFT published guidance (the 'Mergers: Substantive assessment guidance'), as required by s 106 of the 2002 Act, to companies and their advisers on the criteria applied by the OFT when considering whether to refer a merger to the commission for further investigation. In para 1.4 it is claimed that the guidance represents the policy and practice of the OFT 'reflecting current legal and economic thinking'. Paragraph 3.2 is in the following terms:

> 'The test for reference will be met if the OFT has a reasonably held belief that, on the basis of the evidence available to it, there is at least a significant prospect that a merger may be expected to lessen competition substantially. The OFT considers that this threshold is the same as that against which (1973 Act) reference advices were prepared. It differs from that used by the CC (Competition Commission) in its merger enquiries, reflecting the fact that the OFT is a first-phase screen while the CC is determinative: hence, the test for making a merger reference is lower than the CC's test for deciding that a merger may be expected to substantially lessen competition.'

Paragraphs 8.3 and 8.4 indicate the view of the OFT that undertakings in lieu of a reference authorised by s 73 are only appropriate in cases where both the substantial lessening of competition and the requisite remedy are clear-cut.

DID THE CAT CORRECTLY INTERPRET AND APPLY S 33(1) OF THE 2002 ACT?

[31] In their careful and comprehensive judgment the CAT set out the background and the statutory framework of the 2002 Act in detail. In para 63 in the section dealing with the statutory framework the CAT expressed the view that a key issue in the case is the intended balance between the two-stage procedure, that is a reference by the OFT and an investigation by the commission. The CAT then described the procedure followed by the OFT in this case, the OFT's decision and the arguments for the parties. The CAT's own analysis starts at para 168 by posing the question whether the OFT was presented with a real question as to whether it is or may be the fact that the iSoft/Torex merger may be expected to lead to a substantial lessening of competition. If the answer was in the negative then no reference would be made and the question of the interpretation of s 33 would not arise. The CAT considered that the answer was in the affirmative largely for the reasons set out in the issues letter which I have summarised in [13], above.

[32] The CAT dealt with the interpretation of s 33(1) in paras 178–214. They divided the subsection into three elements, namely 'the OFT believes', 'that it is or may be the case' and 'may be expected to result'. They considered (at paras 182 and 183) that the last of those elements indicated a more than 50% chance. In respect of the first element they assumed (at paras 184–188) that the belief is not subjective but must be held on reasonable grounds which presupposes a sufficient investigation. The CAT contrasted the belief of the OFT under s 33(1) with the decision of the commission under s 36(1). They considered that 'the role of the OFT is primarily that of a first screen, to identify where competition issues *may* arise'.

[33] They described (at para 189) the remaining element 'it is or *may be* the case' as 'the double may' and considered that it was central to the appeal. Their

reasoning and conclusion on that issue is set out in paras 190–198 which, in fairness to the CAT, I must quote in full. The CAT said: a

'190. The use of the word "may" in the second line of s 33(1) seems to us to signify that, even if those responsible at the OFT are themselves of the view that a merger may not be expected to result in a substantial lessening of competition, it still "may be the case", within the meaning of s 33(1), that the b merger may be expected to lead to a substantial lessening of competition, if there is, in fact, an alternative credible view that cannot be reasonably rejected by the OFT on the basis of a "first screen".

191. In other words, putting the matter less technically, if there is genuinely "room for two views" on the question whether there is at least a significant prospect that the merger may be expected to lead to a substantial c lessening of competition, then in our opinion the requirement in s 33(1) that "it may be the case" that ... [the merger] may be expected to lead to a substantial lessening of competition, is satisfied.

192. In our opinion, in such circumstances, the statutory duty of the OFT under s 33(1) is not to decide, definitively, which of those two views, it, the d OFT, prefers. Under the scheme of the Act, the definitive decision-maker, in a case where there is room for two views, is not the OFT but the commission. If there is room for two views, the statutory duty of the OFT is to refer the matter to the commission, whose duty is to *decide* on the question whether the merger may be expected to lead to a substantial lessening of competition, as s 36(1) expressly provides. e

193. When we refer to the possibility of there being "room for two views" in a given case, we do not envisage a case in which the alternative view is merely fanciful, or far-fetched. We envisage a case in which the alternative view is credible. It must be a view which cannot be confidently dismissed on the basis of a "first screen" investigation. f

194. There is also in our view a certain asymmetry under s 33(1) between the situation which arises when the OFT makes a reference, and the situation which arises when the OFT decides not to do so. Even in a case where a substantial lessening of competition seems a likely outcome, in *making* a reference the OFT does not *decide* whether, in fact, a substantial lessening of competition may be expected. The OFT simply "believes" that such "may g be the case", without prejudging or pre-empting the commission's investigation.

195. Where, however, the situation is the other way round, and the OFT decides *not* to make a reference it is deciding that the merger does not even reach the threshold of "it *may* be the case". In other words in such h circumstances the OFT decides that the merger does not even reach "the grey area" where there may be room for more than one view. In its practical effect, a decision not to make a reference effectively decides the issue of substantial lessening of competition in the negative. It not only prejudges, but also excludes, any further investigation by the commission. j

196. In the vast majority of cases no practical consequences arise from this asymmetry. An initial search by the tribunal showed 56 published merger cases considered by the OFT under the Act, of which 21 did not qualify and 31 were cleared in short, clear decisions. Similarly, in the decisions made to refer (such as *Unum/Swiss Life* and *P&O/Stena*) the OFT shows shortly and clearly why the OFT felt that it was under a duty to refer.

197. What is the correct approach in cases in the "grey area" in between? In a case where real issues as to the substantial lessening of competition potentially arise, it seems to us that the words "it may be the case" imply a two-part test. In our view, the decision-maker(s) at the OFT must satisfy themselves (i) that as far as the OFT is concerned there is no significant prospect of a substantial lessening of competition and (ii) there is no significant prospect of an alternative view being taken in the context of a fuller investigation by the commission. These two elements may resemble two sides of the same coin, but in our view they are analytically distinct.

198. It is, as we have said, implicit that the OFT in any event must have sufficient material to support its view. It also seems to us implicit in the second limb of the test that the OFT must be able reasonably to discount the possibility of the Competition Commission coming to a different view after a more in-depth investigation. It must be borne in mind throughout that the role of the OFT under the Act is "a first screen".' (The CAT's emphases.)

[34] The CAT applied the test it formulated in para 197 in paras 228, 232 and 233 in the following terms:

'228. Secondly, on the proper construction of s 33(1), and in particular the words "it may be the case", the OFT had to satisfy itself not only (i) that in its own mind there was no significant prospect of a substantial lessening of competition, but also (ii) there was no significant prospect of the Competition Commission reaching an alternative view on the basis of a fuller investigation ...

232. In this case, the tribunal is unable to be satisfied, on the material before it, that the OFT asked itself the right question, namely whether the OFT was satisfied *not only* that there was no significant prospect of a substantial lessening of competition, *but also* that there was no significant prospect of the Competition Commission reaching an alternative view after a fuller investigation. There is no indication in the decision that the OFT considered the second limb of that test.

233. In the tribunal's view, the tenor of the decision read as a whole is that the OFT decided that the effect of the NPfIT was to rebut the inference of a substantial lessening of competition resulting from the increase in market share of the parties following the merger. In other words, the OFT's approach was to seek to decide which of two plausible views the OFT preferred, rather than adopting the correct approach, namely to ask whether there were, reasonably, two views which could be taken. By failing to ask itself that latter question, the OFT failed correctly to ask itself whether "it may be the case" that the merger may be expected to result in a substantial lessening of competition within the meaning of s 33(1).' (The CAT's emphases.)

[35] The OFT accepts that if the test formulated by the CAT is correct then the OFT's decision cannot stand because they did not apply the second part of it. The OFT contends that the CAT's formulation is wrong. They submit that it is inconsistent with the wording of s 33(1) both when read alone and in the context of other parts of the 2002 Act, is impracticable and contrary to the evident intention of Parliament. The test for which the OFT contends is that set out in para 3.2 of their guidance quoted in [30], above.

[36] iSoft and Torex also contend that the CAT was wrong but they do not support the test propounded by the OFT in para 3.2 of their guidance. They object, in particular, that too low a degree of likelihood is implicit in the word 'may' being reformulated as 'a significant prospect that'. But they contend that there is no justification for importing the two-part test which the CAT favoured in either the wording of s 33 or the context of the 2002 Act as a whole. The formulation on which they rely is that of Donaldson MR in *R v Monopolies and Mergers Commission, ex p Argyll Group plc* [1986] 2 All ER 257 at 262, [1986] 1 WLR 763 at 769, 'knows or suspects'.

[37] IBA seeks to uphold the test as formulated by the CAT substantially for the reasons the CAT gave. Thus IBA points to the different roles of the OFT and the commission. It describes that of the OFT as secondary. It points out that the commission's powers of investigation are far greater than those of the OFT and that the ultimate decision is for the commission not the OFT. In its written argument IBA submits:

> 'The second use of the word "may" in s 33, together with the context in which s 33 operates, (as descriptive of the test of a first phase assessor) led the CAT to express its conclusions, derived from an analysis of the statutory language, in broader and less technical terms. Accordingly, in para 191 the CAT adopts the perfectly sensible "room for two views" test. This formulation or pithy encapsulation of the statutory test fits neatly and accurately into the statutory framework. It has explained that this alternative second view must be a credible view and one which the Competition Commission could reasonably adopt. When such a case arises the OFT must refer. This, it is submitted, is entirely logical and consistent with the statutory language.'

In oral argument counsel for IBA accepted that there was a problem of expression, as he described it, with para 197 of the judgment of the CAT. He supported a single test.

[38] I have no hesitation in preferring the submissions of the appellants on this issue. The statutory test, so far as relevant, imposed by s 33(1) is whether 'OFT believes that it is or may be the case that [the merger] may be expected to result in a substantial lessening of competition ...'. Thus the relevant belief is that the merger may be expected to result in a substantial lessening of competition, not that the commission may in due course decide that the merger may be expected to result in a substantial lessening of competition. Further, the body which is to hold that belief is the OFT not the commission.

[39] If the test as formulated by the CAT is right then, for the reasons advanced by counsel for the OFT, other comparable provisions in the 2002 Act become unworkable if the OFT does not hold the requisite belief but considers that the commission may. Thus, unless the OFT itself holds the relevant belief it cannot conduct the balancing exercise required by s 33(2)(c). And if the OFT does not hold the relevant belief it has no power to accept undertakings in lieu as provided for in s 73 and so could not refuse to make a reference as permitted by s 33(3)(b).

[40] Similar problems would arise in connection with the interventions by the Secretary of State as permitted by s 42. I have set out the relevant provisions in [25], above. Not only does s 42 point a clear contrast between a belief and a suspicion but the jurisdiction of the Secretary of State to make a reference to the

commission under s 45 depends on the OFT holding the relevant belief and expressing it in its report under s 44. It would be absurd if the jurisdiction of the Secretary of State to make a reference to the commission should depend on the belief of the OFT as to what the commission might decide.

[41] In [29], above I have summarised provisions relating to market investigation references. These provisions also point to the contrast between a belief and a suspicion. Whether or not the Secretary of State gives his consent under s 150(2) must depend on his own belief, not that of others. It would be contrary to the statutory test if the Secretary of State had to consent notwithstanding that he did not himself believe the relevant fact but could not dismiss as fanciful an alternative view that others might hold.

[42] For all these reasons I would reject the two-part test formulated by the CAT in para 197 of their judgment and applied in paras 228 and 232. Accordingly it is not necessary to consider, assuming it would be permissible to do so, whether the test suggested by the CAT would lead to more references, nor whether it would be contrary to certain parliamentary statements. However it is necessary to go further and reach a conclusion on what is the right test in order to deal with the other grounds, summarised in para 266 of the judgment of the CAT quoted in [6], above, on which the CAT concluded that the decision of the OFT should be quashed.

THE TEST TO BE APPLIED UNDER s 33(1)

[43] The short (and correct) answer to the question is that the test to be applied is that stated in s 33(1). The words are ordinary English words; they should be applied in accordance with their ordinary meaning; the court should not substitute other words for those used by Parliament nor paraphrase nor gloss them. Nevertheless in view of the evident importance of the test and the range of meaning the word 'may' can connote it may help to explain the statutory test by reference to a series of propositions.

[44] First, it is apparent from s 33(1) and the contrast between belief and suspicion demonstrated in ss 42 and 131 that it is necessary for the OFT to form the relevant belief. Thus some form of mental assent is required as opposed to the less positive frame of mind connoted by a suspicion. As pointed out in the *Shorter Oxford English Dictionary* (3rd edn, 1944) vol II, p 2205 a suspicion is but a 'slight belief'. In *Ex p Argyll Group plc* [1986] 2 All ER 257 at 261–262, [1986] 1 WLR 763 at 769 Donaldson MR recast in what he described as simpler language the provision in s 75 of the 1973 Act empowering the Secretary of State to make a merger reference to the commission—

> 'where it appears to him that it is or may be the fact that arrangements are in progress or contemplation which, if carried into effect, will result in the creation of a merger situation qualifying for investigation.'

The test he adopted was that the Secretary of State might make a merger reference 'if he knows or suspects' that a merger qualifying for investigation has been created or is in contemplation. In my view the slightly different wording of s 33(1) and the different context of the 2002 Act, in particular the imposition of a duty rather than the conferment of a power and the distinction drawn in ss 42 and 131, do not warrant paraphrasing 'believes ... it ... may be the case that' as 'or suspects'.

[45] Second, the belief must be reasonable and objectively justified by relevant facts. In *Secretary of State for Education and Science v Metropolitan Borough of*

Tameside [1976] 3 All ER 665, [1977] AC 1014 the question was whether the Secretary of State 'is satisfied'. Lord Wilberforce pointed out ([1976] 3 All ER 665 at 681–682, [1977] AC 1014 at 1047) that— a

> 'This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not b think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must enquire whether those facts exist, and have been taken into account, whether the judgment has been made on a proper self direction as to those facts, whether the judgment has not been made on other facts which ought not to have been taken into c account.'

It was not disputed that the belief must be reasonably held as accepted in para 3.2 of the OFT guidance quoted in [30], above.

[46] Third, by themselves, the words 'may be expected to result' in para (b) of d both ss 33(1) and 36(1) involve a degree of likelihood amounting to an expectation. In para 182 of its judgment the CAT expressed the view that these words connoted more than a possibility and adopted what they described as a crude way of expressing the idea of an expectation as a more than 50% chance. No doubt this is right when applied to the single question which the commission is required to answer under s 36(1)(b). e

[47] Fourth, however, the belief that must be held by the OFT under s 33(1) is 'that it is or may be the case that'. This introduces two alternatives, the certainty posed by the word 'is' and the possibility envisaged by the words 'may be'. These alternatives are to be considered in relation to the circumstances set out in paras (a) and (b) combined and imported by reference to 'the case that'. If these f alternatives are applied to the circumstance set out in para (a) and then compared with the question the commission has to answer under s 36(1)(a) if a reference is ordered it is apparent that the degree of likelihood required by the word 'may' is less than that required by the answer to question (a) in s 36(1). The answer in accordance with s 36 will be that the anticipated merger 'will result in the creation of a relevant merger situation' or not as the case may be. The test for g the OFT is only whether the anticipated merger 'may result in a relevant merger situation' or not. This is consistent with the respective functions of the OFT and the commission. The former is a first screen, the latter decides the matter. Accordingly, although the word 'may' appears in the opening phrase of s 33(1) and in para (b) of both ss 33(1) and 36(1) it is clear that the opening phrase h 'believes that it ... may be the case' imports a lower degree of likelihood than para (b) in ss 33(1) or 36(1) would by itself involve. That lower degree of likelihood might, for example, exist in circumstances where the work done by the OFT did not justify any positive view, but left some uncertainty, and where the OFT therefore believed that a substantial lessening of competition might prove j to be likely on further and fuller examination of the position (which could only be undertaken by the Competition Commission).

[48] At the other end of the scale it is clear that the words 'may be the case' exclude the purely fanciful because the OFT acting reasonably is not going to believe that the fanciful may be the case. In between the fanciful and a degree of likelihood less than 50% there is a wide margin in which the OFT is required to

exercise its judgment. I do not consider that it is possible or appropriate to attempt any more exact mathematical formulation of the degree of likelihood which the OFT acting reasonably must require. As Lord Mustill observed in *South Yorkshire Transport Ltd v Monopolies and Mergers Commission* [1993] 1 All ER 289 at 295, [1993] 1 WLR 23 at 29:

> 'The courts have repeatedly warned against the dangers of taking an inherently imprecise word, and by redefining it thrusting on it a spurious degree of precision.'

[49] In para 3.2 of the OFT's published advice the requisite likelihood is described as 'a significant prospect that a merger may be expected to lessen competition substantially'. This substitutes 'significant prospect' for 'may' and is open to criticism on that account. Further I consider that the word 'significant' tends to put the requisite likelihood too far up the scale of probability. With that qualification, I agree with the first and third sentences of that paragraph. It is not necessary to reach any conclusion as to the validity of the observation in the second sentence save to point out the danger of a too ready assumption that nothing has changed.

DID THE CAT PROPERLY APPLY PRINCIPLES OF JUDICIAL REVIEW AS REQUIRED BY S 120(4) OF THE 2002 ACT?

[50] In paras 215–220 the CAT pointed out that applications for judicial review to a court arise in a great variety of circumstances such that in some the court is reluctant to trespass into areas primarily the responsibility of the executive or legislature but in others, such as pure questions of law or procedure, the court will intervene more readily. They pointed to judicial statements in the *Metropolitan Borough of Tameside* case [1976] 3 All ER 665 at 681–682, [1977] AC 1014 at 1047, *R v Secretary of State for Health, ex p London Borough of Hackney* (25 April 1994, unreported) and *R (on the application of Daly) v Secretary of State for the Home Dept* [2001] UKHL 26, [2001] 3 All ER 433, [2001] 2 AC 532 to the effect that the principles of judicial review depend on the context in which they fall to be applied.

[51] But in para 220 the CAT went on to suggest that its constitution by Parliament as a specialist tribunal—

> 'is in contrast to the more normal situation where a non-specialised court is called upon to review the decision of a specialised decision-maker. For that reason we are unpersuaded that there is necessarily a direct "readover" to s 120 from cases such as [*R v Director General of Telecommunications, ex p Cellcom Ltd* [1999] ECC 314, *Interbrew SA v Competition Commission* [2001] EWHC Admin 367, [2001] UKCLR 954, *R (on the application of T-Mobile (UK) Ltd) v Competition Commission* [2003] EWHC 1566 (Admin), [2003] All ER (D) 377 (Jun), and *R (on the application of London and Continental Stations and Property Ltd) v Rail Regulator* [2003] EWHC 2607 (Admin), [2003] All ER (D) 88 (Nov)] that have been cited to us.'

[52] This conclusion was criticised by the appellants on the grounds that s 120(4) clearly required the CAT to apply the same principles 'as would be applied by a court on an application for judicial review'. It was submitted that those principles were well known and, though developed from time to time, applicable to all cases. The appellants recognised that as the circumstances of the cases to which the principles had to be applied are so diverse their application is

dependent on the facts. They pointed out that each of the judicial statements relied on relates to the nature of the body whose decision is being reviewed, not the specialist expertise of the court carrying out the review.

[53] Counsel for IBA accepted that the principles to be applied by the CAT are the ordinary principles of judicial review. In my view he was right to do so. I would accept the submissions of counsel for the appellants that if and in so far as the CAT did not apply the ordinary principles of judicial review as would be applied by a court whether on the ground that the CAT is a specialist tribunal or otherwise then they failed to observe the mandatory requirements of s 120(4). The question is whether it has been shown that the tribunal erred in this respect. The two specific points relied on are: (1) reversal of the burden of proof and (2) failure to apply the *Wednesbury* test of reasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223). I will examine them in turn.

REVERSAL OF THE BURDEN OF PROOF

[54] It is common ground that the legal onus or burden of proof on an application for judicial review rests on the applicant throughout. The CAT made observations which, according to the appellants, indicate that they did not appreciate this cardinal requirement. The relevant statements are:

> '214. If the above analysis is correct, it also seems to us that where there is a real issue as to substantial lessening of competition, the onus is firmly on the OFT to satisfy the tribunal that it had solid, logical and properly reasoned grounds for not complying with its duty to refer under s 33(1). That involves showing with a sufficient degree of certainty that it was entitled to come to the view that even the lower "may be the case" threshold was not met. In other words the OFT must show that it had good grounds for believing that the matter was not even "grey", but "white" ...
>
> 230. Fourthly, in a case such as the present, where there is a real issue as to substantial lessening of competition, the onus is on the OFT to satisfy the tribunal that it applied the right test, and that it had solid, sufficiently certain, and properly reasoned grounds for deciding that the relatively low threshold of "may be the case" under s 33(1), was not met ...
>
> 253. In those circumstances the tribunal is simply not in a position to find that the OFT has discharged the burden of satisfying the tribunal that there was material on the basis of which it could reasonably have come to the conclusion that it did in the decision.'

[55] I do not accept this criticism of the CAT. All three statements were in the context of there being a real issue as to substantial lessening of competition. This had been dealt with by the CAT in paras 168–177. In that section of their judgment the CAT considered whether there was such an issue. If there was not, no question of the belief of the OFT being unreasonably held could arise. In paras 169–174 the CAT said that there obviously was a real issue arising from the combined market shares of iSoft and Torex, the existence of high barriers to entry, the lack of supply side substitutability and the relative smallness of the next competitor. The CAT then observed that it would be difficult to put the matter more cogently than the way it was put by the OFT in the issues letter.

[56] The CAT continued:

'176. None the less the OFT decided, apparently at a decision meeting on 8 October 2003, just over a week after sending the issues letter, that it was under no duty to make a reference to the commission under s 33 of the Act. That decision was taken following a meeting with the parties on 2 October and a submission made by the parties on 6 October. As appears from the decision, the basis of the OFT's conclusion was, in broad terms, that the potential competition concerns did not after all arise, as a result of the countervailing effects of the NPfIT interpreted by the OFT.

177. We are not required to decide, and should not decide under s 120, whether the OFT's decision was correct on its merits. We do, however, have to decide whether the decision was lawful ...'

[57] The concept of a shifting onus is well known, see, for example, 17(1) *Halsbury's Laws* (4th edn reissue) para 420. The onus will fluctuate from time to time in the course of a hearing such that if a prima facie case is made out by a claimant, the onus may shift to the defendant. But the onus which shifts to the defendant is only that unless he can displace the prima facie case by evidence or argument the claimant is likely to discharge the legal onus which rests on him. A good example in the field of judicial review is provided by *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997 to which I refer in [66], below. In my view it is clear beyond doubt that, read in context, this is all the CAT meant. Their comments are readily understandable in the light of the OFT's apparent change of view in the course of a few days. If the hypotheses set out in the issues letter were well founded then the OFT was bound to refer. The CAT was entitled and bound to examine with care why such hypotheses were rejected in so short a time and whether their rejection was justified, particularly in view of the statutory duty to give reasons imposed by s 107. I would reject this criticism.

FAILURE TO APPLY THE *WEDNESBURY* TEST

[58] As is well known '*Wednesbury* unreasonableness' is shorthand for an act or decision which is so unreasonable as to be an act or decision which no person or tribunal properly instructed and taking account of all but only relevant considerations could do or make. The CAT said:

'223. As far as the specific context of a decision by the OFT not to make a reference under s 33(1) is concerned, it seems to us that, unlike *Wednesbury* itself and many leading cases on judicial review, the issue before us does not involve controlling the exercise of a discretion. Hence a test geared to controlling a discretionary power does not seem to be appropriate. The issue before us is whether the OFT has complied with a duty, and in particular whether the OFT acted unlawfully in taking the view that the underlying circumstances giving rise to the duty were not present.

224. Moreover, in the present context, the tribunal's task is not to take a decision itself, but primarily to decide which of two other specialised decision-makers, the OFT or the commission, should take the decision. As already emerges from the earlier part of this judgment, we see this case primarily in terms of statutory construction and the process to be followed, and not in terms of deciding factual disputes.

225. As a matter of general approach, the broad question we ask ourselves is whether we are satisfied that the OFT's decision was not erroneous in law,

and was one which it was reasonably open to the OFT to take, giving the word "reasonably" its ordinary and natural meaning.' a

[59] Counsel for the appellants contend that these statements betray a series of errors. They contend that the *Wednesbury* test applies to the formation of its belief by the OFT which is a condition of the duty under s 33(1) arising, that the task of the OFT was not to decide which tribunal should decide the issues, and b that the test of unreasonableness as being that connoted by its ordinary and natural meaning is wrong in law.

[60] I will consider the second objection first. The suggestion that the task of the CAT was to decide which of two specialist bodies should decide whether if the merger went through it might be expected to result in a substantial lessening of competition appears to hark back to the two-part test espoused by the CAT. c To that extent, for the reasons I have already given, I agree that para 224 betrays an error of law. But I do not think that at that stage in the CAT's judgment the error is of any consequence. The CAT was not then dealing with the test to be applied by s 33(1). But, equally, it can be read as a recognition of the consequence of the performance of the OFT's duty under s 33(1). To that extent it is correct.

[61] Of more significance are the first and third objections. Plainly d unreasonableness in the ordinary and natural meaning of the word is different from *Wednesbury* unreasonableness. If the CAT was seeking to apply the former meaning as the test of *Wednesbury* unreasonableness they were wrong to do so. But, once again, I do not think that a fair reading of their judgment leads to that conclusion. e

[62] The question of reasonableness was carried forward, through para 226, to para 233 where the CAT said:

'... In other words, the OFT's approach was to seek to decide which of two plausible views the OFT preferred, rather than adopting the correct approach, namely to ask whether there were, reasonably, two views which f could be taken. By failing to ask itself that latter question, the OFT failed correctly to ask itself whether "it may be the case" that the merger may be expected to result in a substantial lessening of competition within the meaning of s 33(1).'

[63] The CAT then continued with a section headed: 'Could the OFT have g reasonably excluded the alternative view?' The first paragraph of that section (para 234) states:

'Secondly, if, which is not established before the tribunal, the OFT believed not only that there was no significant prospect of the merger resulting in a h substantial lessening of competition, but also that there was no significant prospect of the commission coming to an alternative view after a fuller investigation, the tribunal is not satisfied that was a view that the OFT could reasonably have reached.'

This idea is carried forward into subsequent passages in which the CAT considers j not whether they can interfere with the OFT's decision as being unreasonable but whether the OFT asked itself the right questions and gave adequate reasons for its answer.

[64] For these reasons I reject the first and third objections too. I do not consider that the CAT adopted the wrong standard of unreasonableness when

seeking to apply the *Wednesbury* test. They were considering a different question, whether if there are two or more tenable views as to the likelihood of a substantial lessening of competition the OFT was reasonable to reject that which produced an affirmative answer. This question arose in the context that it was and is common ground that the belief of the OFT referred to in s 33(1) had to be reasonably held, a requirement which is emphasised in the OFT's own guidance quoted in [30], above. It is in this sense that I read the passage in para 266 quoted in [6], above that 'we are not satisfied that the OFT applied the right test, or that the OFT reached a conclusion that was reasonably open to them'.

DID THE REASONS GIVEN BY THE OFT JUSTIFY THEIR CONCLUSION?

[65] This, in summary, is the last of the reasons given by the CAT in its conclusions set out in para 266 for quashing the decision of the OFT. It does not appear to me to be dependent on the two-stage test formulated and applied by the CAT in earlier sections of their judgment. Nevertheless it is necessary to consider it on the basis of the correct test as to likelihood to which I have referred in [43]–[49], above.

[66] I take the test to be that formulated by Lord Wilberforce in the *Metropolitan Borough of Tameside* case [1976] 3 All ER 665 at 681–682, [1977] AC 1014 at 1047 which I have quoted in [45], above. A good example is provided by the decision of the House of Lords in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] 1 All ER 694, [1968] AC 997. In that case the minister had the power to direct a committee of investigation to consider and report to him in respect of any complaint as to the operation of any marketing scheme for agricultural produce. Milk producers in the south-eastern region complained about the price paid by the Milk Marketing Board for their milk when compared with prices paid to producers in the far-western region. They asked the minister to appoint a committee of investigation to investigate their complaint. The minister refused.

[67] Lord Upjohn ([1968] 1 All ER 694 at 717, [1968] AC 997 at 1058) noticed that the minister had a discretion so that the real question was how far it was subject to judicial control. Having summarised the four conventional heads under which the exercise of such a discretion may be attacked he said:

> 'In practice they merge into one another and ultimately it becomes a question whether for one reason or another the Minister has acted unlawfully in the sense of misdirecting himself in law, that is, not merely in respect of some point of law but by failing to observe the other headings which I have mentioned. In the circumstances of this case which I have sufficiently detailed for this purpose it seems to me quite clear that prima facie there seems a case for investigation by the committee of investigation. As I have said already it seems just the type of situation for which the machinery of s 19 was set up, but that is a matter for the Minister. He may have good reasons for refusing an investigation, he may have indeed good policy reasons for refusing it ... So I must examine the reasons given by the Minister, including any policy on which they may be based, to see whether he has acted unlawfully and thereby overstepped the true limits of his discretion, or as it has been frequently said in the prerogative writ cases, exceeded his jurisdiction. Unless he has done so the court has no jurisdiction to interfere.'

Lord Upjohn then proceeded to consider the minister's various reasons individually and in detail.

[68] A similar course was taken by the CAT in this case. In paras 240–247 they considered whether the facts are sufficiently found in the decision. They considered them to be defective in a number of respects, including the lack of any clear exposition of the working of the market concerned (para 240) and the lack of any satisfactory description of what NPfIT would involve and when (para 241). The CAT concluded (para 243) that the description of the market was so scanty that it was extremely difficult to be satisfied that all material considerations had been taken into account and all material facts ascertained. They said (para 246):

> 'The present matter is a case of a direct merger between two companies who compete horizontally and who are identified in the decision as nos 1 and 2 in the market, with combined market shares in the 45%/55% range. A decision by the OFT to the effect that on no reasonable view could such a merger be expected to lead to a substantial reduction of competition in our view needs a proper factual basis and exceptional clarity of analysis. We do not find such a basis in the decision.'

[69] Finally in paras 248–265 the CAT considered the question whether there was material on which the OFT could base their decision. In para 248 the CAT listed ten matters in issue arising from the OFT's decision. In paras 254–262 the CAT dealt in detail with the issue concerning the significance of the legacy base. The CAT concluded (para 263):

> 'Self-evidently, issues like these cannot be resolved, or even gone into, on an application for judicial review. But the resulting picture the tribunal has is one of considerable confusion, in which the exact nature of the competitive process in relation to new, extended or upgraded contracts, and the significance of incumbency, is far from clear. Particularly in a sector of national importance, where large amounts of public money are at stake, a decision such as the present should in our view clearly set out the OFT's reasoning on issues such as these, together with sufficient material to show that the conclusion can be supported and that the matter has been properly investigated. The tribunal has been unable to satisfy itself that such is the case here.'

[70] In my view the issue for this court is whether that conclusion can stand, notwithstanding the mistaken adoption of the two-stage test under s 33(1). In my view it is not dependent on that test and must be considered on its own merits. I bear in mind the warning given by Lord Brightman in *Puhlhofer v Hillingdon London BC* [1986] 1 All ER 467 at 474, [1986] AC 484 at 518:

> 'Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, is acting perversely.'

Equally it is appropriate to bear in mind that by perversity is meant that class of case which Lord Radcliffe described in *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48 at 57, [1956] AC 14 at 36 as those where—

> 'the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal. In those circumstances, too, the court must intervene. It has no option but to assume that there has been some misconception of the law and that this has been responsible for the determination.'

Later he described such a case as one where the 'only reasonable conclusion contradicts the determination'. By those standards I consider that CAT's conclusion should be upheld. I can explain my reasons relatively shortly.

[71] The issues letter set out ten matters in respect of which a significant lessening of competition might be expected to result from the proposed merger. The letter explained that they were hypotheses which the OFT were still evaluating in the light of evidence put before them by iSoft and Torex as well as by third parties. Seemingly some eight days later all these hypotheses had been rejected or discounted to such an extent that the OFT felt able reasonably to believe that there was no likelihood that the proposed merger would lead to a significant lessening of competition.

[72] Not only did IBA not see this letter but they had no opportunity to comment on iSoft and Torex's responses to it. Moreover the OFT did not apparently see the OBS to which I referred in [11], above. Further, in each of paras 29–32 in which the OFT expresses its conclusions it does so in terms of likelihood. Thus—

> 'the competitive advantage acquired from the legacy base is unlikely to be strong, especially where a new procurement strategy is being introduced' (para 29).
>
> 'Absent the merger ... Torex is likely to face significantly reduced opportunities to sell its products to hospital users in England' (para 30).
>
> 'The presence of these international competitors makes it likely that competition for future contracts will remain active' (para 31).
>
> 'There is a reasonable prospect that international competitors with a United Kingdom base will bid for contracts in the regions with the likely effect of increased competition for contracts in Northern Ireland, Scotland, and Wales' (para 31).
>
> 'While a strong legacy base may give the parties a large presence it is unlikely, in itself, to confer significant market power in view of the changes being brought about by NPfIT' (para 32).

[73] None of these conclusions excludes a likelihood to the opposite effect so as reasonably to justify the belief that the anticipated merger 'may' result in a significant lessening of competition. No doubt the OFT is right to conclude (at para 32): 'Such a fundamental change [NpfIT] has altered the future competitive landscape with the effect that competitive constraints must be viewed under a new scenario.' But that does not, in my view, justify the further conclusion that such a scenario overcomes the anti-competitive features which do exist to such an extent as to remove the requisite likelihood of a significant lessening of competition.

[74] Such features include the facts that the merger is horizontal, the merger parties enjoy a market share well above the usual 25% level, the next competitor enjoys a market share well below that enjoyed by the merger parties, supply substitutability is limited, the merger parties enjoy the benefit of a network effect and information asymmetry. All of those features are referred to by the OFT in its guidance as important in assessing the effect of a proposed merger on competition.

[75] In these circumstances, it appears to me that either the OFT applied too high a test of likelihood when forming their belief or they failed adequately to justify the belief they formed in accordance with the proper test. In either event, notwithstanding the fact that the CAT adopted a wrong test as to likelihood, their ultimate conclusion is right and should be upheld.

CONCLUSIONS

[76] For all these reasons I conclude that: (a) the two-stage test formulated by the CAT is not the test of likelihood required by s 33(1); (b) the CAT did not wrongly reverse the burden of proof; (c) the CAT did not wrongly apply the *Wednesbury* test of unreasonableness; (d) the CAT were right to conclude that either the OFT had applied the wrong test as to likelihood or they had failed adequately to explain or justify their conclusion in accordance with the right test. I would dismiss this appeal.

MANCE LJ.

[77] I have had the benefit of studying in draft the judgment given by Sir Andrew Morritt V-C and the supplementary observations made by Carnwath LJ, and I agree with both. I specifically agree with Sir Andrew Morritt V-C's examination at [43]–[49], above of the test to be applied under s 33(1) of the Enterprise Act 2002.

CARNWATH LJ.

[78] I agree that the appeal should be dismissed for the reasons given by Sir Andrew Morritt V-C. Given the novelty and complexity of the statutory framework, I shall add some comments of my own, under three heads: the statutory test, the principles of judicial review, and the duty to give reasons.

THE STATUTORY TEST

[79] The annotations to the *Current Law Statutes Annotated* edition of the Enterprise Act 2002 (vol 2, p 40-26) refer to the changes made by Pt 3 of the 2002 Act as 'dramatic', in two ways:

> '... first, the Secretary of State is removed from the process. Under the previous position the OFT merely referred cases to the Secretary of State who made the final decision whether to refer. Second, the previous "public interest" test is replaced with a "competition-based" substantial lessening of competition test.'

(The latter test is referred to in the annotations as the 'SLC test'. For convenience I shall follow the same approach and use the term 'SLC' to mean 'a substantial lessening of competition'. This is perhaps one of those rare cases where such shorthand is permissible as an aid to finding a way through the density of the statutory language.)

[80] These major changes make it unwise, in my view, to seek assistance in the case law and practice under the previous statutes, even though some of the wording of the 2002 Act echoes phrases used in the Fair Trading Act 1973. The 2002 Act must be construed in accordance with its own terms and apparent purpose.

[81] I see the key to the present issue in the contrast between the respective roles of the Office of Fair Trading (the OFT) under s 33 and the Competition Commission under s 36 (confining attention for these purposes to *anticipated* mergers). To highlight the critical point, it is helpful to simplify the other elements. The ultimate questions for both authorities are defined in effectively the same terms, by paras (a) and (b) of ss 33(1) and 36(1) respectively. In this case, (a) does not arise; we can assume a 'merger situation'. We are concerned only with (b): whether the creation of the merger situation 'may be expected to result in' SLC. The Competition Appeal Tribunal (the tribunal) (without dissent) has interpreted 'may be expected' as implying a 'more than 50% chance' (para 182). Thus, in effect, the factual judgment has to be made on the balance of probabilities. With that qualification, and reduced to its essentials, the question for each body under (b) is simply: will the merger situation result in SLC?

[82] The difference between ss 33 and 36 lies in the nature of the conclusion to be arrived at. The question for the OFT is whether it '*believes* that [SLC] is or *may* be the case'; the commission is required to '*decide*' whether there will be SLC. Thus for the OFT, unlike the commission, belief in the possibility of SLC is enough to trigger the next stage.

[83] At first sight, it might be thought that the OFT is required to do no more than form a preliminary view of the matter, so that any case raising an arguable issue of SLC should be referred to the commission. This is one possible view of a 'first-screen' role (to use the tribunal's term: heading to para 73ff). If that were the correct view, it would be difficult to see any answer to the case for a reference on the facts of the present case. As the OFT's evidence makes clear, this case passed the initial screening stage for cases which could be cleared as 'not raising any complex or material competition concerns'. It was selected for treatment under the procedure for cases 'identified as potentially raising complex or material competition issues' leading to the preparation of the 'issues letter'. At that point the OFT clearly considered that there was at least a possibility of SLC. If the matter had to stop there, a reference would have been inevitable.

[84] However, other indications in the statute show that the formation of a 'belief' by the OFT requires something more than that. Sir Andrew Morritt V-C has referred to the provisions relating to public interest cases, in which (in relation to the Secretary of State's role) the word 'belief' is used in contrast to having 'reasonable grounds for suspecting' (s 42(1), (2)). Furthermore, the 'beliefs' of the OFT on the question of SLC are treated as 'decisions' which are binding on the Secretary of State (see ss 44(4), 46(2)), as to whether SLC is expected to result, or not to result (see s 45(2)(b), (3)(b)). They are also treated as 'relevant decisions' on which the OFT is under a duty to carry out prior consultation with relevant parties upon what is proposed (s 104(2), (6)).

[85] These pointers, combined with the undoubted expertise of the OFT, indicate something more than a purely 'first-screen' role. The precise extent or timescale of what is required by way of investigation is not defined by the statute. It is no doubt implicit that the OFT must take 'reasonable steps' to inform itself within the limits of its statutory role (see *Secretary of State for Education and Science v Metropolitan Borough of Tameside* [1976] 3 All ER 665 at 696, [1977] AC 1014 at

1065). However, it is not suggested that the OFT failed in that respect. The tribunal was entitled to assume that, at least by the time of the hearing, the OFT had done whatever it thought necessary to reach the stage of decision required by its statutory role.

[86] Having reached that stage, there were three possible views for the OFT to take under the wording of s 33(1): (1) that it believed that there would be SLC; (2) that it believed there might be SLC; (3) that the risk of SLC was sufficiently low for the OFT to believe there neither was nor might be SLC. (1) and (2) follow from the words 'is or may'. (3) is their implicit obverse. I agree with Sir Andrew Morritt V-C (at [49], above) that the word 'significant', as used in the OFT advice, is capable of being misread as setting the test too high. No doubt the possibility must be more than fanciful, but subject to that I would prefer not to qualify the statutory wording.

[87] This analysis helps to highlight what to me is the basic distinction between the roles of the OFT and the commission. The commission has to reach a 'decision' on the SLC question, and for that purpose is given extensive powers for gathering information, calling witnesses and making a detailed investigation (see s 109 of the 2002 Act). The OFT is required only to form a belief as to the possibility of SLC, and its powers are accordingly more limited. This relationship seems to me entirely consistent with what was said in the White Paper *Productivity and Enterprise: A World Class Competition Regime* (Cm 5233), which preceded the statute:

> '5.20 The new regime retains a two-stage approach to merger investigations. The OFT will conduct the first stage investigation to decide whether a reference is necessary. The Competition Commission will continue to carry out such references via a second stage, in depth investigation.'

The material placed before the tribunal represented the results of the first-stage investigation. The issue for the tribunal was whether on that material the OFT could reasonably take the view that the issues (so clearly identified by it in the 'issues letter') had been sufficiently resolved for it to be satisfied that there would not be SLC. If not, it was its duty to refer the matter for 'in-depth' investigation by the commission.

PRINCIPLES OF JUDICIAL REVIEW

[88] The tribunal was required to apply the principles which would be applied 'by a court on an application for judicial review' (s 120(4)). On its face, this seems a clear indication that, notwithstanding the tribunal's specialised composition, the review was not to take the form of an appeal on the merits, but was limited by the ordinary principles applied in the Administrative Court.

[89] The tribunal expressed their difficulty in interpreting this duty (para 217). In these circumstances, they might have found help in the leading textbooks on the subject. The case law on the principles of judicial review, even at the appellate levels, is now so voluminous, and the subject matter so diverse, that the assistance of an authoritative guide (such as De Smith, Woolf and Jowell *Judicial Review of Administrative Action* or Wade and Forsyth *Administrative Law*, to name only two of many) should in my view be regarded as indispensable when considering the application of those principles to a new statutory regime. (References below are to *De Smith, Woolf and Jowell* (5th edn, 1995) and *Wade and Forsyth* (8th edn, 2000). Another invaluable source-book for comparison of

relevant case law on particular issues is Michael Fordham *Judicial Review Handbook* (3rd edn, 2001).)

[90] For example, the tribunal was right to observe that its approach should reflect the 'specific context' in which it had been created as a specialised tribunal (para 223); but it was wrong to suggest that this permitted it to discard established case law relating to 'reasonableness' in administrative law, in favour of the 'ordinary and natural meaning' of that word (para 225). Its instinctive wish for a more flexible approach than *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1947] 2 All ER 680, [1948] 1 KB 223) would have found more solid support in the textbook discussions of the subject, which emphasise the flexibility of the legal concept of 'reasonableness' dependent on the statutory context (see *De Smith, Woolf and Jowell* pp 586–593 (para 13-055ff), 'The Intensity of Review'; cf *Wade and Forsyth* p 364ff, 'The Standard of Reasonableness', and the comments of Lord Lowry in *Brind v Secretary of State for the Home Dept* [1991] 1 All ER 720 at 737ff, [1991] 1 AC 696 at 765ff).

[91] Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially upon political judgment' (*De Smith, Woolf and Jowell* pp 586–587 (paras 13-056–13-057)). Examples are *Nottinghamshire CC v Secretary of State for the Environment* [1986] 1 All ER 199, [1986] AC 240 and *Hammersmith and Fulham London BC v Secretary of State for the Environment* [1990] 3 All ER 589, [1991] 1 AC 521, where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity' (see [1990] 3 All ER 589 at 636, [1991] 1 AC 521 at 597 per Lord Bridge of Harwich). At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity', and a 'lower' threshold of unreasonableness is used:

> 'Review is stricter and the courts ask the question posed by the majority in *Brind*, namely, "whether a reasonable Secretary of State, on the material before him, could reasonably conclude that the interference with freedom of expression was justifiable."' (See *De Smith, Woolf and Jowell* p 589 (para 13-060), citing *Brind*'s case [1991] 1 All ER 720, [1991] 1 AC 696.)

[92] A further factor relevant to the intensity of review is whether the issue before the tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience, or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment (see *Brind*'s case [1991] 1 All ER 720 at 739, [1991] 1 AC 696 at 767 per Lord Lowry). On the other hand where the question is the fairness of a procedure adopted by a decision-maker, the court has been more willing to intervene: such questions are to be answered not by reference to *Wednesbury* unreasonableness, but 'in accordance with the principles of fair procedure which have been developed over the years, and of which the courts are the author and sole judge' (see *R v Panel on Take-overs and Mergers, ex p Guinness plc* [1989] 1 All ER 509 at 531, [1990] 1 QB 146 at 184 per Lloyd LJ).

[93] The present case, as the tribunal observed (para 223), is not concerned with questions of policy or discretion, which are the normal subject matter of the *Wednesbury* test. Under the present regime (unlike the 1973 Act) the issue for the OFT is one of factual judgment. Although the question is expressed as depending on the subjective belief of the OFT, there is no doubt that the court is entitled to inquire whether there was adequate material to support that conclusion (see the

Metropolitan Borough of Tameside case [1976] 3 All ER 665 at 681–682, [1977] AC 1014 at 1047 per Lord Wilberforce). a

[94] Again, even in relation to factual issues, the cases show considerable variation in the 'intensity' of review. The well-known case of *Edwards (Inspector of Taxes) v Bairstow* [1955] 3 All ER 48, [1956] AC 14 is a good example of the flexible approach of the court to such issues, outside the sphere of political judgment. b

[95] The case is sometimes misrepresented as a mere application of *Wednesbury* unreasonableness. This may owe something to the fact that it was cited by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 All ER 935 at 951, [1985] AC 374 at 410 in the context of his famous restatement of *Wednesbury* unreasonableness in terms of 'irrationality': that is— c

> 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.'

However, his reference to *Edwards v Bairstow* was simply in relation to his view that 'irrationality' could now 'stand on its own feet', without resort to the d inference of a mistake of law. The actual decision in *Edwards v Bairstow* could certainly not be described as 'outrageous' in any sense (at least without gross unfairness to the tax commissioners who made it). The issue was whether a particular transaction was 'an adventure in the nature of trade'. Although the House of Lords accepted that this was 'an inference of fact', they held that on the primary facts as found by the commissioners 'the true and only reasonable e conclusion' contradicted that decision (see [1955] 3 All ER 48 at 57, [1956] AC 14 at 36 per Lord Radcliffe).

[96] The concluding remarks of Lord Radcliffe's speech are often overlooked. He criticised the tendency of the courts to treat such questions as 'pure questions of fact', so as to exclude review: f

> 'As I see it, the reason why the courts do not interfere with the commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the commissioners of greater experience in the matters of business, or any other matters. The reason is simply that, by the system that has been set up, the g commissioners are the first tribunal to try an appeal and, in the interests of the efficient administration of justice, their decisions can only be upset on appeal if they have been positively wrong in law. The court is not a second opinion, where there is a reasonable ground for the first. But there is no reason to make a mystery about the subjects that commissioners deal with, h or to invite the courts to impose any exceptional restraint on themselves because they are dealing with cases that arise out of facts found by the commissioners. *Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.*' (See [1955] 3 All ER 48 at 59, [1956] AC 14 at 38–39; my j emphasis.)

[97] At the other extreme is *Puhlhofer v Hillingdon London BC* [1986] 1 All ER 467, [1986] AC 484, another case which is often cited without sufficient regard to its special context. The subject matter was the duty of a local housing authority towards the homeless, the imposition of which depended on the authority's

conclusion on various factual questions defined by the statute. Lord Brightman, giving the leading speech, was concerned by the 'mass of litigation' affecting authorities who were 'endeavouring to cope with intractable housing problems and to balance competing claims to limited housing resources' ([1986] 1 All ER 467 at 469, [1986] AC 484 at 511). It was against that background that he referred to the limited role of the judicial review, which he defined by reference to the narrowest version of the *Wednesbury* test ('unreasonableness verging on absurdity'), as applied in cases such as the *Nottinghamshire CC* case (see [91], above). It is clear that this was a response to the particular context, and there is no reason to see it as intended as a statement of more general application. (In fact, his comments on the *Wednesbury* test, though of course of great authority, were not essential to the decision. This turned on a pure issue of construction: whether the term 'accommodation' was to be read as qualified by some word such as 'appropriate' or 'reasonable'. The House of Lords answered that question in the negative, holding that Parliament had 'plainly, and wisely' added no such qualifying adjective, and none was to be implied ([1986] 1 All ER 467 at 474, [1986] AC 484 at 517). The difficulty of divining the parliamentary intention in such cases is underlined by the fact that the decision was reversed later the same year by a statutory amendment adding the word 'suitable': see s 14(3) of the Housing and Planning Act 1986.)

[98] Another illustration of the different approaches to review—closer to the present context—is the decision of Lightman J in *R v Director General of Telecommunications, ex p Cellcom Ltd* [1999] ECC 314 (one of the cases referred to but discarded by the tribunal: para 220). The duty of the director was to exercise his functions in the manner which 'he considers ... best calculated to secure ... such telecommunication services as satisfy all reasonable demands for them ...' (see s 3(1) of the Telecommunications Act 1984). Lightman J (at 330) held that the section drew a distinction between 'means' and 'ends':

> '... whilst the Director is expressly made the arbiter of the means to the ends, he is not ... made the arbiter of the ends. Section 3 recognises that there is a public interest in reasonable demands for telecommunication services being met and the court is intended to be the guardian of that public interest.'

His subsequent exposition of *Wednesbury* principles (at 331) was directed only to the policy issues (relating to 'means') on which the decision-making power was conferred on the director, rather than the court.

[99] Finally, reference may be made to a recent case in the House of Lords, *Moyna v Secretary of State for Works and Pensions* [2003] UKHL 44, [2003] 4 All ER 162, [2003] 1 WLR 1929, where Lord Hoffmann discussed the difficulty of finding a clear or logical division, in the case law, between issues of fact and issues of law. *Edwards v Bairstow* was seen as exemplifying the proposition that 'the question of whether the facts as found ... fall on one side or the other of some conceptual line drawn by the law is a question of fact' and that, on an appeal limited to questions of law, the court was able to interfere if the decision 'falls outside the bounds of reasonable judgment' ([2003] 4 All ER 162 at [25]). In his view the lack of a clear division caused no difficulty—

> 'as long as it is understood that the degree to which an appellate court will be willing to substitute its own judgment for that of the tribunal will vary with the nature of the question.' (See [2003] 4 All ER 162 at [27], citing his

own judgment in *Re Grayan Building Services Ltd (in liq)* [1995] Ch 241 at 254–255, [1995] 3 WLR 1 at 12–13.)

[100] I have referred to these cases in some detail, because they show that the tribunal did not need to rely on some special dispensation from the ordinary principles of judicial review. Those principles, whether applied by a court or a specialised tribunal, are flexible enough to be adapted to the particular statutory context. No doubt the existence of such a special jurisdiction will help to ensure consistency from case to case; and the expertise of the tribunal will better fit it to deal with such cases expeditiously and with a full understanding of the technical background. However, the essential question was no different from that which would have faced a court dealing with the same subject matter. That question was whether the material relied on by the OFT could reasonably be regarded as dispelling the uncertainties highlighted by the issues letter. That question was wholly suitable for evaluation by a court. It involved no policy or political judgment, such as would be regarded as inappropriate for review by the Administrative Court.

[101] On that basis, I agree with Sir Andrew Morritt V-C, for the reasons given by him, that the tribunal was fully justified in reaching the conclusion that the uncertainties had not, on any reasonable view, been adequately resolved.

ADEQUACY OF REASONS

[102] Finally, although inadequacy of reasons is not a ground of challenge as such, it may be helpful to comment briefly on the tribunal's observations on this aspect.

[103] The tribunal expressed concern at having to consider material outside the decision letter. It noted that the OFT was under a statutory duty to give its reasons, and referred to what it called the 'well-known principle' that 'the court should, at the very least, be circumspect about allowing material gaps to be filled by affidavit evidence or otherwise' (see para 257, citing *R v Westminster City Council, ex p Ermakov* [1996] 2 All ER 302 at 312 per Hutchison LJ). It commented (at para 258):

> 'If a material element is not set out in the decision, it is very difficult for the reviewing court or tribunal to be satisfied that the matter was properly investigated or that the supplementary reasons did in fact form part of the decision-making process.'

In other parts of the judgment, the tribunal criticised the failure of the OFT to set out all the underlying material (see paras 211, 252).

[104] With respect, I think this concern, and the associated criticisms, were misplaced. The statutory duty to give reasons is an important one, but it is not the same as a duty to give a 'judgment' (such as that of a court) or a duty to make a 'report' (such as that of an inquiry inspector). Again reference to the textbooks might have assisted. The numerous cases on the subject lay down no general test, other than the requirement that reasons must be 'intelligible and must adequately meet the substance of the arguments advanced' (see *Re Poyser and Mills' Arbitration* [1963] 1 All ER 612 at 616, [1964] 2 QB 467 at 477–478, cited in *De Smith, Woolf and Jowell* p 465 (para 9-049, n 8) as 'the most frequently cited judicial articulation of the test'; see also *Wade and Forsyth* pp 916–919).

[105] In a case such as the present, where the subject matter is complex and the supporting material voluminous, there is no statutory requirement for all the evidence to be set out in the decision letter. However when a challenge is made,

a there is, as the tribunal noted, an obligation on a respondent public authority to put before the court the material necessary to deal with the relevant issues; 'all the cards' should be 'face upwards on the table' (see *R v Lancashire CC, ex p Huddleston* [1986] 2 All ER 941 at 945).

[106] There is certainly nothing unusual, particularly in a case which has to be dealt with in a relatively short timescale, for the stated reasons to be amplified by b evidence before the court. While in some areas of the law, the court may need to be 'circumspect' to ensure that this is not used as means of concealing or altering the true grounds of the decision, that does not arise in this case. As I understand it, no objection had been taken to any of the evidence being put before the tribunal (or to the additional evidence adduced in the Court of Appeal). The question for the tribunal was not whether the reasoning was c adequately expressed in the decision, but whether the material ultimately before it, taken as a whole, disclosed grounds on which the tribunal could reasonably have reached the decision it did.

Appeal dismissed.

Celia Fox Barrister.

Roberts v Parole Board

[2004] EWCA Civ 1031

COURT OF APPEAL, CIVIL DIVISION
TUCKEY, CLARKE LJJ AND JACKSON J
14, 15, 28 JULY 2004

Prison – Release on licence – Life sentence – Mandatory life sentence – Right to liberty and security – Secretary of State putting information about prisoner before Parole Board but not disclosing information to prisoner – Parole Board directing disclosure of information to specially appointed advocate – Whether Parole Board acting ultra vires – Whether breach of right to liberty and security – Criminal Justice Act 1991, s 32 – Human Rights Act 1998, Sch 1, Pt I, art 5(4).

The claimant was convicted of murder in 1966 and sentenced to life imprisonment with a tariff sentence which was later fixed at 30 years. By October 2001 the claimant had good prospects of being recommended for release on licence. It was then alleged that he had been involved in behaviour which called into question his eligibility for release. His case was reviewed by the Parole Board in pursuant to s 32[a] of the Criminal Justice Act 1991. That section required the Secretary of State to refer the sentence of a life prisoner to the board at his request, after he had served the tariff part of his sentence. The board was required to deal with cases in which it gave directions on consideration of 'all such evidence as may be adduced before it'. It had a duty not to recommend release unless it was satisfied that it was no longer necessary for the protection of the public that a prisoner should be confined. In the course of the review of the claimant's case the Secretary of State put before the board sensitive material which was withheld from the claimant and his solicitor. The board ruled that that material should only be disclosed to a specially appointed advocate and not to the claimant or his legal representatives. The claimant's application for judicial review of that decision was dismissed, and he appealed. He contended (i): that the board had no power to appoint a special advocate, since it had no express power to do so and no such power could be inferred from the general powers conferred by s 32 of the 1991 Act; (ii) that to deny a prisoner or his representative the right to see evidence which might persuade the board to extend his detention was a breach of art 5(4)[b] of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998) which provided, inter alia, that everyone who was deprived of his liberty by detention was entitled to take proceedings by which the lawfulness of his detention was to be decided by a court; and alternatively (iii) that the exceptional specially appointed advocate procedure should be reserved for cases involving national security.

Held – (1) Section 32 of the 1991 Act impliedly authorised the board to adopt the specially appointed advocate procedure. The board's inherent power to adopt

a Section 32, so far as material, is set out at [8], [9], below
b Article 5, so far as material, is set out at [19], below

that procedure stemmed from its obligation to perform its protective and preventative role whilst ensuring that its process was substantially fair for a prisoner. The 1991 Act itself said nothing about the board's procedures apart from its obligation to consider all the evidence adduced before it. Such evidence might come from a source who might be at risk if his identity were known, and the board had to have inherent power to devise procedures to protect such a source. If the risk were sufficiently serious the board had to have the power to direct that the evidence should be withheld from a prisoner or his representatives altogether. It followed that the board also had to have the power to mitigate the unfairness to the prisoner caused by such withholding of evidence. The specially appointed advocate procedure was one obvious way of so doing (see [26], [29]–[31], [46], below).

(2) In the context of art 5(4) of the convention fairness had to be judged on a case-by-case basis. It could not be right to say that as a matter of principle it would never be fair for the board to appoint a special advocate. In the instant case the board had recognised the prejudice to the claimant which its decision to withhold disclosure had caused and counter-balanced that unfairness by adopting the specially appointed advocate procedure. That procedure was the obvious solution to the unacceptable alternatives open to the board of: disclosure to the claimant or his representatives posing a real risk to the source or sources; disregarding the sensitive material meaning that the board could not have properly performed its duty; or having to test the evidence itself. While such a solution should only be adopted in exceptional circumstances there was no principled distinction between the need to protect the interest of the state and the need to protect an individual if that were necessary. The appeal would therefore be dismissed (see [39]–[42], [44]–[46], below).

Decision of Maurice Kay J [2004] 2 All ER 776 affirmed.

Notes

For the constitution and functions of the Parole Board and its power to release mandatory life sentence prisoners, and for the right to liberty and security of the person, see, respectively, 36(2) *Halsbury's Laws* (4th edn reissue) paras 618, 622, and 8(2) *Halsbury's Laws* (4th edn reissue) paras 127, 128.

For the Criminal Justice Act 1991, s 32, see 34 *Halsbury's Statutes* (4th edn) (2001 reissue) 805.

For the Human Rights Act 1998, Sch 1, Pt I, art 5, see 7 *Halsbury's Statutes* (4th edn) (2004 reissue) 705.

Cases referred to in judgments

Brown v Stott (Procurator Fiscal, Dunfermline) [2001] 2 All ER 97, [2003] 1 AC 681, [2001] 2 WLR 817, PC.

Chahal v UK (1996) 1 BHRC 405, ECt HR.

Edwards v UK (2003) 15 BHRC 189, ECt HR.

Hussain v UK (1996) 22 EHRR 1, [1996] ECHR 21928/93, ECt HR.

R (on the application of Brooks) v Parole Board [2004] EWCA Civ 80, [2004] All ER (D) 142 (Feb), 148 Sol Jo LB 233.

R (West) v Parole Board [2002] EWCA Civ 1641, [2003] 1 WLR 705.

R v H, R v C [2004] UKHL 3, [2004] 1 All ER 1269, [2004] 2 AC 134, [2004] 2 WLR 335.

R v Parole Board, ex p Davies (27 November 1996, unreported).

R v Parole Board, ex p Watson [1996] 2 All ER 641, [1996] 1 WLR 906, CA.

R v Shayler [2002] UKHL 11, [2002] 2 All ER 477, [2003] 1 AC 247, [2002] 2 WLR 754.

Secretary of State for the Home Dept v Rehman [2000] 3 All ER 778, [2003] 1 AC 153, [2000] 3 WLR 1240, CA; *affd* [2001] UKHL 47, [2002] 1 All ER 122, [2003] 1 AC 153, [2001] 3 WLR 877.

Stafford v UK (2002) 13 BHRC 260, ECt HR.

Taylor v Lawrence [2002] EWCA Civ 90, [2002] 2 All ER 353, [2003] QB 528, [2002] 3 WLR 640.

Tinnelly & Sons Ltd v UK (1998) 4 BHRC 393, ECt HR.

Appeal

The claimant, Harry Maurice Roberts, a prisoner serving mandatory sentences of life imprisonment, appealed from the decision of Maurice Kay J on 19 December 2003 ([2003] EWHC 3120 (Admin), [2004] 2 All ER 776) refusing his application for judicial review of the decisions of the Parole Board (chairman: Sir Richard Tucker) contained in a letter dated 13 June 2003 directing that certain material relating to the Parole Board's review of the claimant provided to the board by the Secretary of State for the Home Department should not be disclosed to the claimant or his legal representatives but only to a specially appointed advocate. The Secretary of State appeared as an interested party. Justice was given leave to intervene in the appeal and made written submissions. The facts are set out in the judgment of Tuckey LJ.

Tim Owen QC and *Alison Macdonald* (instructed by *Bhatt Murphy*) for the claimant.

Michael Fordham (instructed by the *Treasury Solicitor*) for the Board.

James Eadie (instructed by the *Treasury Solicitor*) for the Secretary of State.

Cur adv vult

28 July 2004. The following judgments were delivered.

TUCKEY LJ.

[1] On 12 December 1966 the appellant, Harry Roberts, was convicted of the murder (by shooting) of three police officers in Shepherds Bush and sentenced to life imprisonment with a tariff sentence which was later fixed at 30 years. By October 2001 the appellant, who is now 68, was in an open prison and had good prospects of being recommended for release on life licence. This all changed when it was alleged that he had been involved in drug dealing, bringing contraband into prison and other behaviour which called into question his eligibility for release. He was transferred to a closed prison pending completion of the review of his case then in progress. In the course of this review the Secretary of State put before the Parole Board material which was withheld from the claimant and his solicitor. In due course the board, chaired by Sir Richard Tucker, ruled that this sensitive material should only be disclosed to a specially appointed advocate (Nicholas Blake QC) and not to the claimant or his legal representatives.

[2] The appellant's challenge to this decision failed before Maurice Kay J ([2003] EWHC 3120 (Admin), [2004] 2 All ER 776) and he now appeals to this court. His contention is that the specially appointed advocate (SAA) procedure was not an option open to the board. This is obviously an important point of principle.

[3] Before the judge the appellant also contended that this procedure was unjustified in his case. This challenge failed as well, but is not pursued on appeal. It involved the judge looking at the sensitive material, hearing submissions from Mr Blake and giving a separate judgment in private. As we only have to deal with the point of principle we have not seen the sensitive material, heard submissions from Mr Blake or sat in private.

[4] The facts need little elaboration. Sir Richard Tucker's ruling was made following directions given by the deputy chairman of the board (Scott Baker LJ) on 15 November 2002. He said:

> 'Having considered the sensitive material, in my view the way ahead is as follows. It should in the first instance be disclosed to a special advocate agreeable to both parties. This would be on the basis that it would not be disclosed to Roberts, his lawyers, or anyone else without the consent of the Parole Board. The special advocate procedure is I think a statutory one in other fields [Special Immigration Appeals Commission] but I can see no reason why it should not be used in the present circumstances and it does not prejudice Roberts provided other options remain open to argument thereafter. I think a hearing then should take place before the legal chairman of the panel that is to hear Roberts' case ... There can then be argument both as to the law and as to disclosure, including any issues such as whether some of the sensitive material might be disclosed and what, if any, broad information Roberts might be given about the nature of the withheld material.'

[5] Sir Richard Tucker held two directions hearings. Following the first hearing and after considering the sensitive material, submissions on behalf of the claimant and closed submissions on behalf of the Secretary of State and by Mr Blake Sir Richard found:

> '(i) with regard to the sensitive material ... the fears of the source or sources are genuine and held on reasonable grounds ... (ii) if full disclosure were to be made to Mr Roberts there would be a real risk to the safety of the source or sources; (iii) in making directions on disclosure the Board must balance the interests of the various parties involved. These are: (a) the public—the Board's ultimate purpose is to protect the public. Moreover, it is important that all judicial decisions are made on the basis of the broadest information available; (b) the prisoner—the prisoner has the right to proper representation and examination of the evidence. This is not however an absolute right. The Parole Board Rules, whilst not specifically applicable to mandatory lifers ... acknowledge that the public interest may restrict the prisoner's right in this respect ... (c) the source or sources of the sensitive material—these parties have the right under arts 2 and 3 of the [European Convention on Human Rights] and under common law, to protection.'

[6] The integrity of the claimant's legal representatives, including his solicitor who had acted for him for many years, was not in question but in his decision letter after the second hearing Sir Richard said:

> 'The Board is however quite satisfied that disclosure of the sensitive material to Mr. Roberts' representatives would lead to real risk of inadvertent disclosure to Mr. Roberts by his representatives, having regard to the circumstances of the case and the unusual pressures that would be placed upon them.'

Sir Richard confirmed his earlier directions about disclosure and that the decision on the claimant's eligibility for release on life licence would be made following a full hearing at which first the disclosed evidence would be examined before the SAA, the claimant and his representatives and then the sensitive material in the absence of the claimant and his representatives.

[7] Although the directions did not spell out what Mr Blake was to do it is common ground that it was intended that he would perform the same functions and be subject to the same restrictions as a special advocate appointed under the Special Immigration Appeals Commission (Procedure) Rules 1998, SI 1998/1881. Thus he was required to represent the interest of the appellant by making submissions to the board at any closed hearings, cross-examine witnesses at any such hearing and make written submissions to the board. In performing these functions he was not to disclose any sensitive material to or obtain instructions from the prisoner or his representatives, although they could and had provided him with as much information about the case as possible. At the directions hearings Mr Blake had submitted that the SAA procedure was unnecessary and inappropriate. Of these submissions Sir Richard said:

> 'Although the Board generally accepts Mr. Blake's reasoning, the Board is satisfied [that] the SAA procedure does have a place outside the immediate context of terrorism and intelligence gathering (it may be that Mr. Blake himself accepts that) and that it may have a part to play in cases like the present where the public interest, balanced against the other interests, may require it. Despite the possibility of prejudice to Mr. Roberts in making representations to the Board and having taken carefully into account all the points made on Mr. Roberts' behalf, the Board is entirely satisfied that the balance of interest is firmly in favour of the appointment of [the SAA] to represent Mr. Roberts in relation to the sensitive material. The Board is also satisfied that with the cooperation of all parties the appointment of [an] SAA can secure acceptable standards of fairness for Mr. Roberts.'

[8] The board now derives its authority from s 32 of the Criminal Justice Act 1991 as amended by the Crime (Sentences) Act 1997. By s 32(1)(b) the board is to have the functions conferred by Ch II of Pt II of the 1997 Act in respect of life prisoners. Chapter II of the 1997 Act contains s 28 which, as amended, requires the Secretary of State to refer the sentence of a life prisoner to the board at his request, after he has served the tariff part of his sentence, or two years have elapsed since any previous reference has been disposed of. By s 28(5) once a prisoner has served the tariff part of his sentence and the board has

recommended his release it is the duty of the Secretary of State to release him on licence. However s 28(6) says:

> 'The Parole Board shall not give a direction under subsection (5) above with respect to a life prisoner to whom this section applies unless—(a) the Secretary of State has referred the prisoner's case to the Board; and (b) the Board is satisfied that it is no longer necessary for the protection of the public that the prisoner should be confined.'

[9] Section 32 of the 1991 Act contains further provisions which require the board to deal with cases in which it gives directions on consideration of 'all such evidence as may be adduced before it' (sub-s (4)). The evidence referred to includes 'any documents given to it by the Secretary of State; and ... any other oral or written information obtained by it' (see sub-s (3)). 'Without prejudice to subsections (3) and (4) ... the Secretary of State may make rules with respect to the proceedings of the Board, including ...' (see sub-s (5)).

[10] The Parole Board Rules 1997 were made under s 32(5) but they only apply to discretionary life prisoners. There are no rules relating to mandatory life prisoners although we were told that new rules relating to all life prisoners are under consideration. Changes to the legislation since the early 1990s have been in response to decisions of the European Court of Human Rights. Before the decision in *Stafford v UK* (2002) 13 BHRC 260 the Secretary of State retained the right to decide whether a mandatory life prisoner should be released or recalled. Following this decision s 28 of the 1997 Act was amended so that it applied to all life prisoners, but the 1997 rules remain unamended.

[11] However, although the 1997 rules do not apply to mandatory life prisoners, much of the argument below focused on them because it was contended that they set out what the Secretary of State considered to be the limit of acceptable departure from the normal requirements of procedural fairness and equality of arms in discretionary cases. The appellant argued that any procedure applying to mandatory cases which was not similarly confined would amount to discrimination in breach of art 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the Human Rights Act 1998).

[12] The relevant parts of the 1997 rules are as follows:

> '5.—(1) ... the Secretary of State shall serve on the Board and, subject to paragraph (2), the prisoner or his representative—[specified information and reports relating to the prisoner] and (c) such further information that the Secretary of State considers to be relevant to the case.
>
> (2) Any part of the information or reports referred to in paragraph (1) which in the opinion of the Secretary of State should be withheld from the prisoner on the ground that its disclosure would adversely affect the health or welfare of the prisoner or others shall be recorded in a separate document and served only on the Board together with the reasons for believing that its disclosure would have that effect.
>
> (3) Where a document is withheld from the prisoner in accordance with paragraph (2), it shall nevertheless be served as soon as [is] practicable on the prisoner's representative if he is—(a) a barrister or solicitor, (b) a registered medical practitioner, or (c) a person whom the chairman of the panel directs

is suitable by virtue of his experience or professional qualification; provided that no information disclosed in accordance with this paragraph shall be disclosed either directly or indirectly to the prisoner or to any other person without the authority of the chairman of the panel ...

13. ... (3) The parties shall be entitled to appear and be heard at the hearing and take such part in the proceedings as the panel thinks proper; and the parties may hear each other's evidence, put questions to each other, call any witnesses who the Board has authorised to give evidence ... and put questions to any witness or other person appearing before the panel ...

(5) The panel may receive in evidence any document or information notwithstanding that such document or information would be inadmissible in a court of law ...

(6) The chairman of the panel may require the prisoner, or any witness appearing for the prisoner, to leave the hearing where evidence is being examined which the chairman of the panel ... previously directed should be withheld from the prisoner as being injurious to the health or welfare of the prisoner or another person.'

[13] Having noted the discrimination argument based on the 1997 rules the judge said ([2004] 2 All ER 776 at [12]):

'A crucial legal point lies at the heart of this ground of challenge. It is whether, as a matter of law, the Parole Board would have been able to take the same course and appoint an SAA in the case of a discretionary life prisoner in the same circumstances.'

He decided it could. The 1997 rules were not exhaustive of all procedural issues which might arise as r 13(3) appeared to acknowledge. The concept of an SAA was of recent origin, had been introduced into other legislation and appeared to have the approval of the European Court of Human Rights. He concluded (at [14]):

'In my judgment, when the Parole Board is carrying out its very important public function in relation to a discretionary life prisoner, it is entitled, in exceptional circumstances, to resort to the SAA procedure. It has the inherent power to adopt a novel concept in the interests of justice and in the public interest. It is crucial that SAAs should remain wholly exceptional and not become the norm. On the other hand, where their availability enables justice to be done on the basis of all relevant material when the alternative is a decision on incomplete relevant material, I consider that the Parole Board has the power to resort to the procedure to the same extent in relation to discretionary life prisoners as [it has in] relation to mandatory life prisoners.'

The discrimination argument therefore fell at the first hurdle. There was no differential treatment.

[14] The judge then went on to review the board's decision at a level of utmost intensity and approved deployment of the SAA procedure in this case. He concluded that it was 'fair, proportionate and, indeed, correct'.

[15] In this second part of his judgment the judge recorded (at [16]):

> 'There is another important piece of common ground. It is that the Parole Board has inherent powers to control its own proceedings in relation to mandatory life prisoners and that, in exceptional circumstances, these may permit the appointment of an SAA. However, Mr Owen's first submission in relation to that proposition is that "exceptional circumstances" should be limited to matters of national security. I do not agree. Whilst I accept that the exceptional must remain exceptional and not become the norm, I am not persuaded that the constraints which may justify the appointment of an SAA in the context of national security cannot be matched by comparable constraints in other contexts.'

[16] This 'common ground' appeared to be accepted in para 24 of the claimant's amended skeleton argument for the purposes of this appeal. However in his supplementary skeleton argument Mr Owen QC for the claimant makes it clear that his primary submission is that the board has no power to adopt the SAA procedure in any life imprisonment case. It is only if he is wrong about this that he submits that the board's power to adopt the SAA procedure is confined to cases involving national security.

[17] Mr Owen developed his primary submission both by reference to domestic law and the convention. His submission is supported by Justice who have been given leave to intervene in the appeal. We are grateful for their written submissions.

[18] As a matter of domestic law it is submitted that the board as a creature of statute has no jurisdiction to adopt the SAA procedure. There is no express power to do so and such a power could not be inferred from the general powers conferred by s 32 of the 1991 Act.

[19] A sentence of life imprisonment engages art 5(4) of the convention. After he has served the tariff part of his sentence the prisoner has the right to have the lawfulness of his continued detention 'decided ... by a court'. In *Hussain v UK* (1996) 22 EHRR 1 the European Court of Human Rights decided that art 5(4) required an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses. Paragraph 2 of Sch 5 to the 1991 Act requires the board to include a person who holds or has held judicial office and others with a wide range of experience in dealing with offenders. Since 1991 it has been accepted that the board has been able to provide what art 5(4) requires. In other words it is considered to be a court for the purposes of art 5(4). However, it is submitted that it would be a breach of art 5(4) to deny the prisoner or his representative the right to see evidence which might persuade the board to extend his detention, perhaps forever.

[20] It was also contended that art 6(1) is engaged because the board are involved in the determination of a prisoner's civil rights. But, as Mr Owen conceded, the right to a fair hearing before an independent and impartial tribunal adds little if anything to the requirements of art 5(4) or indeed to the prisoner's common law rights. There is clear authority that the board's

proceedings do not involve the determination of a criminal charge but considerable uncertainty as to whether they involve determination of civil rights. We were asked not to decide this point and, as it is unnecessary to do so in this case, I do not think we should.

[21] In his reply Mr Owen said that the appellant's case now focused on the domestic law argument. He frankly accepted that this was a change of emphasis. I add that it was almost entirely different from the case advanced before the judge which was based on discrimination. Mr Owen submitted that if his domestic law argument succeeded it would follow that there was a breach of art 5 because the appellant's continued detention would not be in accordance 'with a procedure prescribed by law'. Mr Owen may be right about this but I think one cannot ignore art 5(4) when considering the board's powers, since it is the court which has to give effect to the right and one would expect it to have the powers to do so.

[22] I will start however with the domestic law issue. It is submitted that the SAA procedure is a significant departure from the established standard for procedural fairness and equality of arms. The language of s 32(3) and (4) of the 1991 Act, though broad, cannot be construed so as to permit the adoption of such an exceptional procedure. The vires of the 1991 Act must be read narrowly where fundamental rights are engaged. If Parliament had intended the board to have the power to adopt the SAA procedure it would have done so expressly as it has in other cases. I have already referred to the Special Immigration Appeals Commission. The SAA procedure is also provided for in the Proscribed Organisations and Pathogens Access Appeal Commissions, employment tribunals and the Employment Appeal Tribunal in race discrimination claims involving national security, the tribunal established to review certificates issued by the Secretary of State for Northern Ireland for the purposes of national security etc and the Northern Ireland Life Sentence Review Commissioners. In the latter case rules were only made after extensive consultation. We were also shown the Mental Health Review Tribunal Rules 1983, SI 1983/942 which contain a similar provision to r 5 of the 1997 rules.

[23] The appellant's submission therefore is that the judge was wrong to say that the board had the inherent power to adopt the SAA procedure. He is criticised also for not identifying what he considered to be the source of this power.

[24] Mr Owen helpfully took us through a number of English cases where the board's powers had been considered. In *R v Parole Board, ex p Davies* (27 November 1996, unreported) Collins J quashed a decision of the board because it had not made relevant inquiries in the case of a mandatory life prisoner who had been recalled. The judge records without disapproval common ground between counsel for the prisoner and counsel for the board that—

> 'there is a discretion in the board ... which is underlined in the terms of s 32(3) to adopt whatever procedure is, in any individual case, the fair procedure.'

[25] In *R (West) v Parole Board* [2002] EWCA Civ 1641, [2003] 1 WLR 705 this court decided that the board's decisions did not involve the determination of criminal charges for the purpose of art 6 in a case involving the recall of a

prisoner serving a determinate sentence. In the course of his judgment (at [30]) Simon Brown LJ accepted counsel for the board's submission that the rationale of prisoner recall was 'protective and preventative, not ... deterrent'. Later he added (at [40]) that the board 'plainly have power under section 32 of the Act to adopt whatever procedures they think necessary'. Sedley LJ (at [44]) referred to the need of the board to do 'proper justice to prisoners case by case' and that 'attention [needed] to be given in each recall case to what is necessary for its just disposal'. He continued (at [45]):

> 'Our judge-made public law recognises that the impact of recall is ... grave ... It accordingly calls for a high standard of fair procedure. What it does not do is react schematically to the need by insisting on the translation of the criminal trial process into the different context of a Parole Board hearing.'

[26] Mr Owen submitted that the statements in these two cases supporting the view that the board had wide powers to decide its own procedures should be treated with caution since each case was concerned with steps taken to enhance fairness to the prisoner. I do not accept this. These cases lend general support to the view that the board should be able to adapt its procedures to enable it to perform its very important protective and preventative role whilst ensuring substantial fairness for the prisoner.

[27] In *R (on the application of Brooks) v Parole Board* [2004] EWCA Civ 80, [2004] All ER (D) 142 (Feb) this court had to decide the extent to which the board could rely on hearsay evidence in a case in which a discretionary life prisoner's licence had been revoked. The evidence was crucial to the issue of risk, but this court (by a majority) upheld the board's decision relying on it.

[28] The board is concerned with the assessment of risk. As Bingham MR put it in *R v Parole Board, ex p Watson* [1996] 2 All ER 641 at 650, [1996] 1 WLR 906 at 916–917:

> 'In exercising its practical judgment the board is ... balancing the hardship and injustice of continuing to imprison a man who is unlikely to cause serious injury to the public against the need to protect the public against a man who is not unlikely to cause such injury. In other than a clear case this is bound to be a difficult and very anxious judgment. But in the final balance the board is bound to give preponderant weight to the need to protect innocent members of the public against any significant risk of serious injury.'

[29] In making these difficult judgments, s 32 of the 1991 Act requires the board to have regard to all the evidence which is put before it. This is not surprising given its protective and preventative role. It is obvious that such evidence may come from a source who himself may be at risk of life or limb if his identity is known. It seems to me that the board must have inherent power to devise procedures to protect such a source. The risk to the witness may only justify external measures of protection such as those used to protect witnesses in criminal trials. But if the risk is sufficiently serious, I think the board must have the power to direct that the evidence should be withheld from the prisoner or his representatives altogether. Once it is accepted that the board

does have such a power it must additionally have the power to mitigate the unfairness to the prisoner caused by the withholding of the evidence from him or his representatives. One obvious way of doing this is by the SAA procedure.

[30] The vires question is simply whether s 32 of the 1991 Act which empowers the board to carry out its important function, impliedly authorises it to adopt the SAA procedure. The 1991 Act itself says nothing about the board's procedures apart from its obligation to consider all the evidence adduced before it. So far as mandatory life prisoners are concerned there are no other rules. The board therefore must have the power to adopt procedures which are necessary to enable it to perform its task. In the cases to which I have referred it has been accepted that the board have a wide choice as to how it should proceed in any particular case. For the reasons I have already given I think this choice extends to adopting the SAA procedure.

[31] There is nothing in the language of the 1991 Act which stands in the way of this conclusion. The fact that primary and secondary legislation has been passed to authorise adoption of the SAA procedure in other contexts adds some weight to the appellant's argument but is in no way determinative. If the board was being set up today or rules were being made to regulate its procedures, I have little doubt that they would authorise adoption of the SAA procedure. The board's inherent power to do so, however, stems, as I have found, from its obligation to perform its very important protective and preventative role whilst ensuring that its process is substantially fair for the prisoner.

[32] This conclusion is fortified by the fact that the board is considered for convention purposes to be a court. It is not just any administrative tribunal. As a court it has the inherent or implicit power to determine the procedure necessary to achieve its statutory purpose (see *Taylor v Lawrence* [2002] EWCA Civ 90 at [17], [50]–[53], [2002] 2 All ER 353 at [17], [50]–[53], [2003] QB 528). The criminal courts have adopted the SAA procedure without legislative authority in the context of disclosure where there are public interest immunity (PII) issues. In *Secretary of State for the Home Dept v Rehman* [2000] 3 All ER 778, [2003] 1 AC 153 the Court of Appeal invited the appointment of a special advocate when hearing an appeal against a decision of the Special Immigration Appeals Commission and in *R v Shayler* [2002] UKHL 11, [2002] 2 All ER 477, [2003] 1 AC 247 the House of Lords recognised that this procedure might be appropriate if it were necessary to examine very sensitive material on an application for judicial review by a member or former member of a security service.

[33] So I turn to consider Mr Owen's primary submission from the Strasbourg perspective. Here it is submitted that the SAA procedure offends established principles of fairness by denying the prisoner the right to see and answer all adverse material presented to the board and to be represented by counsel who is acting for and responsible to him.

[34] Mr Owen submitted that any measure which cut down a prisoner's right to know the case against him and respond to it was a breach of art 5(4) of the convention. This meant, he said, that r 5 of the 1997 rules and the rules for reviewing life sentences in Northern Ireland were arguably incompatible with the convention. We obviously do not have to decide any such issues, but they illustrate the width of Mr Owen's submissions.

[35] Mr Owen emphasised how intrusive the SAA procedure was by reference to Lord Bingham of Cornhill's speech in *R v H, R v C* [2004] UKHL 3, [2004] 1 All ER 1269, [2004] 2 AC 134 where the House had to consider PII procedures in criminal trials. Of the SAA procedure Lord Bingham said (at [22]):

> 'Such an appointment does however raise ethical problems, since a lawyer who cannot take full instructions from his client, nor report to his client, who is not responsible to his client and whose relationship with the client lacks the quality of confidence inherent in any ordinary lawyer-client relationship, is acting in a way hitherto unknown to the legal profession. Whilst not insuperable, these problems should not be ignored, since neither the defendant nor the public will be fully aware of what is being done. The appointment is also likely to cause practical problems: of delay ... expense ... and of continuing review ... None of these problems should deter the court from appointing special counsel where the interests of justice are shown to require it. But the need must be shown. Such an appointment will always be exceptional, never automatic; a course of last and never first resort. It should not be ordered unless and until the trial judge is satisfied that no other course will adequately meet the overriding requirement of fairness to the defendant.'

[36] It is submitted that if this is the established threshold for the use of special advocates in relation to disclosure issues, the threshold must be even higher where a special advocate is used to address a tribunal on the substantive issue in the proceedings.

[37] Mr Eadie for the Secretary of State submitted that the appellant's submissions had to be tested in the light of the following principles derived from the Strasbourg jurisprudence. (1) Fairness and its ingredients need to be judged in context. (2) The formulation of hard-edged principles is eschewed. (3) The constituent rights of fairness are not absolute. Qualifications to them are justified provided they are necessary and proportionate. (4) The extent to which qualification or flexibility is permitted depends upon the context. A greater degree of latitude is permitted in cases concerning civil rights than in criminal cases. In deciding what is necessary it is legitimate to have regard to the interest of others, including the public if they are affected. (5) The interaction of these interests is a matter of degree to be judged on a case-by-case basis.

[38] Most of these principles can be derived from the speeches of Lord Bingham in *Brown v Stott (Procurator Fiscal, Dunfermline)* [2001] 2 All ER 97 at 115, [2003] 1 AC 681 at 704–705 and *R v H* [2004] 1 All ER 1269 at [12], [23], [27]–[33]. But I do not understand that they are in dispute and I accept them. I would add to the third principle that in considering whether qualification to the right is proportionate, consideration must be given to ways of mitigating or counterbalancing the restriction so as to achieve substantial fairness. Thus in *Chahal v UK* (1996) 1 BHRC 405, an immigration case involving national security, the European Court of Human Rights held that there had been a breach of art 5(4) because the SAA procedure, then only used in Canada, showed that there were techniques which could be employed which both accommodated legitimate security concerns about the nature and sources of

intelligence information and yet achieved for the individual a substantial measure of procedural justice. Failure to adopt a procedure of this kind meant that there had been a breach of the convention right. The court reached the same conclusion in *Tinnelly & Sons Ltd v UK* (1998) 4 BHRC 393, a discrimination case raising security issues in Northern Ireland.

[39] Applying these principles to this case it seems to me that the appellant's complaint must fail. His argument is that as a matter of principle it would never be fair for the board to adopt the SAA procedure. That cannot be right. Fairness has to be judged on a case-by-case basis.

[40] Furthermore, on the facts of this case it has been found that there would be a real risk to the safety of the source or sources of the sensitive material if it was disclosed to the appellant or his representatives. In deciding whether it was necessary to withhold this material the board rightly took into account, not only the interest of the appellant, but the interest of the public in having the board perform its protective and preventative role on all the information available and the interests of the source or sources whose art 2 and/or art 3 rights required protection. Recognising the prejudice to the appellant which its decision to withhold disclosure caused, the board mitigated or counter-balanced that unfairness by adopting the SAA procedure which, it concluded, could secure acceptable standards of fairness to the appellant. In reaching this decision I think it faithfully applied the principles to which I have referred.

[41] The alternatives open to the board were unacceptable: disclosure to the appellant or his representatives posed a real risk to the source or sources; disregarding this sensitive material would have meant that the board could not properly perform its duty and might put the public at risk; and it would have been invidious for the board to have to test the evidence itself. The SAA procedure was the obvious solution. I agree with the judge however that such a solution should only be adopted in exceptional circumstances and should not become the norm.

[42] For the reasons which I have given I reject both limbs of Mr Owen's primary submission.

[43] I can deal with Mr Owen's alternative submission shortly. He says that as the SAA procedure is exceptional it should only be reserved for cases involving national security. He submits that in such cases the interests of the state as a whole are involved. The need to protect a source only involves an individual or individuals.

[44] I do not accept this submission. There is no principled distinction between the need to protect the interest of the state and the need to protect an individual if that is necessary. Why should a member of the security services be protected and not a member of the public? No such distinction is recognised domestically or in the Strasbourg jurisprudence. The Northern Ireland life sentence rules, for example, enable the SAA procedure to be adopted for a number of reasons including national security and where disclosure would be likely adversely to affect the safety of any individual. In *Edwards v UK* (2003) 15 BHRC 189 at 202 (para 53), in the context of criminal proceedings the European Court of Human Rights said:

> '... there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the

a accused. In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest.'

[45] For these reasons I reject Mr Owen's alternative submission.

[46] It follows that I think the judge reached the right decision in this case b and that this appeal should be dismissed.

CLARKE LJ.

[47] I agree.

JACKSON J.

c [48] I also agree.

Appeal dismissed.

Kate O'Hanlon Barrister.

R v Coates and another
R v Colman and another

[2004] EWCA Crim 2253

COURT OF APPEAL, CRIMINAL DIVISION

JUDGE LJ, RODERICK EVANS AND PITCHERS JJ

29, 30 JULY 2004

Criminal law – Court of Appeal – Jurisdiction – Appeal against conviction – Determining an appeal against conviction – When appeal against conviction determined – Supreme Court Act 1981, s 55(4).

The same constitution of the Court of Appeal heard two separate appeals against conviction. At the end of the respective hearings, the presiding judge announced that renewed applications for leave to appeal by one of the defendants would be dismissed for reasons to be given at a later date. In both sets of appeals the court reserved judgment. After the hearings the three members of the court met and agreed their decisions and the reasons for them. The presiding judge was due to write the judgment of the court. It would have then been circulated to his colleagues for their consideration and with a view to their agreement. His sudden death occurred before he had written the judgment. Section 55(2)[a] of the Supreme Court Act 1981 provided that a court of the criminal division of the Court of Appeal was duly constituted for the purpose of exercising any of its jurisdiction if it consisted of any uneven number of judges not less than three. Section 55(4) provided, inter alia, that a court, if it consisted of two judges, was duly constituted for every purpose except, inter alia, determining an appeal against conviction. The Registrar of Criminal Appeals proposed that one of the other members of the court should produce the written judgment in each appeal, explaining the decision and the agreed reasons for it. The defendants objected on the basis that the effect of s 55(4) of the 1981 Act was that the two remaining judges lacked jurisdiction. They contended, inter alia, that appeals against conviction were not 'determined' until both the decision and the reasons for it were pronounced in open court. The Crown contended that appeals were determined for the purposes of s 55(4) once the court had agreed its decision and the reasons for it.

Held – (1) An appeal against conviction could not be said to have been determined for the purposes of s 55 of the 1981 Act if the decision reached by the judges had not been finally binding on the judges themselves. Where, as in the instant cases, until the presiding judge had produced his draft judgments and his colleagues had had an opportunity to consider them, it had been open to him, on reflection on the facts or the relevant legal principles, to change his mind, and it had been equally open to either of them, on further reflection, to reconsider their views, none of the judges had been bound by the decision they had agreed. It had been provisional: conditional on their continuing agreement after they had considered the draft judgment (see [28], [29], [31], [32], below); *R (on the*

a Section 55, so far as material, is set out at [6], below

application of Anufrijeva) v Secretary of State for the Home Dept [2003] 3 All ER 827 distinguished.

(2) Where the court gave its decision in open court at the conclusion of the argument, with reasons to be given later, the subsequent death of one member of the court before reasons had been given did not vitiate that decision. When a court said in terms that an appeal was allowed or dismissed, or an application granted or refused, that was a final determination. The court itself could not change its mind. While importance was rightly attached to the requirement that the court's decision should be properly explained, in cases such as the instant cases, the decision of the court would survive the absence of a reasoned written judgment and it would be sufficient for the reasons for the decision to be produced by one of the two remaining members of the court. Accordingly, in the instant cases, save in relation to those decisions which had been announced in open court by the presiding judge before his death, no judgments would be given (see [32], [34], [36], below).

Notes

For the constitution of the Criminal Division of the Court of Appeal, see 10 *Halsbury's Laws* (4th edn reissue) para 636.

For the Supreme Court Act 1981, s 55, see 11 *Halsbury's Statutes* (4th edn) (2000 reissue) 1099.

Cases referred to in judgment

R v Cannings [2004] EWCA Crim 1, [2004] 1 All ER 725, [2004] 1 WLR 2607.

R v Sekhon, R v McFaul, R v Knights [2002] EWCA Crim 2954, [2003] 3 All ER 508, [2003] 1 WLR 1655.

R (on the application of Anufrijeva) v Secretary of State for the Home Dept [2003] UKHL 36, [2003] 3 All ER 827, [2004] 1 AC 604, [2003] 3 WLR 252.

Appeals

R v Coates and Graves

Victor Henry Bright Coates and Martin John Graves appealed, with leave, against their convictions at Basildon Crown Court on 4 April 2003 and made renewed applications for leave to appeal. Their appeals were heard by the Court of Appeal (Kay LJ, Evans and Pitchers JJ) on 28 April 2004. At the end of the hearing the court reserved judgment. The members of the court considered the arguments and came to decisions as to the outcome of the appeals. Kay LJ died before writing the draft judgment of the court. The Registrar of Criminal Appeals proposed that one of the other members of the court should produce a written judgment, explaining the decision and the agreed reasons for it. Coates and Graves addressed objections to the Court of Appeal that the remaining judges lacked jurisdiction. The facts are set out in the judgment of the court.

R v Colman and Terry

Robert Luke Colman and Wayne Michael Terry appealed, with leave, against their convictions at Winchester Crown Court on 8 February 2002 and Terry made renewed applications for leave to appeal. Their appeals were heard by the Court of Appeal (Kay LJ, Evans and Pitchers JJ) on 28 April 2004. At the end of the hearing the court announced that the renewed applications by Terry would be dismissed and that reasons would be given at a later date. The court otherwise

reserved judgment. The members of the court considered the arguments and came to decisions as to the outcome of the appeals. Kay LJ died before writing the draft judgment of the court. The Registrar of Criminal Appeals proposed that one of the other members of the court should produce a written judgment, explaining the decision and the agreed reasons for it. Terry addressed objections to the Court of Appeal that the remaining judges lacked jurisdiction. The facts are set out in the judgment of the court.

Peter Birts QC and *John Hulme* (assigned by the *Registrar of Criminal Appeals*) for Coates.

Miles Bennett (assigned by the *Registrar of Criminal Appeals*) for Graves.

David Harounoff (assigned by the *Registrar of Criminal Appeals*) for Colman.

Rupert Pardoe and *Fiona Horlick* (assigned by the *Registrar of Criminal Appeals*) for Terry.

Sir Derek Spencer QC and *John Dodd* (instructed by the *Crown Prosecution Service*, Chelmsford) for the Crown in the cases of Coates and Graves.

David Bartlett (instructed by the *Crown Prosecution Service*, Eastleigh) for the Crown in the cases of Colman and Terry.

JUDGE LJ.

[1] The problem we have to address arises from the much lamented sudden death of Kay LJ. It arises in this stark way. Coates and Graves appealed against their convictions at the Crown Court at Basildon on 4 April 2003. Terry appealed against his conviction at the Crown Court at Winchester on 8 February 2002. Their appeals were heard on 28 April 2004 and 4–6 May 2004 respectively before the court presided over by Kay LJ. The other members of the court were Roderick Evans and Pitchers JJ. Leave had been given to appeal on some grounds and refused in others, and the court therefore had to consider not only full appeals, but also renewed applications for leave to appeal.

[2] At the end of the respective hearings Kay LJ announced that the renewed applications for leave to appeal by Terry would be dismissed and that the reasons would be given at a later date. In both sets of cases, on the grounds on which leave to appeal had been given, the court reserved its judgment.

[3] After the hearing the three members of the court reflected together on the material placed before them and the respective arguments of counsel. The outcome of the appeals was agreed, and so were the reasons for the outcomes. Kay LJ was due to write the judgment of the court. When he had completed it, it would have been circulated by him to his colleagues for their consideration and with a view to their agreement. Unfortunately, his sudden death occurred before he had written the judgment. In a letter dated 12 July 2004 from the Registrar of Criminal Appeals to all counsel, they were informed: 'After the conclusion of submissions all three members of the court considered the arguments and came to decisions as to the outcome of the appeal.' It was proposed that one of the other members of the court should produce a written judgment in each appeal, explaining the decision and the agreed reasons for it.

[4] Objection was taken to that course on the basis that the two remaining judges lacked jurisdiction to determine the appeal. A separate point in relation to matters of discretion was also taken, but the argument was not pursued before us.

[5] In relation to the Court of Appeal (Criminal Division) and its predecessor, the Court of Criminal Appeal, the problem we have to address is unprecedented, and none of the many counsel involved in the hearing before us had discovered

any relevant authorities. Our primary concern, therefore, is whether the course proposed in the letter from the registrar is prohibited on jurisdictional grounds.

[6] The jurisdiction of this court depends exclusively on statute. Section 55 of the Supreme Court Act 1981 provides as follows, so far as material:

> '(2) ... a court shall be duly constituted for the purpose of exercising any of its jurisdiction if it consists of any uneven number of judges not less than three.
>
> (3) Where—(a) part of any proceedings before a court has been heard by an uneven number of judges greater than three; and (b) one or more members of the court are unable to continue, the court shall remain duly constituted for the purpose of those proceedings so long as the number of members (whether even or uneven) is not reduced to less than three.
>
> (4) ... a court shall, if it consists of two judges, be duly constituted for every purpose except—(a) determining an appeal against—(i) conviction; or (ii) a verdict of not guilty by reason of insanity; or (iii) a finding of a jury under section 4 of the Criminal Procedure (Insanity) Act 1964 (unfitness to plead) that a person is under a disability; (aa) reviewing sentencing under Part IV of the Criminal Justice Act 1988; (b) determining an application for leave to appeal to the House of Lords; and (c) refusing an application for leave to appeal to the criminal division against conviction or any such verdict or finding as is mentioned in paragraph (a)(ii) or (iii), other than an application which has been refused by a single judge.
>
> (5) Where an appeal has been heard by a court consisting of an even number of judges and the members of the court are equally divided, the case shall be re-argued before and determined by an uneven number of judges not less than three.'

[7] The language of the statute makes it plain that appeals against conviction are to be heard and decided by constitutions of not less than three judges. If the appeal begins before more than three judges, one of whom is no longer able to continue with the proceedings, the statute provides that the court will remain duly constituted provided the number of judges is not reduced below three. It follows that if an appeal against conviction starts before three judges, the hearing cannot continue in front of the two remaining judges if, for whatever reason, their colleague is unable to continue.

[8] None of these principles present any difficulty. They follow from the clear language of the statute. In essence, the argument is that the problems with which we are concerned are entirely covered by these provisions and that they lead to the conclusion that, for jurisdictional reasons, the judgment may not be given.

[9] There is no broad discretion similar to that provided by s 54(4A) of the 1981 Act, exercisable by the Master of the Rolls, in relation to the future conduct of a civil appeal where a member of the court is unable to continue and the proceedings are 'partly heard'.

[10] We believe that the distinction between criminal and civil appeals is quite deliberate. Appeals against conviction are concerned with the safety of verdicts reached by a jury. The requirement that appeals against conviction should be decided by a court of not less than three judges is a proper acknowledgment of the constitutional pre-eminence of the jury.

[11] Our attention was also drawn to s 59 of the 1981 Act. This provides that in the Court of Appeal (Criminal Division) the judgments of the court must be

given by the judge presiding over the court or such other member of the court as he may direct. a

[12] We doubt whether this provision, which relates to the normal arrangements by which a single judgment of the court is usually produced, is of more than peripheral interest in the present situation. In our view, its direct concern is administrative arrangements.

[13] The proper application of s 55 of the 1981 Act therefore requires us to b decide a deceptively simple question: were these appeals against conviction 'determined' by the three judges?

[14] The critical facts in each case are that the hearings were concluded and the members of the court had met and agreed their decisions and the reasons for them. Superficially, at any rate, all that was left was for the reasons to be reduced into writing and the decision to be pronounced in court. c

[15] We emphasise that we are not here dealing with a reserved judgment in which the outcome of the appeal and the reasons for the decision were not apparently agreed by the three judges before the death of one of them. Equally, we are not concerned with an overnight or short adjournment for reasons of convenience; nor was this a case where the judgment and the reasons were ready d for delivery and circulated to the parties.

[16] Mr Peter Birts QC and Mr Pardoe, for Coates and Terry respectively, submitted that, for the purposes of s 55, appeals against conviction were not determined until the decision and the reasons for it were pronounced in open court.

[17] Mr Bennett, for Graves, took a less extreme position. He accepted that if e the court had pronounced its decision in court at the end of the hearing, the appeal or application was there and then determined, notwithstanding that reasons for the decision had not been reduced into writing.

[18] Sir Derek Spencer QC and Mr Bartlett, in separate submissions for the Crown, suggested that where the court had agreed its decision and the reasons f for it before the death of Kay LJ, for the purposes of s 55 the appeals were determined.

[19] It was rightly agreed on all sides that, as the issue related to jurisdiction, the outcome could not depend on whether the decision agreed by the three judges was favourable or adverse to the appellants.

[20] Sir Derek made a number of powerful submissions to the effect that there g could be no injustice to the appellants if one of the two surviving judges produced the judgment of the court and explained the reasons for its decision. The case had, after all, been fully argued; it was not in the public interest for the same appeal to be re-litigated. These are persuasive considerations, but they do not create a jurisdiction which is otherwise absent. h

[21] Sir Derek further suggested that s 55 was enacted without reference to the possible death of one member of the court. We are less sure about this argument. As we see it, equivalent provision could have been made in relation to appeals against criminal convictions as for civil appeals, and none was. In this context the Lord Chief Justice does not have the equivalent powers of the Master j of the Rolls. We do not think it is open to us to fashion what might appear to be a commonsense answer to the problems now facing us if the three judges had not in fact determined the appeal.

[22] Sir Derek further suggested that s 55 itself did not suggest that a process by which the two surviving judges would produce the judgment of the court would be null and void. If, however, the court is not 'duly constituted' it lacks

jurisdiction, and, equally, we are unable to accept his invitation to treat these particular jurisdictional points as procedural and technical matters of the kind which the court in *R v Sekhon, R v McFaul, R v Knights* [2002] EWCA Crim 2954, [2003] 3 All ER 508, [2003] 1 WLR 1655 was entitled to disregard.

[23] Our attention was drawn to a number of authorities, but we were unable to derive any assistance from them about the principles which apply to s 55 and the question, when is an appeal against conviction determined?

[24] We must briefly address *R (on the application of Anufrijeva) v Secretary of State for the Home Dept* [2003] UKHL 36, [2003] 3 All ER 827, [2004] 1 AC 604, which was strongly relied on by the appellants. The House of Lords was considering whether income support should be paid to an asylum seeker whose claim for asylum was 'recorded' as having been determined but without notification to her of the decision. Our attention was focused on passages in the speech of Lord Steyn relating to fundamental principles:

> '[26] ... Notice of a decision is required before it can have the character of a determination with legal effect because the individual concerned must be in a position to challenge the decision in the courts if he or she wishes to do so. This is not a technical rule. It is simply an application of the right of access to justice ...
>
> [28] ... a constitutional state must accord to individuals the right to know of a decision before their rights can be adversely affected.'

In short, the problem under consideration in that appeal was whether the decision of the Secretary of State could take effect before A was notified of it.

[25] There is a major difference between that decision and the present problem. The question here is whether there was a determination at all. The court would be ready and willing to announce a decision and give the reasons for it if it has jurisdiction and may validly do so.

[26] Sir Derek Spencer drew our attention to the observations of Lord Millett (at [39]) that—

> 'a determination must actually be made before it can properly be recorded; and that it is not necessarily merely provisional until it is notified to the person or persons adversely affected by it.'

He submitted that the court had made its determination and therefore all that was necessary was for it to be pronounced in court. The decision was not 'merely provisional' at all; it was final. If that is right, then we would agree.

[27] We note a passage in Lord Millett's speech which included observations of broader implication to the outcome of the present argument. Lord Millett introduced his speech by recording that, until he had read the speech of Lord Steyn in draft, he had been of the opinion that the appeal should be dismissed. He had, he recorded, been persuaded to change his mind. In this observation Lord Millett encapsulated an experience which anyone who has sat as a judge will immediately recognise. In short, more mature reflection can produce a change of mind, sometimes in most unexpected circumstances. It therefore illustrates considerations which are critical to our decision.

[28] We must return to the facts. The three judges responsible for the conduct of these appeals against conviction met and discussed the decisions they should reach. They were all agreed about the outcome. Nevertheless, certainly until Kay LJ produced his draft judgment and his colleagues had an opportunity to consider it, it was open to him, on reflection on the facts or the relevant legal

principles, to change his mind, and it was equally open to either of them, on further reflection, to reconsider their views. If so, each member of the court was duty bound to communicate any change of view, or even a change of emphasis, to the other members of the court, and further discussion would then have ensued. The outcome would of course be unknown.

[29] In short, none of the judges was bound by the decision they had agreed, although they all believed they were agreed. No matter how sure they all were about their agreement, on strict analysis it was provisional; conditional on their continuing agreement after they had considered the draft judgment.

[30] In passing, we note that it remained open to any of the parties to send further written submissions to the court and, again, no matter how firmly the judges thought they had agreed about the outcome of the case, they would have had to reflect on the further submissions and any new authorities drawn to their attention. In one of these two cases that is precisely what happened. Before Kay LJ's death, Mr Pardoe asked the court to consider a number of decisions from the European Court which, he urged, strengthened his argument and which he had overlooked when he was before the court at the hearing.

[31] In our judgment, therefore, if the decision reached by the judges was not finally binding on the judges themselves, the appeal could not be said to have been determined. Moreover, for the purposes of s 34 of the Criminal Appeal Act 1968, until the judges themselves had finally agreed their decision, there can have been no decision of the court on which to found an application for leave to appeal to the House of Lords.

[32] Accordingly, we are persuaded that, notwithstanding the apparent agreement of the three judges about the outcome of these appeals, it could not be said that they were determined for the purposes of s 55 of the 1981 Act until the decision was properly to be treated as binding on the judges themselves, and, notwithstanding the agreement between the judges in the circumstances we have described, it was open to any of them, and therefore the court, to change its mind about the outcome. Accordingly, save in relation to those decisions which were announced in open court by Kay LJ before his death, this court ceased to be properly constituted for the purpose of deciding these appeals when Kay LJ died. Therefore, no judgments will be given.

[33] We must next address the situation which arose in at least one of these appeals, where the court gave its decision at the end of the hearing on the renewed application for leave and stated that the reasons would be produced at a later date. This is a common enough experience, sometimes a decision being adverse and sometimes favourable to the appellant.

[34] We have reflected on the arguments by Mr Birts and Mr Pardoe. In our judgment, however, where such a decision is given in open court at the conclusion of the argument, the subsequent death of one member of the court before reasons are given does not vitiate the decision.

[35] In the recent case of *R v Cannings* [2004] EWCA Crim 1, [2004] 1 All ER 725, [2004] 1 WLR 2607, in which Pitchers J and I, together with Rafferty J, were members of the court, the convictions for murder were quashed on 10 December 2003 with reasons to be given later. Our reasoned judgment was provided on 19 January. Something of a public scandal would rightly have erupted if the result of the appeal somehow ceased to have effect simply because of the sudden death of one member of the court after the decision had been announced, but before the reasons were produced. It is nothing to the point that in such circumstances the Crown would probably not have contested the conviction at a subsequent

hearing. The impact on the appellant would have been devastating. If the argument that the announcement of the decision had no effect until the reasons were given, the convictions for murder would have been immediately restored on the death of one member of the court. Alternatively, despite the pronouncements in open court, her convictions were never validly quashed at all. That would be a novel and disturbing proposition.

[36] The short answer is that when the court says in terms that an appeal is allowed or the application granted, or the appeal is dismissed or any application refused, that is a final determination. The court itself cannot change its mind. Like any other court, we recognise the importance rightly to be attached to the requirement that the court's decision should be properly explained. Nevertheless, in cases of the kind currently under consideration, the decision of the court would survive the absence of a reasoned written judgment and it would be sufficient for the reasons for the decision to be produced by one of the two remaining members of the court. The principle applies irrespective of whether the decision is favourable or unfavourable to the appellant.

[37] We shall now give any consequential directions which follow from the judgment.

Directions accordingly.

Stephen Leake Barrister.

Watkins v Secretary of State for the Home Department and others

[2004] EWCA Civ 966

COURT OF APPEAL, CIVIL DIVISION

BROOKE, CLARKE AND LAWS LJ

4 MAY, 20 JULY 2004

Public office – Abuse of – Misfeasance by a public officer – Ingredients of tort – Special damage – Interference by prison officers with prisoner's right of access to the court – Whether special damage necessary.

The claimant was a serving prisoner. He was engaged in various legal proceedings. The Prison Rules 1964 (and subsequently the Prison Rules 1999, in identical terms) applied to a prisoner's correspondence with his legal adviser and any court, setting out the circumstances in which such correspondence could be opened, read, or stopped. The claimant made frequent complaints to the effect that his correspondence was being treated by prison officers in a manner that conflicted with the 1964 rules and the 1999 rules. He brought an action against the Secretary of State and certain prison officers for damages for misfeasance in public office. The judge found that three of the officers had acted in bad faith in connection with their breaches of the rules. He also found that there had been no resulting damage to the claimant in the form of financial loss or physical or mental injury and, holding that such loss or damage constituted a necessary ingredient of the tort, dismissed the claim. The claimant appealed.

Held – Infringement by a holder of a public office of a right identifiable as a constitutional right, together with the requisite mental element, could give rise to a cause of action for infringement of that right without proof of special damage. The right of the claimant in the instant case, which was the right of every citizen to unimpeded access to the court, was a right of that level of importance, so that when the three prison officers had maliciously infringed that right the claimant's cause of action in misfeasance in public office was complete. The appeal would accordingly be allowed, a nominal award of general damages made against those three defendants, and the case remitted to the county court for determination of whether exemplary damages should be awarded, and if so, in what amount (see [47]–[49], [52], [60]–[62], [64], [65], [67]–[69], below).

Ashby v White, ex p Leech (1703) 1 Sm LC (13th edn) 253 and *Three Rivers DC v Bank of England (No 3)* [2000] 3 All ER 1 applied.

Notes

For misfeasance in public office, see 45(2) *Halsbury's Laws* (4th edn reissue) para 502.

Cases referred to in judgments

Allsop v Allsop (1860) 29 LJ Ex 315, 157 ER 1292.
Ashby v White (1703) 2 Ld Raym 938, 92 ER 126; *rvsg* (1703) 1 Sm LC (13th edn) 253, 1 ER 417, HL.
Beaumont v Greathead (1846) 2 CB 494, 135 ER 1039, CCP.
Calveley v Chief Constable of the Merseyside Police [1989] 1 All ER 1025, [1989] AC 1228, [1989] 2 WLR 624, HL.
Constantine v Imperial London Hotels Ltd [1944] 2 All ER 171, [1944] 1 KB 693.
Embrey v Owen (1851) 6 Exch 353, 155 ER 579.
Farrington v Thomson [1959] ALR 695, Vic SC.
Fitzgerald v Firbank [1897] 2 Ch 96, [1895–9] All ER Rep 445, CA.
Harrop v Hirst (1868) LR 4 Exch 43, Ex Ct.
Henley v Mayor of Lyme (1828) 5 Bing 92, 130 ER 995.
Holford v Bailey (1849) 13 QB 426, Ex Ch.
Huckle v Money (1763) 2 Wils 205, 95 ER 768, CCP.
Jones v Jones [1916] 2 AC 481, [1916–17] All ER Rep Ext 1348, HL.
Kuddus v Chief Constable of Leicestershire Constabulary [2001] UKHL 29, [2001] 3 All ER 193, [2002] 2 AC 122, [2001] 2 WLR 1789.
Leech v Parkhurst Prison Deputy Governor, Prevot v Long Larton Prison Deputy Governor [1988] 1 All ER 485, [1988] AC 533, [1988] 2 WLR 290, HL.
Lonrho Ltd v Shell Petroleum Co Ltd (No 2) [1981] 2 All ER 456, [1982] AC 173, [1981] 3 WLR 33, HL.
Marzetti v Williams (1830) 1 B & Ad 415, 109 ER 842, [1824–34] All ER Rep 150.
Mediana (Owners of the Steamship) v Owners, Master and Crew of the Lightship Comet, The Mediana [1900] AC 113, [1900–3] All ER Rep 126, HL.
Neville v London 'Express' Newspaper Ltd [1919] AC 368, [1918–19] All ER Rep 61, HL.
Nicholls v Ely Beet Sugar Factory Ltd [1936] 1 Ch 343, CA.
Northern Territory of Australia v Mengel (1995) 185 CLR 307, Aust HC.
Owen and Smith (t/a Nuagin Car Service) v Reo Motors (Britain) Ltd [1934] All ER Rep 734, CA.
Quartz Hill Consolidated Gold Mining Co v Eyre (1883) 11 QBD 674, [1881–5] All ER Rep Ext 1474, CA.
R v Lord Chancellor, ex p Witham [1997] 2 All ER 779, [1998] QB 575, [1998] 2 WLR 849, DC.
R v Secretary of State for the Home Dept, ex p Leech [1993] 4 All ER 539, [1994] QB 198, [1993] 3 WLR 1125, CA.
Rookes v Barnard [1964] 1 All ER 367, [1964] AC 1129, [1964] 2 WLR 269, HL.
Savile v Roberts (1698) 1 Ld Raym 374, 91 ER 1147, [1558–1774] All ER Rep 456.
Thompson v Comr of Police of the Metropolis, Hsu v Comr of Police of the Metropolis [1997] 2 All ER 762, [1998] QB 498, [1997] 3 WLR 403, CA.
Three Rivers DC v Bank of England (No 3) [2000] 3 All ER 1, [2003] 2 AC 1, [2000] 2 WLR 1220, HL; *affg in part* [1999] 4 All ER 800n, [2003] 2 AC 1, [2000] 2 WLR 15, CA; *affg* [1996] 3 All ER 558.
Webb v Portland Manufacturing Co (1838) 3 Sumner's Rep 189.
X (minors) v Bedfordshire CC, M (a minor) v Newham London BC, E (a minor) v Dorset CC [1995] 3 All ER 353, [1995] 2 AC 633, [1995] 3 WLR 152, HL.

Cases referred to in skeleton arguments

Appleton v Garrett (1997) 34 BMLR 23.

Beaudesert Shire Council v Smith (1966) 120 CLR 145, Aust HC.

Cassell & Co Ltd v Broome [1972] 1 All ER 801, [1972] AC 1027, [1972] 2 WLR 645, HL.

Cornelius v Hackney LBC [2002] EWCA Civ 1073, [2003] LGR 178.

Hague v Deputy Governer of Parkhurst Prison, Weldon v Home Office [1991] 3 All ER 733, sub nom *R v Deputy Governor of Pankhurst Prison, ex p Hague, Weldon v Home Office* [1992] 1 AC 58, [1991] 3 WLR 340, HL.

Harman v Tappenden (1801) 1 East 555, 102 ER 214.

Holden v Chief Constable of Lancashire [1986] 3 All ER 836, [1987] QB 380, [1986] 3 WLR 1107, CA.

Hunter v Canary Wharf Ltd, Hunter v London Docklands Development Corp [1997] 2 All ER 426, [1997] AC 655, [1997] 2 WLR 684, HL.

Janvier v Sweeney [1919] 2 KB 316, [1918-1919] All ER Rep 1056, CA.

Victorian Railways Comrs v Coultas (1888) 13 App Cas 222, PC.

Wainwright v Home Office [2003] UKHL 53, [2003] 4 All ER 969, [2003] 3 WLR 1137.

Wilkinson v Downton [1897] 2 QB 57, [1895-1899] All ER Rep 267.

Wong v Parkside Health NHS Trust [2001] EWCA Civ 1721, [2003] 3 All ER 932.

Appeal

Jeffrey Shane Watkins appealed from the order of Judge Ibbotson in the Leeds County Court on 15 July 2003 dismissing his claim for damages for misfeasance in public office brought against the Secretary of State for the Home Department, Prison Officers Ravenscroft, Rosevere and Robinson, and eleven other prison officers. The facts are set out in the judgment of Brooke LJ.

Flo Krause (instructed by *AS Law*, Liverpool) for Mr Watkins.

Wendy Outhwaite (instructed by the *Treasury Solicitor*) for the defendants.

Cur adv vult

20 July 2004. The following judgments were delivered.

BROOKE LJ.

[1] This is an appeal by the claimant Jeffrey Shane Watkins against an order of Judge Ibbotson sitting in the Leeds County Court on 15 July 2003 whereby he directed that judgment be entered for the defendants in this action. The claimant was at the material times a serving prisoner, and the judge found that three prison officers had acted in bad faith when dealing with his legally-privileged correspondence. However, he was not satisfied that Mr Watkins had suffered any loss or damage such as constituted an essential ingredient of the tort of misfeasance in public office, and because he held that this tort was not actionable per se he dismissed his claim.

[2] Rule 37A of the Prison Rules 1964, SI 1964/388 was the rule in force for much of the time with which this action is concerned. It was then superseded by r 39 of the Prison Rules 1999, SI 1999/728, which is in identical terms. These two rules provide, so far as is material:

'(1) A prisoner may correspond with his legal adviser and any court and such correspondence may only be opened, read or stopped by the governor in accordance with the provisions of this rule.

(2) Correspondence to which this rule applies may be opened if the governor has reasonable cause to believe that it contains an illicit enclosure and any such enclosure shall be dealt with in accordance with the other provisions of these Rules.

(3) Correspondence to which this rule applies may be opened, read or stopped if the governor has reasonable cause to believe its contents endanger prison security or the safety of others or are otherwise of a criminal nature.

(4) A prisoner shall be given the opportunity to be present when any correspondence to which this rule applies is opened and shall be informed if it or its enclosure is to be read or stopped.'

[3] The rule was introduced following the judgment of this court in *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198. Steyn LJ said ([1993] 4 All ER 539 at 548, [1994] QB 198 at 210) that even in our unwritten constitution the right of every citizen to have unimpeded access to a court must rank as a constitutional right, and that a prisoner's unimpeded right of access to a solicitor for the purpose of receiving advice and assistance in connection with the possible institution of civil proceedings in the courts formed an inseparable part of his right of access to the courts themselves. It was for this reason that the court held that s 47(1) of the Prisons Act 1952 did not authorise the making of any rule which created an impediment to the free flow of communications between a solicitor and a client about contemplated legal proceedings. Steyn LJ said that this, too, was a rule of fundamental importance.

[4] In order to give effect to the new rule, HM Prison Service included in Standing Order 5 a direction that an envelope carrying correspondence between an inmate and his/her legal adviser should be marked with a reference to that provision. The Standing Order explained the effect of the new rule. It was supplemented by a Home Office instruction to prison governors, issued on 21 December 1995 (113/1995) which also explained the effect of the new rule and warned governors that any breach of it was likely to lead to legal challenge. Governors were told to ensure that sufficient safeguards were in place to avoid the possibility of such correspondence being opened inadvertently. All staff who handled correspondence were to be informed of the terms of these procedures.

[5] Mr Watkins is a serving life prisoner. His complaints in this action straddle a period between 1 May 1998 and 5 December 2000. For the first part of this period he was detained at Wakefield Prison. In September 1999 he was moved to Frankland Prison. Throughout the period he was engaged in a variety of legal proceedings, actual or contemplated, which necessitated correspondence with various legal advisers, courts and other bodies. He made frequent complaints to the effect that this correspondence, both outgoing and incoming, was being treated by prison officers in a manner that conflicted with the requirement of r 37A (or r 39, as the case might be). His attempts to pursue the matter both through the formal prison complaints systems and the Prisons Ombudsman failed to provide satisfaction, and he was eventually granted legal aid to bring an action for damages in the courts. By his particulars of claim

Mr Watkins claimed damages for misfeasance in public office against the Home Office and 14 named prison officers. *a*

[6] The judge found that most of these officers had committed a breach of the rule, but he acquitted them of bad faith. At Wakefield some misunderstandings had arisen from the fact that although the prison governor notified both prisoners and prison staff on 21 September 1998 about the effect of the rule, he overlooked the fact that the letters a court sent to a prisoner bore the name of the court on *b* the envelope but contained no reference to Standing Order 5. The judge was, moreover, satisfied that some of the officers had opened the relevant letters accidentally; in other cases he ascribed the breach of the rule to inadequate training as opposed to bad faith. He found three prison officers, however, guilty of bad faith in connection with their breach of the rule, and the question at the *c* heart of this appeal is whether the tort of misfeasance in public office is actionable per se, or whether the judge was obliged to dismiss Mr Watkins' claim in these three cases, too, because he could not prove he had suffered any loss sounding in damages.

[7] The history of the three incidents can be told quite briefly. The first two incidents concerned Officers Ravenscroft and Rosevere in Wakefield Prison in *d* September and October 1998. The third concerned Officer Robinson at Frankland Prison in December 2000.

[8] The first adverse finding arose out of events in Wakefield Prison on 16–17 September 1998. On 16 September Mr Watkins asked the officer on duty for his mail and was told that unless he opened his letters in that officer's *e* presence he would not be allowed to have them. He pointed out that he was entitled to take his legal mail unopened unless the governor had reasonable cause to suspect an illicit enclosure, but the officer refused to give them to him. He told Mr Watkins he would be referring the letters to the principal officer in his wing.

[9] On 17 September, Officer Ravenscroft summoned Mr Watkins into the *f* landing office and told him that there were two legal letters for him. Each envelope was marked with a reference to r 37A, and each bore a franked strip containing details of the solicitor from whom the correspondence originated. The officer then proceeded to pull legal paperwork out of the larger envelope, which had already been opened. When Mr Watkins complained, the officer *g* told him that the envelope was already open when he had entered the office.

[10] The officer then inspected the contents of this envelope before he handed the envelope and the legal papers over to Mr Watkins. He then picked up the smaller envelope, opened it, and inspected the envelope's contents before handing the letter and envelope over. When Mr Watkins protested *h* about the breach of r 37A, the officer laughed and said 'So report me to John Major' [Prime Minister 1990–1997]. The following day Mr Watkins made a formal complaint about the matter. This led to the promulgation of the notice to staff drawing attention to the effect of r 37A to which I have referred in [6], above.

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[11] The judge found that when Officer Ravenscroft opened the letters he did so not caring whether he was acting unlawfully. He had accepted that he was aware of r 37A, and the judge formed the view that it was more likely than not that when he opened the letters he did not care whether he was breaking that rule.

[12] Mr Watkins did not assert that he had suffered any specific injury or loss or damage as a result of this incident. He made a general complaint about such matters as having his private affairs made common knowledge, and being unable to communicate fully with his legal advisers, but although he said that the chances of success of his various legal challenges might have been jeopardised, the judge said that there was no evidence that any such jeopardy in fact occurred. Mr Watkins also made a general allegation of injury to his sense of pride and dignity. The judge said that although an answer like that given by Officer Ravenscroft might do little for Mr Watkins' self-esteem, it did not, in his view, amount to such injury, loss or damage as was a necessary ingredient of the tort of misfeasance in public office.

[13] The second incident occurred just over two weeks later. By this time prison officers at Wakefield had seen the notice reminding them of the effect of r 37A to which I have referred in [6] and [10], above.

[14] On 5 October 1998 Mr Watkins noticed that his name was on the landing board for mail. When he asked for his mail, he was told that there was a r 37A letter for him, but the officer on duty refused to hand it over to him unless he was willing to open it in his presence. Later that day Officer Rosevere called Mr Watkins into the landing office as he was passing it and told him there was a letter for him. He then proceeded to rip it open. When Mr Watkins asked him why he was doing this, Officer Rosevere told him that the new notice only applied to outgoing mail. Mr Watkins made a formal complaint ten days later.

[15] The judge found that Officer Rosevere opened a letter addressed to Mr Watkins fully marked r 37A, that in doing so he acted in breach of the rule, and that he chose to do so. He said he acted in bad faith in that he knew he was acting unlawfully or was reckless as to whether his conduct was unlawful as regards Mr Watkins. However, he made the same finding that there was no resulting damage in the form of financial loss or physical or mental injury, so that Mr Watkins' claim failed in this regard.

[16] The third incident occurred in December 2000 at Frankland Prison. Mr Watkins was pursuing county court proceedings at that time against one of the officers at the prison, Officer Robinson. On 5 December 2000 this officer opened two letters marked 'Durham County Court' which were addressed to Mr Watkins without his knowledge or consent and without due cause. He then handed them to Mr Watkins already opened. The judge found that when Mr Robinson opened his letters he did so to see if they related to Mr Watkins's case against him, and that this was sufficient to establish the requisite degree of bad faith that constitutes the first element of the tort of misfeasance in public office. Again, he did not find that Mr Watkins had suffered any resulting injury, loss or damage such as was necessary to constitute the second ingredient of the tort.

[17] The judge ended his judgment in these terms:

> '161. As a result of the various findings I have made, all 15 defendants are entitled to judgment against the claimant. The issue of damages does not arise, but I will add the following observation: even if liability had been established against any of the defendants, I would not have awarded aggravated damages. Having listened to the evidence and seen the claimant in the witness box, I would have found that he was not

particularly embarrassed or humiliated. He seemed to me to be a man of some intelligence who has acquired some knowledge of the legal process and, without in any way trivialising his complaints or minimising the effect on him, I think it could be said that in many ways he appears to thrive on these conflicts.

162. As regards exemplary damages, I might well, in the event of liability having been established against any defendant, have been prepared to award exemplary damages if the appropriate level of compensatory damages was so modest as to represent less than the defendants ought to pay for unlawful conduct of this nature. I decline to indicate the level of exemplary damage because it would depend on the circumstances of the individual case. In my view, the first defendant could not as a matter of law be vicariously liable for exemplary damages awarded against one of its individual employees.'

[18] The question at the heart of this appeal is whether proof of damage is a necessary ingredient of the tort of misfeasance in public office. The editors of *Clerk & Lindsell on Torts* (18th edn, 2000) ended their analysis of this part of the law (pp 23–25 (paras 1.46–1.48)) with the statement that this 'emergent tort' was perhaps one example where it remained to be decided whether or not the tort was actionable per se. The point did not have to be decided by the House of Lords in *Three Rivers DC v Bank of England (No 3)* [2000] 3 All ER 1, [2003] 2 AC 1 (but already decided when the 18th edition of *Clerk & Lindsell* went to press), but it is to the speeches of Lord Hobhouse of Woodborough and Lord Steyn in that case that I must first turn.

[19] Lord Hobhouse explained ([2000] 3 All ER 1 at 43, [2003] 2 AC 1 at 229) how the tort of misfeasance in public office operated in an area left unoccupied because of the limits imposed on the scope of two other classes of tort that involve persons holding public office.

[20] One of these is concerned with the invasion of some legally protected right of the plaintiff, such as trespass to the person (or to property) and conversion. If the plaintiff's person or some possessory or propriety right of his is invaded, Lord Hobhouse commented ([2000] 3 All ER 1 at 43, [2003] 2 AC 1 at 229):

'Such conduct on the part of the defendant is actionable as such and the belief of the defendant as to the legality of what he did is irrelevant. It is no defence for the defendant to say that he believed that he had statutory or other legal authority if he did not. The legal justification must actually exist otherwise he is liable in tort. (See *Northern Territory of Australia v Mengel* (1995) 185 CLR 307 at 358.)'

[21] Lord Hobhouse's second class contained those cases where the plaintiff complains that he suffered loss in consequence of some act of the defendant which the defendant mistakenly believed was authorised by law. In those cases the defendant's honest belief provides him with an answer to the plaintiff's claim notwithstanding any actual illegality. Illegality without more does not give a cause of action. Lord Hobhouse said:

'There is no principle in English law that an official is the guarantor of the legality of everything he does; but he is liable if he injures another by an act which is itself tortious if not justified and he is unable to justify it, however honestly he may have acted.'

[22] When turning to the ground occupied by the tort of misfeasance in public office Lord Hobhouse observed that it did not, and did not need to apply, where the defendant had invaded a legally protected right of the plaintiff. He said:

'It applies to the holder of public office who does not honestly believe that what he is doing is lawful ... Similarly, it covers the situation where the plaintiff has suffered some financial or economic loss and therefore raises the question what relationship between the plaintiff's loss and the defendant's bad faith is required ...'

[23] After analysing the different ingredients of the tort, including its mental element, Lord Hobhouse said:

'The tort is historically an action on the case. It is not generally actionable by any member of the public. The plaintiff must have suffered special damage in the sense of loss or injury which is specific to him and which is not being suffered in common with the public in general ... The plaintiff has to be complaining of some loss or damage to him which completes the special connection between him and the official's act.' (See [2000] 3 All ER 1 at 45, [2003] 2 AC 1 at 229 at 231.)

[24] Lord Steyn, for his part, in the section of his speech which is headed 'the matrix of the tort' ([2000] 3 All ER 1 at 7, [2003] 2 AC 1 at 190–191), explained how the law of tort denies a remedy to depositors who suffer losses as a result of a bank's breach of its statutory duties, or as a result of negligent licensing or supervision by a regulatory authority, or the failure of such an authority to withdraw a licence. In such contexts judicial review is regarded as an adequate remedy. In *Calveley v Chief Constable of the Merseyside Police* [1989] 1 All ER 1025 at 1030, [1989] AC 1228 at 1238 the availability of the tort of misfeasance in public office was said to be one of the reasons that justified the non-actionability of a claim in negligence for an act of maladministration. Lord Steyn also observed that it was established that an ultra vires act would not per se give rise to liability in tort (*X (minors) v Bedfordshire CC , M (a minor) v Newham London BC, E (a minor) v Dorset CC* [1995] 3 All ER 353, [1995] 2 AC 633), and that there was no overarching principle in English law for liability in tort for 'unlawful, intentional and positive acts' (see *Lonrho Ltd v Shell Petroleum Co Ltd (No 2)* [1981] 2 All ER 456 at 463, [1982] AC 173 at 187). He cited *Winfield and Jolowicz on Tort* (15th edn, 1998) p 55 when he said that the tort of misfeasance in public office was an exception to—

'the general rule that, if conduct is presumptively unlawful, a good motive will not exonerate the defendant, and that, if conduct is lawful apart from motive, a bad motive will not make him liable.'

[25] When he came on to consider issues of damage or redress, Lord Steyn made it clear that he was concerned in that case with claims for recovery of consequential losses. After considering the rival submissions, he concluded that in both forms of the tort the intent required must be directed at the harm complained of, or at least harm of the type suffered by the plaintiffs:

> 'This results in the rule that a plaintiff must establish not only that the defendant acted in the knowledge that the act was beyond his powers but also in the knowledge that his act would probably injure the plaintiff or person of a class of which the plaintiff was a member.' (See [2000] 3 All ER 1 at 12, [2003] 2 AC 1 at 196.)

[26] During this passage of his speech Lord Steyn showed himself aware that recklessness about the consequences of an act, in the sense of not caring whether the consequences happened or not, was sufficient in law.

[27] *Three Rivers* was a case in which the plaintiff's claim was concerned only with the recovery of financial losses that flowed from the misfeasance complained of. Indeed, Lord Neill QC's primary submission to the Court of Appeal was that the tort constituted an action on the case on proof of special damage (see [2003] 2 AC 1 at 29, [2000] 2 WLR 15 at 38 per Hirst LJ). The courts were therefore not concerned in that case with the question whether in any circumstances there might be a complete cause of action in the absence of proof of special damage.

[28] Lord Neill was following earlier statements about the ingredients of the tort when he made this submission. I need quote only two of them. In *Henley v Mayor of Lyme* (1828) 5 Bing 92 at 107, 130 ER 995 at 1001, Best CJ said:

> 'Now I take it to be perfectly clear, that if a public officer abuses his office, either by an act of omission or commission, and the consequence of that is an injury to an individual, an action may be maintained against such public officer. The instances of this are so numerous ...'

And in the Australian case of *Farrington v Thomson* [1959] ALR 695, in which the plaintiff's claim related to the closure of his hotel by police officers, Smith J said (at 702):

> 'Proof of damage is, of course, necessary in addition. In my view, therefore, the rule should be taken to go this far at least, that if a public officer does an act which, to his knowledge, amounts to an abuse of his office, and he thereby causes damage to another person, then an action in tort for misfeasance in a public office will lie against him at the suit of that person.'

[29] This cannot, however, provide a complete answer because there is a line of old cases which relate to claims brought by those who have been deprived of their right to vote at an election by some misfeasance by a public officer. The best known of these cases is *Ashby v White* (1703) 1 Sm LC (13th edn) 253, 1 ER 417, in which Mr Ashby was prevented from voting at an election by the misfeasance of a constable, Mr White, on the apparent pretext that he was not a settled inhabitant. Holt CJ, whose judgment was upheld by the House of Lords, said:

'If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for ... want of right and want of remedy are reciprocal ... And I am of opinion, that this action on the case is a proper action. My brother Powell indeed thinks, that an action upon the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right.' (See (1703) 2 Ld Raym 938 at 953–955, 92 ER 126 at 136–137.)

[30] In the last 300 years the courts have sometimes had to stop and consider the principles according to which they decide whether a cause of action in tort lies without proof of special damage. Although the general rule was that an action in trespass or conversion lay without proof of damage, and that proof of damage was a prerequisite for an action on the case, like so much in the common law this general rule was not inviolable.

[31] There is a useful survey of some of the old case law in Birkett J's judgment in *Constantine v Imperial London Hotels Ltd* [1944] 2 All ER 171, [1944] 1 KB 693, in which he held that an action by a traveller against an innkeeper for wrongfully refusing to receive and lodge him was an action for the violation of a right at common law, so that the action, although sounding in case, could be sustained without proof of special damage.

[32] After citing the extracts from Holt CJ's judgment in *Ashby v White*, Birkett J continued ([1944] 2 All ER 171 at 177, [1944] 1 KB 693 at 705–706):

'In *Embrey v. Owen* ((1851) 6 Exch 353 at 368, 155 ER 579 at 585), Parke, B., said this:

"It was very ably argued before us by the learned counsel for the plaintiffs, that the plaintiffs had a right to the full flow of the water in its natural course and abundance, as an incident to their property in the land through which it flowed; and that any abstraction of the water, however inconsiderable, by another riparian proprietor, and though productive of no actual damage, would be actionable, because it was an injury to a right, and, if continued, would be the foundation of a claim of adverse right in that proprietor. We by no means dispute the truth of this proposition, with respect to every description of right. Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage; *injuria sine damno* is actionable, as was laid down in the case of *Ashby v. White*, by LORD HOLT, and in many subsequent cases, which are all referred to, and the truth of the proposition powerfully enforced in a very able judgment of the late STORY, J., in *Webb v. Portland Manufacturing Co.* (1838) 3 Sumner Rep 189."'

In the case cited, Story J said ((1838) 3 Sumner's Rep 189 at 192):

'But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie, even in the case of a wrong or violation of a right, unless it is followed, by some perceptible damage, which can be

established, as a matter of fact; in other words, that *injuria sine damno* is not actionable. On the contrary, from my earliest reading, I have considered it laid up among the very elements of the common law, that, wherever there is a wrong, there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages.'

[33] In *Quartz Hill Consolidated Gold Mining Co v Eyre* (1883) 11 QBD 674, [1881–5] All ER Rep Ext 1474 this court considered whether an action lay without proof of special damage for maliciously presenting a winding-up petition. In his judgment ((1883) 11 QBD 674 at 689, [1881–5] All ER Rep Ext 1474 at 1477–1478) Bowen LJ referred to the judgment of Holt CJ in *Savile v Roberts* (1698) 1 Ld Raym 374 at 378, [1558–1774] All ER Rep 456 at 457 in which he held that proof of damage to a man's fame, or damage to his person or property, was necessary to support an action for malicious prosecution. Bowen LJ said ((1883) 11 QBD 674 at 691, [1881–5] All ER Rep Ext 1474 at 1478) that notwithstanding this rule, there were legal proceedings which necessarily involved damage, such as indictments involving scandal to reputation or possible loss of liberty, or the presentation of a bankruptcy petition against a trader, and in such cases an action lay without proof of special damage once malice was proved. He went on to say:

'In the present instance we have to consider whether a petition to wind up a company falls upon the one side of the line or the other—whether, as the Master of the Rolls has said, it is more like an action which does not necessarily involve damage, and therefore will not, however maliciously and wrongfully brought, justify an action for malicious prosecution, or whether it is more like a bankruptcy petition. I do not see how a petition to wind up a company can be presented and advertised in the newspapers without striking a blow at its credit. I suppose that most of the lawyers of the present day have seen a great increase of three kinds of abuses, all of which are indulged in for the purpose of extorting the payment of some debt, which ought to be the subject of some civil redress. There is the abuse of the police courts when their process is used to extort money; there is the abuse of the bankruptcy law; and there is the abuse of the provisions in the Companies Act, 1862, for winding up companies. In all these three forms of abuse the aim is to wreck credit, and I should be sorry to think that since they all involve a blow at the credit of those against whom they are instituted, the law did not afterwards place in the hands of the injured and aggrieved persons who have been wrongfully assailed, a means of righting themselves and recouping themselves, as far as can be, for the mischief done to them. I therefore answer the two first questions—whether this action will lie, and whether it will lie without further proof of special damage—in the following manner: I think that the action will lie, for the reason that special damage is involved in the very institution of the proceedings (which ex hypothesi are unjust and without reasonable or probable cause) for the purpose of winding up a going company.' (See (1883) 11 QBD 674 at 692–693, [1881–5] All ER Rep Ext 1474 at 1479.)

[34] In *Fitzgerald v Firbank* [1897] 2 Ch 96, [1895–9] All ER Rep 445 the question arose whether the owner of a right of fishing has a cause of action

without proof of special damage against someone who polluted the river in which the right was exercised. Lindley LJ said that a right of fishing was of such a nature that a person who enjoyed it had such possessory rights that he could bring an action for trespass at common law for the infringement of those rights (see [1897] 2 Ch 96 at 101, [1895–9] All ER Rep 445 at 448). Rigby LJ, after referring to the judgment of the Court of Exchequer Chamber in *Holford v Bailey* (1849) 13 QB 426 at 446, said:

> 'There was another point about several fishery which we do not need to deal with, because the decision of the Queen's Bench was overruled in that respect. But the important point was whether the grantee could sue in trespass, and in the Court of Exchequer Chamber it was held that he might. The Court of Exchequer Chamber said that it was not necessary for them to decide the question whether the count might not be a count in case, but that they saw no reason to doubt that the Queen's Bench were right on that point. But that does not mean that the plaintiff can only sue in trespass. I cannot doubt, on the construction of the grant, the right of the plaintiffs by virtue of that grant to sue for a wrongful act which operates as a disturbance of the rights granted by the deed. The argument was pushed with the greatest courage to this extent—that a wrongdoer, unless he tried to do the very thing that the grantees were authorized to do, might destroy the whole subject-matter of the grant and be liable to no action. I never met with any case which gave the slightest colour to such a doctrine. I hold that the grantees of the incorporeal hereditament have a right of action against any person who disturbs them either by trespass or by nuisance, or in any other substantial manner.' (See ([1897] 2 Ch 96 at 104, [1895–9] All ER Rep 445 at 449–450.)

[35] The speech of Viscount Haldane in *Jones v Jones* [1916] 2 AC 481, [1916–17] All ER Rep 1348, an appeal concerned with the viability of an action of slander without proof of special damage (subject to four well-known exceptions), is noteworthy for his description of the different historical origins of the actions for libel and slander (see [1916] 2 AC 481 at 489–490, [1916–17] All ER Rep 1348 at 1350). Libel was regarded by the Court of Star Chamber not merely as a crime punishable as such, but also as a wrong carrying the penalty of general damages, and this remedy was carried forward by the common law courts after the Star Chamber was abolished by the Long Parliament. Slander, on the other hand, was never punished in the civil courts as a crime. The old local courts used to take cognisance of it as giving rise to claims for compensation, and when those courts decayed, the entire jurisdiction in cases of defamation appeared to have passed at first to the courts of the Church rather than the courts of the King. Following the Reformation, the courts of the King assumed concurrent jurisdiction in claims arising out of spoken defamation. Viscount Haldane observed ([1916] 2 AC 481 at 490, [1916–17] All ER Rep 1348 at 1350–1351):

> 'As might have been expected of civil Courts, whose concern had been primarily with material rights and not with discipline as such, the new jurisdiction in claims based on slander appears to have been directed to the ascertainment of actual damage suffered and to a remedy limited to such damage. This explains the restricted character of the development of the

remedy and the tendency to confine its scope by the assertion that actual damage was the gist of the action.' a

[36] A little earlier ([1916] 2 AC 481 at 489, [1916–17] All ER Rep 1348 at 1350) Viscount Haldane said that one of the consequences of the different evolution of the action for slander was that the scope of the remedy was in an unusual degree confined by the exactness of precedent, and he did not think b that the House of Lords were free to regard the question at issue as one in which a clear principle might be freely extended. The House was unanimous in its decision on this appeal, Lord Sumner commenting pragmatically ([1916] 2 AC 481 at 499, [1916–17] All ER Rep 1348 at 1356):

'My Lords, it has often been said that the right to sue for words spoken, c when no damage can be proved, ought not to be extended. As Martin B. observes in *Allsop v Allsop* ((1860) 29 LJ Ex 315 at 317, 157 ER 1292 at 1294), "The law is jealous of actions for mere words, and the rules limiting these actions ought to be adhered to here". I am sure that no one who has had even a short experience of the business of an ordinary civil assize would d question the wisdom of this caution. If a change of the law is desired, it is from the Legislature, as it was in 1891, that relief must be sought.'

[37] In *Neville v London 'Express' Newspaper Ltd* [1919] AC 368, [1918–19] All ER Rep 61 the House of Lords decided by a 3–2 majority that an action for damages e for maintenance will not lie in the absence of proof of special damage. It is not necessary for present purposes to dwell very long on the reasoning of the majority (Lord Finlay LC, Lord Shaw of Dunfermline and Lord Phillimore) because they were heavily influenced by features of the historical origin of the tort of maintenance which are of no relevance in the present context. Lord Finlay, however, adopted a different approach to the dicta of Holt CJ in f *Ashby v White* (see [29], above) in relation to that tort to that adopted by the minority of the House (Viscount Haldane and Lord Atkinson). He said:

'The action for maintenance is, in my opinion, one which can be sustained only if special damage had been occasioned to the plaintiff by the g maintenance. The maintenance may be punishable as an offence, but to give a right of action the commission of the offence must have caused damage to the plaintiff. Of course, if a right has been infringed, as in *Ashby v. White* ((1703) 2 Ld Raym 938 at 955, 92 ER 126 at 137) where a man was deprived of his right to vote, no proof of damage is necessary. As Lord Holt expressed h it "an injury imports a damage, when a man is thereby hindered of his right." The same rule applies if an assault, even the most trifling, is committed, though it occasions no damage whatever, or if trespass is committed to the plaintiff's land or goods. But the action for maintenance at common law is not, in my opinion, an action for the invasion of a right; it is an action in respect of an offence which causes damage to the plaintiff.' (See [1919] AC j 368 at 379–380, [1918–19] All ER Rep 61 at 66.)

[38] Viscount Haldane, for his part, approached this issue along the following lines. He said:

'My Lords, as Lord Holt showed in *Ashby v. White* ((1703) 2 Ld Raym 938 at 955, 92 ER 126 at 137), every violation of a right imports damage in contemplation of law. This principle applies whether the right arises out of a contract, as in *Marzetti v. Williams* ((1830) 1 B & Ad 415, [1824–34] All ER Rep 150), or out of a tort, as in *Embrey v. Owen* ((1851) 6 Exch 353, 155 ER 579). The damage may be substantial, but may also amount to what is merely nominal. As Maule J. said in *Beaumont v. Greathead* (1846) 2 C.B. 494, 499), "Nominal damages are a mere peg on which to hang costs ... Nominal damages, in fact, mean a sum of money that may be spoken of, but that has no existence in point of quantity." As Parke B. observed in *Embrey v. Owen* ((1851) 6 Exch 353 at 368, 155 ER 579 at 585), "Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage". He went on to point out that the principle did not apply to the case with which he was dealing, because the right was to the flow of a stream, a right only to the flow subject to its reasonable enjoyment and possible slight diminution by higher riparian owners. The right there was only a qualified one. But where the right is, as it often is, an absolute right the doctrine laid down by Lord Holt in *Ashby v. White* applies, and every infringement of such an absolute right gives a claim to nominal damages, even though all actual loss or injury is disproved.' (See [1919] AC 368 at 392, [1918–19] All ER Rep 61 at 72–73.)

Viscount Haldane went on to say that he thought that the right to protection against maintenance was an absolute one, although on the facts of that case only nominal damages should have been awarded for the violation of that right.

[39] Lord Atkinson was of a similar opinion (see [1919] AC 368 at 405–406, [1918–19] All ER Rep 61 at 79). He thought that the authorities showed that every subject had a legal right not to be harried in courts of justice by actions brought by officious intermeddlers who had no legitimate interest in their subject matter, and that in the present case the plaintiff was entitled to nominal damages by the defendant's invasion of that right. Lord Shaw of Dunfermline ([1919] AC 368 at 421, [1918–19] All ER Rep 61 at 88) disagreed with that view without going further than the reasons given by Lord Finlay LC and Lord Phillimore. Lord Phillimore, for his part, considered that the plaintiff had been unable to prove 'that he sustained any private injury, such as the law recognizes as some invasion of his rights as a citizen by reason of the unlawful act of the defendant company' ([1919] AC 368 at 433, [1918–19] All ER Rep 61 at 93) and that the law gave no encouragement to actions where the damages must always be nominal (see [1919] AC 368 at 434, [1918–19] All ER Rep 61 at 93).

[40] The difference of judicial opinion which lay at the heart of this decision was whether a plaintiff in a maintenance action possessed a recognisable legal right for which the law would award him compensation in the event of its violation without proof of damage. It was not a decision disapproving what Holt CJ said in *Ashby v White* (in which he was upheld by the House of Lords), but rather a majority decision to the effect that the principle in *Ashby v White* had no application in the tort of maintenance.

[41] *Nicholls v Ely Beet Sugar Factory Ltd* [1936] 1 Ch 343 was another case concerned with river pollution. Clauson J had dismissed the action on the grounds that the plaintiff, who was the owner of a several fishery, could not prove that he had suffered any damage. This court, reversing him, held that

disturbance of a several fishery was an invasion of a legal right, and in such a case the injury to the legal right carried with it the right to damages. a

[42] The leading judgment was given by Lord Wright MR. After explaining that the nature of the plaintiff's rights was that he had an incorporeal hereditament in the fishery and that he also had property in the fish that are found in the fishery, Lord Wright MR (at 348) commented on Lindley LJ's judgment in *Fitzgerald v Firbank* [1897] 2 Ch 96, [1895–9] All ER Rep 445 (see [34], above) to this effect: b

> 'That therefore defines the right, and it also defines the cause of action which follows from an infringement of that right. It is not, I think, material to decide whether the proper description of that cause of action is trespass, or trespass on the case or nuisance, forms of action which are now abolished. If it were described as "nuisance" the word "nuisance" would be used in that connection as meaning a private nuisance, one which involved an interference with a private right, so that, as I shall explain in a moment, an action would lie for that interference.' c

[43] After referring to textbook authority, Lord Wright MR continued (at 349–350): d

> '*Harrop v. Hirst* ((1868) L.R. 4 Ex. 43), to which Sir Frederick [Pollock] refers, is an authority again for the proposition that if you have an infringement of a legal right there is a right of action without actual damage being proved. The claim was for diverting water, and it was held e that an action for diverting water is maintainable without proof of any actual personal damage, inasmuch as the act of the defendant might, if repeated often enough without interruption, furnish evidence in derogation of the plaintiff's legal rights. Although that is a reason which is emphasized in that case, and for which there is good authority and good ground, the ability to maintain such an action without proof of actual loss f depends on a much wider principle, that is, the principle that where you have an interference with a legal right the law presumes damage.'

Holt CJ's judgment in *Ashby v White* (1703) 2 Ld Raym 938, 92 ER 126 (see [29], above) was the leading authority cited by Lord Wright MR in support of this g principle.

[44] What all these cases tell us is that, as Lord Hobhouse said in *Three Rivers DC v Bank of England (No 3)* [2000] 3 All ER 1, [2003] 2 AC 1, the common law has always shown itself jealous to protect possessory or proprietary rights or the rights protected by the tort of trespass to the person. In those cases a cause h of action arises if the right is infringed, without any need to prove special damage or some mental element on the infringer's part, such as malicious intent or awareness of the infringement, coupled with recklessness as to its consequences. The rationale behind an award of nominal damages in these cases was explained by Lord Halsbury LC in *Mediana (Owners of the Steamship) v Owners, Master and Crew of the Lightship Comet, The Mediana* [1900] AC 113 at j 116, [1900–3] All ER Rep 126 at 129, in these terms:

> '"Nominal damages" is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though

a it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.'

[45] There are also cases which do not fall within such a tidy category, but which owe their origin to the way a particular tort developed long ago in our legal history. A good example is defamation by the written word, where a claimant may recover nominal damages for the infringement of his right to a b fair reputation (a right not protected by the law of trespass to the person) without any need to prove special damage. The difficulties of categorisation in borderline cases is illustrated by the 3–2 division over the tort of maintenance in the House of Lords in *Neville v London 'Express' Newspaper Ltd* [1919] AC 368, [1918–19] All ER Rep 61 (see [37]–[40], above).

c [46] That case is notable because both Lord Finlay LC (for the majority) and Viscount Haldane (for the minority) reached their differing conclusions by applying the test suggested by Holt CJ in *Ashby v White*. Their difference lay in the fact that the former did not consider that the tort of maintenance involved the infringement or invasion of a claimant's right (see [37], above), whereas the latter considered ([1919] AC 368 at 392, [1918–19] All ER Rep 61 at 73) that there d existed a 'right to protection against maintenance' which the law should recognise, while Lord Atkinson, supporting him, identified the right in question as 'a legal right not to be harried in courts of justice by actions brought by officious intermeddlers' (see [38], [39], above).

[47] At all events, it is obvious that the old distinction between actions for e trespass and actions on the case does not provide a clear-cut solution in every case: those old causes of action no longer rule us from the grave.

[48] *Ashby v White* and the other election cases still represent good law today. These cases show that if there is a right which may be identified as a constitutional right, then there may be a cause of action for an infringement of that right without proof of special damage, provided that there is something f more than the mere infringement. The task of defining the nature of the requisite mental element was undertaken by the House of Lords in the *Three Rivers* case [2000] 3 All ER 1, [2003] 2 AC 1. And the infringer must be someone who holds public office. I do not consider that one can safely explain *Ashby v White* as a case involving the infringement of a franchise (being a property g right), even if English law has shied away from the path suggested by Story J, that great nineteenth century US judge, in *Webb v Portland Manufacturing Co* (1838) 3 Sumner's Rep 189 (see [32], above).

[49] If this is the correct analysis of *Ashby v White*, then there are some rights recognised by English law which in constitutional significance are every much as important in our liberal democracy as the right to vote.

h [50] In *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779 at 783–784, [1998] QB 575 at 581, a case concerned with access to the courts, Laws J identified the qualities of the rights in question in these terms:

j 'The common law does not generally speak in the language of constitutional rights, for the good reason that in the absence of any sovereign text, a written constitution which is logically and legally prior to the power of legislature, executive and judiciary alike, there is on the face of it no hierarchy of rights such that any one of them is more entrenched by the law than any other. And if the concept of a constitutional right is to have any meaning, it must surely sound in the protection which the law

affords to it. Where a written constitution guarantees a right, there is no conceptual difficulty. The state authorities must give way to it, save to the extent that the constitution allows them to deny it. There may of course be other difficulties, such as whether on the constitution's true interpretation the right claimed exists at all. Even a superficial acquaintance with the jurisprudence of the Supreme Court of the United States shows that such problems may be acute. But they are not in the same category as the question: do we have constitutional rights at all? In the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of a constitutional right can in my judgment inhere only in this proposition, that the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose views in main legislation specifically confers the power to abrogate. General words will not suffice. And any such rights will be creatures of the common law, since their existence would not be the consequence of the democratic political process but would be logically prior to it. I shall explain in due course what I mean by a requirement of specific provision, a concept more elusive than it seems.'

[51] After analysing the case law, Laws J concluded ([1997] 2 All ER 779 at 787, [1998] QB 575 at 585):

'It seems to me, from all the authorities to which I have referred, that the common law has clearly given special weight to the citizen's right of access to the courts. It has been described as a constitutional right, though the cases do not explain what that means. In this whole argument, nothing to my mind has been shown to displace the proposition that the executive cannot in law abrogate the right of access to justice, unless it is specifically so permitted by Parliament; and this is the meaning of the constitutional right.'

[52] I have only to refer back to what Steyn LJ said in *R v Secretary of State for the Home Dept, ex p Leech* [1993] 4 All ER 539, [1994] QB 198 (see [3], above) in order to be able to conclude that the right of Mr Watkins which these three prison officers infringed was a right of this level of importance, so that when they maliciously infringed that right his cause of action in misfeasance in public office was complete even without proof of special damage. The judge's conclusion on this issue was therefore wrong, and Mr Watkins was entitled to judgment for nominal damages (at least) against each of those defendants.

[53] Was he entitled to more? To answer this question, one must go back to the findings the judge made at the end of his judgment (see [17], above), remembering that he had the great advantage, denied to this court, of seeing those three prison officers give evidence. Ms Krause did not challenge the judge's refusal to award aggravated damages. However, she submitted that we should go back to what the judge said about an award of exemplary damages, and that if we found that a cause of action had been established, we should be willing to make such an award ourselves, alternatively we should remit the matter to the judge to enable him to make the award.

[54] Ms Outhwaite, who appeared for the defendants, accepted that exemplary damages may be awarded in respect of misfeasance in public office

(see *Kuddus v Chief Constable of Leicestershire Constabulary* [2001] UKHL 29, [2001] 3 All ER 193, [2002] 2 AC 122). In that case Lord Scott of Foscote expressed the provisional view that vicarious punishment, via an award of exemplary damages, was contrary to principle and should be rejected, and Ms Krause prudently did not press for an award against the Home Office on this appeal.

[55] She submitted, however, that there was no reason why an appropriate award of exemplary damages should not be made against each of the three prison officers. The judge found that Officer Ravenscroft did not care whether he was breaking r 37A or not when he opened and inspected the envelope's contents, and laughed at Mr Watkins when he protested (see [10], [11], above). He found that Officer Rosevere knew he was acting unlawfully, or was reckless as to whether his conduct was unlawful, when he ripped open Mr Watkins' r 37A letter (see [14], above). And he found that when Officer Robinson opened Mr Watkins' letters from the court, he did so to see if they related to Mr Watkins' case against him, and that in so doing he evinced the degree of bad faith needed to constitute the first element of the tort (see [16], above). There was no appeal against any of these findings, and Ms Krause argued that the officers' deliberate or reckless infringement of Mr Watkins' constitutional right (of which they were aware, although they might not have described it in those terms) represented conduct sufficiently outrageous to justify an award of exemplary damages. The judge himself said that he might well have been prepared to make such an award if the appropriate level of compensatory damages was so modest as to represent less than the defendants ought to pay for unlawful conduct of this nature.

[56] In *Thompson v Comr of Police of the Metropolis, Hsu v Comr of Police of the Metropolis* [1997] 2 All ER 762, [1998] QB 498 this court was concerned to give guidance as to the appropriate level of a jury award in cases of malicious prosecution or false imprisonment, for which jury trial is still the normal mode of trial (see s 69(1)(b) of the Supreme Court Act 1981 and s 66(3)(b) of the County Courts Act 1984). In that context Lord Woolf MR said ([1997] 2 All ER 762 at 776, [1998] QB 498 at 517) that where exemplary damages were appropriate they were unlikely to be less than £5,000: otherwise the case was probably not one which justified an award of exemplary damages at all.

[57] I see no reason why that dictum should prevent a judge, sitting without a jury, from making a much lower award of exemplary damages in a case of the present type against an individual prison officer (following an inquiry into that officer's means) if he considers that the officer's conduct is sufficiently outrageous to justify an exemplary award. Ms Krause referred us to some of the cases mentioned by Lord Devlin in his speech in *Rookes v Barnard* [1964] 1 All ER 367 at 408–412, [1964] AC 1129 at 1222–1225. She did not tell us what the award of £300 exemplary damages in *Huckle v Money* (1763) 2 Wils KB 205, 95 ER 768 would be worth in today's money, and I do not consider we can derive much assistance from that case. But Lord Devlin mentioned without disapproval the award of £100 exemplary damages by this court in *Owen and Smith (t/a Nuagin Car Service) v Reo Motors (Britain) Ltd* [1934] All ER Rep 734, although again we were not told what that award would represent today.

[58] Ms Krause suggested that an award of £500 exemplary damages against each defendant would be appropriate, together with a nominal award of general damages of £10 or £20. She said that unless the courts were willing to mark their disapproval of such officers' acts in this way, prisoners like

Mr Watkins would have to stand by and watch their constitutional rights being maliciously infringed by prison officers without any effective redress at all (unless they could prove some kind of financial loss or other loss sounding in general damages). She argued that judicial review was an inappropriate remedy in a case like this because the existence of the right was not in issue, and r 37A represented the prison authorities' visible recognition of the right. Mr Watkins had achieved nothing through making complaints through formal channels. He had invoked the assistance of the Prison Ombudsman to no avail. And he would not have been awarded legal aid if he had not exhausted all his other avenues of redress.

[59] Ms Outhwaite reminded us that exemplary damages were still a controversial topic (see *Kuddus*'s case [2001] 3 All ER 193 at [50], [2002] 2 AC 122 at [50] per Lord Nicholls of Birkenhead): indeed, Lord Scott suggested in *Kuddus*'s case that in his opinion there was no longer any need for punitive damages in the civil law. However, the remedy is still available, and the Law Commission in its powerfully argued report on *Aggravated, Exemplary and Restitutionary Damages* (Law Com no 247 (1997)) has recommended its retention. Although one of the wrongs done to Mr Watkins post-dated the coming into force of the Human Rights Act 1998, the other two did not, and we are deciding this appeal in the absence of any argument to the effect that a claim for compensation for the breach of a convention right would now provide prisoners like Mr Watkins with a satisfactory remedy (see the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Sch 1 to the 1998 Act)).

[60] I do not see how this court can make an award of exemplary damages itself. It is for the trial judge to determine whether an award should be made, and all that Judge Ibbotson has so far said is that he might well have been prepared to make an award. There is no evidence before us as to the financial means of these officers, and a defendant's capacity to pay an exemplary award is always a factor to be taken into account (see *Rookes v Barnard* [1964] 1 All ER 367 at 411, [1964] AC 1129 at 1228).

[61] In these circumstances I would allow this appeal, direct that a nominal award of £5 general damages be entered against these three defendants and remit the case to Judge Ibbotson to determine whether to make an exemplary award against any of them, and if so, how much that award should be. Apart from saying that he need not feel constrained by what Lord Woolf MR said in *Thompson v Comr of Police of the Metropolis, Hsu v Comr of Police of the Metropolis* [1997] 2 All ER 762, [1998] QB 498 about the minimum level of a jury award in a different class of case, I do not consider that it would be appropriate of us to add anything about the law on exemplary damages. This is a case which falls into Lord Devlin's first category (if it fits there at all, in relation to the conduct of any of these officers) and the ground rules for cases in that category are now well known. If Judge Ibbotson is for any reason unavailable, any new judge would have to hear a modicum of evidence himself before he could make an award (if any).

[62] I have read the judgment of Laws LJ in draft, and I agree with what he says.

[63] One final word. I am not impressed by 'floodgates' arguments any more than the House of Lords was in *Leech v Parkhurst Prison Deputy Governor, Prevot v Long Larton Prison Deputy Governor* [1988] 1 All ER 485 at 499–501, [1988]

AC 533 at 566–568. It is now well established that a prisoner does not lose his right of access to a court when he goes through the prison gate. If prison officers wrongfully infringe that right in a way that can be properly categorised as misfeasance in public office, I see no reason why the law should deny the prisoner an adequate remedy, even if that remedy may include an element of punishment for the prison officer in question, if he has no satisfactory remedy by any other route. Indeed, I can see every reason why adequate redress should be available.

CLARKE LJ.

[64] I agree that this appeal should be allowed for the reasons given by Brooke and Laws LJJ. I could not possibly match the learning in their judgments and I can see no useful purpose in adding any separate reasons of my own.

LAWS LJ.

[65] I gratefully adopt the account of the facts and the relevant learning set out in the judgment of Brooke LJ, which I have had the advantage of reading in draft. I agree that this appeal should be allowed, and that the orders proposed by Brooke LJ should be made. I agree also that it would not be appropriate for this court to say anything about the law on exemplary damages or the level at which such damages might be awarded, save to the effect (as Brooke LJ indicates at [61], above) that in considering, if it arises, how much to award by way of exemplary damages the judge need not feel constrained by what Lord Woolf MR, as he then was, said in *Thompson v Comr of Police of the Metropolis, Hsu v Comr of Police of the Metropolis* [1997] 2 All ER 762, [1998] QB 498 about the minimum amount that might be awarded by a jury in cases of malicious prosecution or false imprisonment.

[66] I add some observations of my own concerning the tort of misfeasance in public office only because I have come to think that to ask whether misfeasance is actionable per se or only on proof of damage is a misleading question. The reason is as follows. As it seems to me the tort may be established in two distinct types of case, and damage must be shown in one but need not be in the other. Now, it is clear that there must be some nexus between the unlawful act committed by the public officer, and the circumstances of the claimant; otherwise the claimant would have no standing to sue. In what must this nexus consist? In *Three Rivers DC v Bank of England (No 3)* [2000] 3 All ER 1 at 10, [2003] 2 AC 1 at 19 Lord Steyn expressly endorsed as correct the following statement made by Clarke J, as he then was, at first instance in that case:

> '"If an officer deliberately does an act which he knows is unlawful and will cause economic loss to the plaintiff, I can see no reason in principle why the plaintiff should identify a legal right which is being infringed or a particular duty owed to him, beyond the right not to be damaged or injured by a deliberate abuse of power by a public officer."'

I apprehend that their other Lordships agreed with this observation.

[67] Now I may explain the two kinds of case which I have in mind. Where a claimant is exposed to economic or material injury by virtue of the public officer's wrongful and malicious act, it will be inherent in his claim that he has

suffered quantifiable loss; and he does not have to prove that in causing such loss the public officer has violated some free-standing right which the claimant enjoys. That is one class of case. But the claimant may be adversely affected in a different sense. The wrongful act may have interfered with a right of a kind which the law protects without proof of any loss. In that case, the public officer's interference with the right will complete the tort and no actual damage needs to be shown. This is the second class of case. Its paradigm is the instance where the public officer's unlawful conduct has interfered with a constitutional right.

[68] The *Three Rivers* case was an instance of the first class of case (assuming, after the second hearing before their Lordships' House, that the claimants succeed on the facts). *Ashby v White* (1703) 1 Sm LC (13th edn) 253, 1 ER 417 was an instance of the second class of case. And for the reasons given by Brooke LJ this present case also falls into the second category. Just as in *Ashby v White*, the public officers' unlawful and malicious acts interfered with a constitutional right enjoyed by the claimant. In *Ashby v White* it was the right to vote. Here it is access to the Queen's courts.

[69] For these reasons, as well as those given by Brooke LJ, I would, as I have said, allow this appeal.

Appeal allowed.

Kate O'Hanlon Barrister.

Exeter City AFC Ltd v Football Conference Ltd and another

[2004] EWHC 2304 (Ch)

CHANCERY DIVISION (BRISTOL DISTRICT REGISTRY)
JUDGE WEEKS QC SITTING AS A JUDGE OF THE HIGH COURT
16, 29 JANUARY 2004

Arbitration – Stay of court proceedings – Refusal to stay – Court's power to refuse stay – Unfair prejudice petition – Arbitration Act 1996, s 9(4).

The Football Association (the FA) was the governing body for football in England, and all professional football clubs, including the petitioner, were members of the FA. Competitions between clubs were organised in a number of leagues under the auspices of the FA. Each of the leagues was run by a separate company in which the competing clubs had to be members. The first respondent company, which was also a member of the FA, was responsible for the league in which the petitioner competed. The rules of the FA provided that any dispute or difference between any two participants were to be referred to and finally resolved by arbitration under the FA rules. Under the first respondent's articles of association, a club that entered into a creditors' voluntary arrangement (CVA) was liable to expulsion from the league and would therefore cease to be a member of the first respondent. The first respondent's directors had a discretion to allow a club to retain membership; it operated a policy to exercise that discretion only toward clubs in CVAs which paid certain creditors (football creditors) in full. The petitioner was in financial difficulties and entered into a CVA which included full payment for football creditors. The Inland Revenue applied to revoke the CVA on the grounds that full payment to the football creditors was unfair. In an attempt to resolve its difficulty of being compelled by the first respondent to favour football creditors but being at risk of having its CVA revoked by the Revenue's insistence on equal treatment, the petitioner presented a petition under s 459[a] of the Companies Act 1985 alleging that the affairs of the first respondent were being conducted in an unfairly prejudicial manner. The first respondent applied to stay the petition (i) under s 9[b] of the Arbitration Act 1996 which provided in sub-s (1) that a party to an arbitration agreement against whom legal proceedings were brought could apply to the court to stay the proceedings, and in sub-s (4) that the court was on such an application to grant a stay unless satisfied that the arbitration agreement was null and void, inoperative or incapable of being performed; and (ii) in the exercise of the inherent jurisdiction of the court to stay proceedings when there was a more suitable alternative means of resolving the dispute.

Held – The statutory rights conferred on shareholders to apply for relief were inalienable and could not be diminished or removed by contract or otherwise. Accordingly, the dispute was not one susceptible to arbitration and s 9 of the 1996

a Section 459, so far as material, provides: '(1) A member of a company may apply to the court ... for an order ... on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members ...'

b Section 9, so far as material, is set out at [12], [13], below

Act did not apply. The court was the appropriate tribunal to decide both the petition under s 459 of the 1985 Act and all related issues and for that reason no stay would be granted in the exercise of its discretion. The application would therefore be dismissed (see [22]–[27], below).

A Best Floor Sanding Party Ltd v Skyer Australia Party Ltd (19 May 1999, unreported) adopted.

Re Magi Capital Partners LLP [2003] EWHC 2790 (Ch) considered.

Re Vocam Europe Ltd [1998] BCC 396 distinguished.

Notes

For arbitration agreements, and for the protection of a company's members against unfair prejudice, see, respectively, 1(1) *Halsbury's Laws* (4th edn) (2001 reissue) para 357, and 7(2) *Halsbury's Laws* (4th edn) (1996 reissue) para 1403.

For the Companies Act 1985, s 459, see 8 *Halsbury's Statutes* (4th edn) (1999 reissue) 508.

For the Arbitration Act 1996, s 9, see 2 *Halsbury's Statutes* (4th edn) (2003 reissue) 661.

Cases referred to in judgment

A Best Floor Sanding Party Ltd v Skyer Australia Party Ltd (19 May 1999, unreported), Vic SC.

Ashville Investments Ltd v Elmer Contractors Ltd [1988] 2 All ER 577, [1989] QB 488, [1988] 3 WLR 867, CA.

Magi Capital Partners LLP, Re [2003] EWHC 2790 (Ch).

Vocam Europe Ltd, Re [1998] BCC 396.

Wayde v New South Wales Rugby League Ltd (1985) 61 ALR 225, Aus HC.

Cases referred to in skeleton arguments

Annamunthodo v Oilfields Workers' Trade Union [1961] 3 All ER 621, [1961] AC 945, [1961] 3 WLR 650, PC.

Boulting v Assocation of Cinematograph, Television and Allied Technicians [1963] 1 All ER 716, [1963] 2 QB 606, [1963] 2 WLR 529, CA.

Cade (J E) & Son Ltd, Re [1992] BCLC 213.

Capital Trust Investments Ltd v Radio Design TJ AB [2002] EWCA Civ 135, [2002] 2 All ER 159.

Castleburn Ltd, Re [1991] BCLC 89.

Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1 All ER 664, [1993] AC 334, [1993] 2 WLR 262, HL.

Company (No 00709 of 1992), Re a, O'Neill v Phillips [1999] 2 All ER 961, [1999] 1 WLR 1092, HL.

Company (No 004377 of 1986), Re a [1987] BCLC 94, [1987] 1 WLR 102.

Company (No 006834 of 1988), Re a, ex p Kremer [1989] BCLC 365.

Continental Bank NA v Aeokos Cia Naviera SA [1994] 2 All ER 540, [1994] 1 WLR 588, CA.

David Wilson Homes Ltd v Survey Services Ltd (in liq) [2001] EWCA Civ 34, [2001] 1 All ER (Comm) 449.

Eastham v Newcastle United Football Club Ltd [1963] 3 All ER 139, [1964] Ch 413, [1963] 3 WLR 574.

Enderby Town Football Club Ltd v Football Association Ltd [1971] 1 All ER 215, [1971] Ch 605, [1970] 3 WLR 1021, CA.

Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd [1993] 3 All ER 897, [1993] QB 701, [1993] 3 WLR 42, CA.
Harrison (Saul D) & Sons plc [1995] 1 BCLC 14, CA.
Harrods (Buenos Aires) Ltd, Re [1991] 4 All ER 334, [1992] Ch 72, [1991] 3 WLR 397, CA.
Hickman v Kent or Romney Marsh Sheepbreeders' Association [1915] 1 Ch 881, [1914–15] All ER Rep 900.
Investors Compensation Scheme Ltd v West Bromwich Building Society, Investors Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896.
Lawlor v Union of Post Office Workers [1965] 1 All ER 353, [1965] Ch 712, [1965] 2 WLR 579.
Lee v Showmen's Guild of Great Britain [1952] 1 All ER 1175, [1952] 2 QB 329, CA.
Metrocall Inc v Electronic Tracking Systems Pty Ltd (2000) 52 NSWLR 1.
Nagle v Feilden [1966] 1 All ER 689, [1966] 2 QB 633, [1966] 2 WLR 1027, CA.
Payne v Cork Co Ltd [1900] 1 Ch 308.
Peverill Gold Mines Ltd, Re [1898] 1 Ch 123.
Pharmaceutical Society of Great Britain v Dickson [1967] 2 All ER 558, [1967] Ch 708, [1967] 2 WLR 718, CA; *affd* [1968] 2 All ER 686, [1970] AC 403, [1968] 3 WLR 286, HL.
Rossi v Edinburgh Corp [1905] AC 21, HL.
Scottish Co-operative Wholesale Society Ltd v Meyer [1958] 3 All ER 66, [1959] AC 324, [1958] 3 WLR 404, HL.
Walkinshaw v Diniz [2000] 2 All ER (Comm) 237.
Welton v Saffery [1897] AC 324, [1895–9] All ER Rep 567, HL.

Application

The Football Conference Ltd (Conference) applied under s 9 of the Arbitration Act 1996 to stay the petition of Exeter City AFC Ltd (Exeter) under s 459 of the Companies Act 1985 alleging that the affairs of Conference were being conducted in a manner unfairly prejudicial to its members. The second respondent, Stevenage Borough Football Club Ltd, was joined as representing all the member clubs of Conference. It took no part in the application. The facts are set out in the judgment.

Adam Lewis (instructed by *Hammonds*) for Conference.
Stephen Davies QC and *Hugh Sims* (instructed by *Clarke Willmott*, Taunton) for Exeter.

16 January 2004. Judge Weeks QC announced that the application would be dismissed for reasons to be given later.

29 January 2004. The following judgment was delivered.

JUDGE WEEKS QC.

[1] This is an application by the first respondent, The Football Conference Ltd (which I shall call Conference) to stay a petition under s 459 of the Companies Act 1985 presented by Exeter City AFC Ltd (which I shall call Exeter).

[2] The application seeks either a compulsory stay of the petition under s 9 of the Arbitration Act 1996 or a discretionary stay under the inherent jurisdiction of

the court on the ground that the parties are bound by an arbitration agreement in the rules of the Football Association and/or dispute resolution provisions in the rules of Conference. a

[3] At the end of the hearing on 16 January 2004 I said that I would dismiss the application, and I now give my reasons for reaching that conclusion.

[4] The Football Association (which I shall call the Association) is the governing body for football in England, and all professional clubs, including b
Exeter, are members of the Association. The competitions between clubs are organised in a number of leagues under the auspices of the Association. The top three leagues are the FA Premier League; the Football League, divided into three divisions; and the Nationwide Conference. Each of these leagues is run by a separate company, incorporated by guarantee, in which the competing clubs are c
members. Conference is responsible for the Nationwide Conference league. Exeter was relegated from the third division of the Football League in the 2002/2003 season and at the 2003 AGM it became a member of Conference and has since competed in the Nationwide Conference.

[5] For a number of reasons, Exeter has been in financial difficulties for the last year and it sought professional insolvency advice in May 2003. A new board of d
directors was appointed on 19 May 2003 and they decided to apply for a creditors' voluntary arrangement (CVA). A moratorium was granted by the court on 19 September. The proposals were approved at the statutory meetings and since 16 October 2003 Exeter has been subject to a CVA.

[6] It was a feature of the proposals that certain creditors, called 'football e
creditors', totalling approximately £450,000 were, for reasons which I will explain later, to be paid in full over five years, unlike the general body of creditors who would only get 10p in the pound.

[7] On 14 November 2003 the Inland Revenue made a revocation application on the ground that the terms for payment in full of certain creditors unfairly f
prejudiced the Revenue, which had lost its status as a preferential creditor on 15 September 2003 when the Enterprise Act 2002 came into force. It is the imminence of the revocation application that has caused Exeter to present the s 459 petition.

[8] The reason for including the discriminatory provision in the CVA was that under art 5(3)(d) of the articles of association of Conference, a club that enters g
into a CVA has to inform Conference's secretary immediately and is liable to expulsion from Conference's Football League competition. Expulsion would result in Exeter ceasing to be a member of Conference, since only clubs taking part in the competition can be members. It would also effectively bring to an end Exeter's attempt to survive. h

[9] The Conference directors have a discretion under art 5(3)(d) to allow a club to retain membership. Exeter's case is that the Association and the leagues which it supervises, including Conference, have a policy to exercise that discretion in favour of the club if, and only if, it can establish that certain creditors, called 'football creditors', will be paid in full. In the accountancy profession this j
practice has become known as the 'super creditor rule' and its validity has been the subject of debate. The Association has a similar rule, and the chief executive of Conference says that the Association required Conference to adopt this rule in 2001. He says that the Association has insisted that the rule is justified by what he calls 'fundamental sporting imperatives'. This is likely to be a crucial issue on the petition.

[10] To reinforce the super creditor rule, Conference at a meeting on 7 June 2003 purported to adopt a change incorporating a new r 2(h), providing for a 12 point deduction from the sporting record of any club that enters into a CVA but remains in the competition. The directors have a discretion to amend the sanction to be consistent with other football competitions. The effect of this sanction is also likely to be an issue in the petition.

[11] Exeter therefore finds itself in an invidious position: compelled by Conference and the Association to favour a particular set of creditors, but at risk of having its CVA revoked by the Revenue's insistence on equal treatment. The way it has chosen to resolve the problem is to present a s 459 petition alleging that the affairs of Conference are being conducted in a manner which is unfairly prejudicial to Exeter. A similar course was taken by a sports club, unsuccessfully, in the High Court of Australia in *Wayde v New South Wales Rugby League Ltd* (1985) 61 ALR 225.

[12] I can now turn to the present application to stay the petition. Section 9 of the 1996 Act provides:

> '(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties in the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.'

[13] Subsections (2) and (3) are not relevant, but sub-s (4) is:

> 'On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.'

[14] There is also inherent jurisdiction in the court to stay proceedings where there is a more suitable alternative means of resolving the dispute.

[15] The provisions on which Conference relies are first to be found in the rules of the Association, by which both Conference and Exeter, as members of the Association, have agreed to be bound. The relevant rule is r K which I shall read, with two typographical errors corrected:

> 'Agreement to arbitration:
>
> 1(A): Subject to Rule K(1)(b) below, any dispute or difference ("a dispute") between any two or more participants (which shall include for the purposes of this section of the Rules the Association), including but not limited to a dispute arising out of or in connection with, including any question regarding the validity of (i) the rules or regulations of the Association; (ii) the rules and regulations of an affiliated association or competition; (iii) the statutes and regulations of FIFA and UEFA; or (iv) the laws of the game, shall be referred to and finally resolved by arbitration by these rules.
>
> (B): Rule K(1)(a) shall not apply to any dispute or difference which falls to be resolved pursuant to any rules from time to time in force of any affiliated association or competition.'

[16] Secondly, Conference relies on r 15 of its own rules, by which Exeter as a member is bound:

> 'Protests, appeals:

> All protests, appeals, claims or complaints relating to these rules shall be heard and determined by the Board of Directors. The club or players protesting, appealing, claiming or complaining must send two copies of such protest, appeal, claim or complaint and deposit a fee of £50 which will be forfeited in the event of the protest, appeal, claim or complaint not being upheld. This rule in respect of the deposit of fee does not apply to those rules where direct reference is made to such fee. Appeals etc must be lodged with the secretary within 14 days of the event or decision causing the appeal to be submitted. The Board of Directors shall also have power to compel any party to the protest to pay such expenses as they deem fit. Any appeal against the decision of the Board of Directors must be lodged with the Football Association within 14 days of the posting of the written notification of the decision, accompanied by a fee of £50 which may be forfeited in the event of the complaint not being sustained.'

[17] I can deal with some matters of construction quite briefly. Association r K is, in my judgment, an arbitration agreement within s 9, but Conference r 15 is not. Rule 15 is not an agreement to refer disputes to an independent body but a provision for internal resolution of disputes, and the possibility of an appeal on limited grounds to the Football Association does not, in my judgment, remedy the deficiency or convert the process into an arbitration agreement.

[18] Secondly, Association r K does, in my judgment, cover disputes relating to the articles of association of Conference. The words 'any dispute or difference' are very wide, and although articles of association are not mentioned in the examples given, those are examples only and do not limit the generality of the preceding words.

[19] Thirdly, a dispute about the rules of Conference does fall within r 15. It is therefore excepted by the words of r K(1)(b), and the arbitration agreement in r K(1)(a) does not apply to it. It follows that if the dispute in the s 459 petition is not decided by the court and there is no further agreement, then part of it would fall to be determined by arbitration under r K(1)(a) and part by the directors of Conference, subject to appeal under r 15. That does not seem to me to be a satisfactory procedure, and partly for that reason and partly because I would not regard the directors of Conference as a preferable first instance tribunal to the court, I would not be minded to exercise any discretion I may have to stay the proceedings generally.

[20] The real question, therefore, is whether I have any discretion and whether s 9 of the 1996 Act compels a reference to arbitration of at least part of the present dispute. If part has to be referred to arbitration, then there are stronger grounds for exercising a discretion to stay the rest of the proceedings in the expectation that the parties will agree to refer the remainder of the dispute to the same tribunal.

[21] As to s 9, it is common ground that there are some disputes which are not susceptible to arbitration and that s 9 does not apply to such disputes. There is a tension here between reserving matters of public interest to the courts and the public interest in the encouragement of arbitration. In *A Best Floor Sanding Party Ltd v Skyer Australia Party Ltd* (19 May 1999, unreported), Judge Warren held that the right of a contributory to apply to the court for a winding-up order could not be limited by agreement and refused to stay a winding-up petition because it did not fall within the scope of the discretionary provisions of s 53 of the Commercial Arbitrations Act 1984.

[22] I find her reasoning compelling and I can see no difference in principle for this purpose between a winding-up petition and a petition under s 459. If the right to petition to wind up conferred on every single shareholder is a condition of incorporation under the Companies Act 1985, then so in my judgment is the right to petition for relief for unfair prejudice. In *Re Magi Capital Partners LLP* [2003] EWHC 2790 (Ch), leading counsel, probably with the Australian authority in mind, conceded that a limited liability partnership was a creature of statute and that it was not possible to exclude the statutory right to apply to have the statutory entity wound up by the court. The Companies Court has jurisdiction to wind up a company or limited liability partnership, and the same court has supervisory powers, designed to give protection to shareholders by enabling them to apply to the court for special relief. In effect, the court controls by statute the creation and extinction of the company, and it also attends to it during midlife crises.

[23] The statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise. I have, however, been referred to two cases where the court has stayed a s 459 petition or a winding-up petition to allow arbitration to take place. The first is *Re Vocam (Europe) Ltd* [1998] BCC 396. That was a decision made by Rimer J in the Companies Court on an interim application. It is not clear whether judgment was reserved. Only one case is referred to and the main argument for the petitioner seems to have been that no stay should be granted because the arbitrator could not grant the same relief as the court could under s 461. Rimer J rejected that submission and held that the applicant was entitled to a stay under s 9 of the 1996 Act. The main point taken before me, decided in Australia and conceded in *Re Magi Capital Partners* does not seem to have been argued. In those circumstances, I feel free not to follow the result of Rimer J's decision.

[24] The other case is my decision in *Re Magi Capital Partners*, to which I have already referred. That case was one of limited partnership, which has some affinity with an ordinary partnership where, as I observed, a stay might have been compulsory under the 1996 Act. As a matter of discretion, I made an order that certain allegations in the petition which were already the subject of arbitration should be decided by the arbitrator before the petition proceeded. That decision was I think essentially one of case management and I do not think that the same considerations are present in the present case to persuade me to exercise my discretion in favour of a stay.

[25] Counsel for Conference submits that there are discrete issues which either must or should be decided by arbitration under r K or the procedure under r 15. I do not accept that analysis of the situation and I prefer to apply Occam's razor to the dispute. In this case the dispute between the parties is whether Conference's affairs are being conducted in a manner which is unfairly prejudicial to Exeter's interests. In the course of making a decision on that issue, the tribunal will no doubt have to resolve a number of sub-issues, but I do not think that r K, properly construed, applies to those sub-issues. In *Ashville Investments Ltd v Elmer Contractors Ltd* [1988] 2 All ER 577 at 599, [1989] QB 488 at 517, Bingham LJ said he would be very slow to attribute to reasonable parties an intention that there should be in any foreseeable eventuality two sets of proceedings.

[26] If, as I think, I have a discretion in the matter, I unhesitatingly prefer not to grant a stay, because the court seems to me the appropriate tribunal to decide

both the s 459 petition itself and all related issues. *Re Magi Capital Partners* was an exceptional case where there were two sets of proceedings already on foot. a

[27] For those reasons, I hold that s 9 of the 1996 Act does not apply, and in my discretion I have chosen to refuse a stay. If costs cannot be agreed, I will hear submissions at some time suitable to both counsel. I will also hear later any submissions as to permission to appeal.

Application dismissed. b

Celia Fox Barrister.

End of Volume 4.